

**BOROUGH OF ALBURTIS
LEHIGH COUNTY, PENNSYLVANIA**

Ordinance No. 328

(Duly Adopted March 13, 1996)

AN ORDINANCE ESTABLISHING THE BOROUGH OF ALBURTIS DEFERRED COMPENSATION PLAN, A VOLUNTARY RETIREMENT PLAN FOR NON-UNIFORMED BOROUGH EMPLOYEES FUNDED SOLELY THROUGH EMPLOYEE CONTRIBUTIONS, IN ACCORDANCE WITH SECTION 457 OF THE INTERNAL REVENUE CODE.

WHEREAS, the Borough Council ("**Council**") of the Borough of Alburdis ("**Borough**") has considered the establishment of a Deferred Compensation Plan to be made available to all eligible non-uniformed Borough employees pursuant to Section 457 of the U.S. Internal Revenue Code of 1986; and

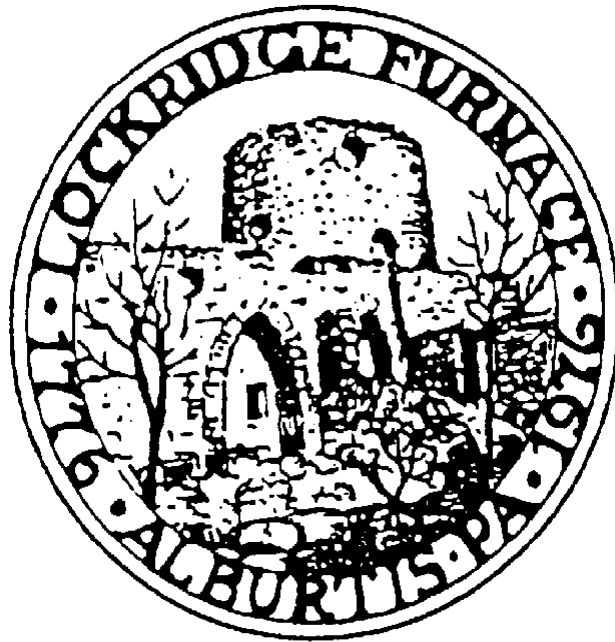
WHEREAS, the Borough is authorized to establish such a Plan under Section 2 of Act 81 of 1987, 72 PA. STAT. ANN. § 4521.2; and

WHEREAS, certain substantial tax benefits could accrue to employees participating in a Deferred Compensation Plan; and

WHEREAS, such benefits will act as incentives to Borough employees to voluntarily set aside and invest portions of their current income to meet their future financial requirements and supplement their Borough pensions and Social Security (if applicable), at no cost to the Borough other than administrative costs;

NOW, THEREFORE, be it **ORDAINED** and **ENACTED** by the Borough Council of the Borough of Alburdis, Lehigh County, Pennsylvania, that the Borough of Alburdis Deferred Compensation Plan is hereby established as follows:

Borough of Albury Deferred Compensation Plan



AS ADOPTED BY THE ALBURY BOROUGH COUNCIL ON MARCH 13, 1996
(ORDINANCE 328)

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Article I — General Definitions

When used in this Ordinance with initial capital letters, the words and phrases defined in this Article shall have the following meaning, unless the context in which they are used clearly indicates a different meaning:

§ 101 Administrator

The term “Administrator” shall mean the Plan Administrator described in Article XI.

§ 102 Alternate Payee

The term “Alternate Payee” shall mean a person entitled to receive, by virtue of a Qualified Domestic Relations Order (*see* Section 904), some of the benefits under this Plan of a Participant .

§ 103 Authorized Leave of Absence

The term “Authorized Leave of Absence” shall mean any absence authorized by the Employer (or any Related Employer) under the Employer’s (or Related Employer’s) standard personnel practices, *provided that* all persons under similar circumstances must be treated alike in the granting of such leaves, and *provided further* that the employee returns or retires within the period of authorized absence. An absence due to service in the uniformed services of the United States shall be considered an Authorized Leave of Absence if the employee complies with all of the requirements of federal law in order to be entitled to reemployment and in fact does return to employment with the Employer (or a Related Employer) within the period provided by law.

§ 104 Beneficiary

The term “Beneficiary” shall mean a person who has the right to receive benefits under this Plan as a result of the death of a Participant or Alternate Payee. (*See* Article VI for the method by which Participants may designate their beneficiaries).

§ 105 Code

The term “Code” shall mean the Internal Revenue Code of 1986, as amended (Title 26, U.S. Code). Reference to a section of the Code shall mean that section as it may be amended or renumbered from time to time, or any corresponding provision of any future legislation that amends, supplements or supersedes that section.

§ 106 Compensation**(a) Compensation.**

The term “Compensation” shall mean remuneration for services rendered to the Employer as an employee.

(b) Includible Compensation.

The term “Includible Compensation” shall mean the amount of Compensation received by an employee of the Employer which is includible in his/her gross income for federal income tax purposes after taking into account all provisions of the Code, including those provisions of Code § 457 which exclude from gross income amounts deferred under this Plan. Accordingly, in calculating the amount “Includible Compensation”, an employee’s full Compensation is reduced, *inter alia*, by the amount of contributions to this Plan and other Code § 457 eligible deferred compensation plans, salary reduction contributions to a Code § 125 cafeteria plan, employee pension contributions which are picked-up and treated as employer contributions under Code § 414(h), amounts contributed to a Code § 403(b) annuity, and Code § 911 amounts for U.S. citizens living abroad.

§ 107 Effective Date

The “Effective Date” shall mean **April 1, 1996**, the date on which this Plan becomes effective.

§ 108 Eligible Spouse

The term “Eligible Spouse” shall mean, with respect to any amount of benefit payments, the spouse to whom a Participant was married on the **earlier of** the date such benefit payments commenced under this Plan, **or** the date of his death (*except* to the extent a former spouse is to be treated as an Eligible Spouse under a Qualified Domestic Relations Order).

§ 109 Employer

The term “Employer” shall mean the Sponsor and all Related Employers which are “eligible employers” (within the meaning of Code § 457 (e)(1)) within the Commonwealth of Pennsylvania and which have adopted this Plan and executed a copy of this Ordinance, and their successors.

§ 110 ERISA

The term “ERISA” shall mean the Employee Retirement Income Security Act of 1974 (P.L. 93-406), as amended (29 U.S. Code § 1001 *et seq.*). Reference to a section of ERISA shall mean that section as it may be amended or renumbered from time to time, or any corresponding provision of any future legislation that amends, supplements, or supersedes that section.

§ 111 Fund

The term “Fund” shall mean the fund established for this Plan in Section 301.

§ 112 Participant

The term “Participant” shall mean an “Active Participant” or an “Inactive Participant”:

(a) Active Participant

An “Active Participant” shall mean a Qualified Employee who is currently an Active Participant in this Plan (*see* Article III).

(b) Inactive Participant

An “Inactive Participant” shall mean any person, other than an Active Participant, who had previously been an Active Participant, and still has an accounts with a positive balance in the Plan.

§ 113 Plan

The term “Plan” shall mean the **Borough of Alburtis Deferred Compensation Plan** as set forth in this Ordinance and as it may be amended from time to time.

§ 114 Qualified Employee

(a) In General.

The term “Qualified Employee” shall mean, as of any given date, any person who is receiving remuneration for personal services rendered to the Employer (other than as an independent contractor) or who would be receiving such remuneration except for an Authorized Leave of Absence or for a temporary lay-off which has not yet become a Separation from Service; *provided* such person is neither—

- (1) a nonresident alien who receives no remuneration from the Employer which constitutes income from sources within the United States (within the meaning of the Code); **nor**
- (2) a person who is included in a unit of employees covered by a collective bargaining agreement or arbitration award which does not provide for his inclusion as a Qualified Employee eligible for participation in this Plan.

§ 115 Related Employer

The term “Related Employer” shall mean any—

- (a) corporation which is a member of a controlled group of corporations (as defined in Code § 414(b)) which includes the Sponsor;
- (b) trade or business (whether or not incorporated) which is under common control (as defined in Code § 414(c)) with the Sponsor;
- (c) member of an affiliated service group (as defined in Code § 414(m)) which includes the Sponsor; **and**
- (d) other entity required to be aggregated with the Sponsor pursuant to Code § 414(o) and the regulations thereunder.

§ 116 Separation from Service

(a) In General.

The term “Separation from Service” shall mean the end of a continuous period of employment of a given person by the Employer (or any Related Employer) and may result from retirement, death, resignation, involuntary termination, unauthorized absence, or by failure to return to active employment with the Employer (or any Related Employer) or to retire by the date on which an Authorized Leave of Absence expires. For purposes of the preceding sentence, periods of Authorized Leaves of Absence, temporary lay-offs, and periods of

service as an independent contractor immediately following a period of employment are considered to be periods of employment by the Employer; a Separation from Service does not occur until the person is thereafter not providing services to the Employer (or any Related Employer). A person “Separates from Service” if he incurs a Separation from Service.

(b) Temporary Lay-Offs.

If the Employer (or any Related Employer) shall terminate a person’s employment due to insufficient work for such person and shall indicate that the termination is temporary and that the Employer (or Related Employer) anticipates being able to re-employ the person within six (6) months, the termination shall be considered a “temporary lay-off” and not a “Separation from Service.” In that case, if the person does not return to active employment with the Employer (or any Related Employer) immediately upon recall and within six (6) months, he shall incur a “Separation from Service” as of the earlier of:

- (1) the date specified in any recall as the date to return to work, **or**
- (2) the date six (6) months after the temporary lay-off began.

(c) Transfers Among Related Employers.

The term “Separation from Service” shall not include transfers between employers all of whom are included within the definition of “Employer” or “Related Employer,” or the mere cessation of a person’s status as a “Qualified Employee” if he remains in the employment of the Employer (or any Related Employer).

(d) Sale of Business

- (1) A person shall not incur a “Separation from Service” if the Employer or any Related Employer sells the trade or business for which the person performs services to an unrelated purchaser, but the person continues to work for the trade or business. Thereafter, the person shall incur a “Separation from Service” if he does so under the provisions of this Section 116 as modified by substituting the purchaser of the trade or business (and his related employers) for the Employer (and Related Employers).
- (2) A person shall not incur a “Separation from Service” if the corporation for which he works shall cease to be included within the definition of Employer or Related Employer (*e.g.*, through the sale of its stock), but the person continues to work for the corporation. Thereafter, the person shall incur a “Separation from Service” if he does so under the provisions of this Section 116 as modified by substituting the corporation for which he works (and its related employers) for the Employer (and Related Employers).

§ 117 **Sponsor**

The term “Sponsor” shall mean **Borough of Alburdis**, Lehigh County, Pennsylvania, a Pennsylvania borough and municipal corporation, and its successors.

Article II — Deferral of Compensation

§ 201 Participation.

(a) Active Participants.

Any Qualified Employee is eligible to become a Participant in this Plan at any time by filing a salary deferral agreement in accordance with Section 202.

(b) Discontinuation.

A Participant shall remain an Active Participant only so long as he remains a Qualified Employee. After he ceases to be a Qualified Employee, he shall become an Inactive Participant until all of his Plan accounts are distributed, or until he becomes an Active Participant again.

(c) Required Information.

The Administrator may require a Qualified Employee to submit relevant information to the Plan in connection with his entry into participation. The Administrator shall be fully protected from any loss which may result from the Qualified Employee's failure to submit such information or from the Plan's reliance on incorrect information.

§ 202 Salary Deferral Agreements.

(a) In General.

Subject to the provisions of this Article II, each Qualified Employee shall have the right to enter into a written agreement with the Employer, from time to time, to defer a portion of the Compensation which would otherwise be payable to him/her by the Employer at the time provided under the Employer's payroll policies, together with the earnings on such amounts, until such time as is provided under this Plan and subject to the provisions of this Plan. Deferrals may only be made with respect to Compensation earned for services which are performed after the first day of the first calendar month which begins at least fourteen (14) calendar days after the date of the written agreement.

(b) Amount of Deferral.

A salary deferral agreed to under subsection (a) must be stated in the form of a specified dollar amount (not less than twenty-five dollars (\$25.00) per month) to be deferred for each calendar month during the term of the salary deferral agreement.

(c) Paychecks Affected.

At the election of the Participant, deferrals shall be made **either**—

- (1) from the first paycheck in the calendar month (to the extent possible, with any remaining amount being deferred in the second paycheck of the calendar month); **or**
- (2) in equal amounts from the first two paychecks in the calendar month (to the extent possible, with any excess amount unavailable for deferral in the first paycheck being deferred in the second paycheck).

(d) Duration and Frequency of Salary Deferral Agreements.

A salary deferral agreement shall continue in effect until terminated or amended. Such an agreement is irrevocable with respect to amounts earned while it is in effect. A Participant may amend or terminate a salary deferral agreement at any time by filing a new written salary deferral agreement or a written termination election, but such amendment or termination shall not be effective until the first day of the first calendar month which begins at least fourteen (14) calendar days after the date the amendment or termination is filed. A Participant is deemed to have terminated a salary deferral agreement when he/she ceases to be a Qualified Employee.

§ 203 **Crediting of Deferrals to the Fund.**

All amounts deferred by a Participant under this Plan shall be deposited into the Deferred Compensation Fund (and credited to the account established for the Participant) and invested in accordance with the provisions of Article III within a reasonable period after the date the amounts deferred would otherwise have been paid to the Participant in cash. In no case shall the deposit and investment occur later than thirty (30) days after the date the amount deferred would have been paid to the Participant. Deposits and investments under this Article II shall be made in such a manner that there is no discrimination among Participants.

§ 204 Maximum Annual Deferrals.**(a) In General.**

The total amount of Compensation which would otherwise be payable to a Participant in any given calendar year which may be deferred by the Participant under this Plan may not exceed the **lesser** of—

- (1) \$7,500, **or**
- (2) 33 1/3% of the Participant's Includible Compensation for the year. (*Note:* since Includible Compensation does not include the amounts deferred under this Plan, a Participant may effectively defer only 25% of his total compensation. For example, if a Participant earns \$20,000, the maximum amount he may defer is \$5,000, which is 33.33% of \$15,000 Includible Compensation (\$20,000 - \$5,000), or 25% of the \$20,000.)

(b) Special Catch-Up Election.

For each of the last three taxable years of a Participant which end prior to the year which includes the Participant's Catch-Up Election Normal Retirement Date (as elected under subsection (c)), the limitation set forth in subsection (a) shall not apply. For each of those years, the total amount of Compensation which would otherwise be payable to the Participant which may be deferred by the Participant under this Plan may not exceed the **lesser** of—

- (1) \$15,000, **or**
- (2) the sum of:
 - (A) the amount described in subsection (a), **plus**
 - (B) the sum of the Underutilized Amounts (*see* subsection (d)) for each of the taxable years prior to the taxable year for which this limitation is being determined.

(c) Catch-Up Election Normal Retirement Date.**(1) In General.**

For purposes of subsection (b), a Participant's "Catch-Up Election Normal Retirement Date" is the date the Participant attains age 70 1/2 **unless** the Participant elects a different date in accordance with the provisions of this subsection (c).

(2) Eligible Dates—Election Prior to Age 70 1/2.

At any time prior to the date the Participant attains age 70 1/2, the Participant may select as his/her Catch-Up Election Normal Retirement Date any date which is—

- (A) not **earlier** than the earliest age at which the Participant has the right to retire and receive unreduced retirement benefits under the basic pension plan of the Employer for such Participant. (For Participant's covered by the Borough of Alburty's Non-uniformed Pension Plan, this date is the Participant's 65th birthday);
- (B) not **later** than the date the Participant attains age 70 1/2;
and
- (C) not **later** than the date selected by the Participant under any other Code § 457 eligible deferred compensation plan for the use of the catch-up limitation of Code § 457(b)(3).
- (3) Eligible Dates—Election After Age 70 1/2.
- If the Participant remains a Qualified Employee at the time he/she attains age 70 1/2, and has not previously elected an earlier Catch-Up Election Normal Retirement Date or utilized the catch-up election under subsection (b) or the corresponding provisions of any other Code § 457 eligible deferred compensation plan in prior years, he/she may select as his/her Catch-Up Election Normal Retirement Date any date thereafter. However, if the Participant Separates from Service with the Employer prior to the date elected, the Participant's Catch-Up Election Normal Retirement Date shall be reset to the date the Participant Separates from Service.
- (4) Election: Irrevocability.
- All elections under this subsection (c) shall be filed in writing on forms provided by the Administrator, and shall be irrevocable.
- (5) Note.
- (The Catch-Up Election Normal Retirement Date is, in the language of Code § 457 and the regulations thereunder, the date the Participant attains "Normal Retirement Age".)
- (d) Underutilized Amount.
- For purposes of subsection (b), the Underutilized Amount for any given taxable year of the Participant shall be determined as follows:
- (1) the Underutilized Amount shall be zero (0) for any taxable year which began before January 1, 1979;
- (2) the Underutilized Amount shall be zero (0) for any taxable year in which the Participant was not eligible, for **any** portion of the year, to participate—
- (A) in this Plan; **or**

- (B) in another Code § 457 eligible deferred compensation plan of the Employer or of any other entity within the Commonwealth of Pennsylvania which was subject to the maximum deferral limitations of Code § 457(b)(2) and (3) for such taxable year; **and**
 - (3) the Underutilized Amount for any other taxable year shall be equal to—
 - (A) the **lesser** of—
 - (I) \$7,500; **or**
 - (II) 33 1/3% of the Participant's Includible Compensation for the given taxable year;
 - minus**
 - (B) the amount of compensation deferred by the Participant in that taxable year under a Code § 457 eligible deferred compensation plan.
- (e) Multiple Plans.

If a Participant also defers compensation under another Code § 457 eligible deferred compensation plan, has amounts excluded from gross income for federal income tax purposes under a Code § 403(b) annuity, and/or makes any salary deferrals under Code § 401(k) cash or deferred arrangement or a Code § 402(h)(1)(B) simplified employee pension, the limitations set forth in subsections (a)(1) and (b) for any given year shall be reduced by the amount of such deferrals and/or exclusions made in that year under plans maintained by the Employer or any Related Employer. In addition, the Participant shall not be entitled to the tax benefits of this Plan to the extent such deferrals and exclusions made in any year under all plans (whether of the Employer or any other person or entity), when added to the deferrals made under this Plan, exceed the limitations set forth in subsections (a)(1) or (b). (The limitation in subsection (a)(2) is not affected by other plans.)

Article III — Deferred Compensation Fund & Investments

§ 301 Creation of Fund; Nature of Fund.

All amounts of compensation deferred by Participants under this Plan shall be transferred and credited to a fund of the Employer to be known as the Deferred Compensation Fund. All such amounts, all property and rights which may be purchased by the Employer with such amounts, and all income attributable to such amounts, property, or rights shall remain the sole property and rights of the Employer without being restricted by the provisions of this Plan, subject only to the claims of the Employer's general creditors. No part of the Fund shall be held in trust or as collateral security for the benefit of any Participant, Beneficiary, or Alternate Payee. The obligations of the Employer under this Plan are purely contractual and shall not be funded or secured in any way. The Employer agrees, as a contractual matter, to reimburse the Deferred Compensation Fund for any amounts which are withdrawn from the Fund by the Employer to pay general creditors and not to provide benefits under or pay expenses of the Plan, or which are attached by general creditors of the Employer, plus any net income or gains which would have been earned on such amounts had they not been withdrawn or attached, less any expenses or net losses which would have been incurred on such amounts had they not been withdrawn or attached.

§ 302 Establishment of Participant Accounts.

(a) In General.

The Administrator shall create and maintain adequate records, in the form of individual accounts, to disclose the amount of compensation deferred by each Participant under the Plan, plus the income and net gain attributable to such amounts while in the Fund, and less the expenses chargeable to and net losses attributable to such amounts, and less any withdrawals or distributions from the Plan.

(b) Allocation of Income, Gain, Expense, and Loss.

(1) If Fund amounts equal to the balance in any Participant's account under the Plan are separately invested from other portions of the Fund, all income, net gain (realized and unrealized), expenses, and losses attributable to those specific invest-

ments shall be allocated in their entirety to that Participant's account.

- (2) A segregation of assets in the Fund is not required. If Fund amounts equal to the balance of more than one Participant's account under the Plan are jointly invested, all income, net gain (realized and unrealized), expenses, and losses attributable to those specific investments shall be allocated ratably among the affected Participants' accounts according to their account balances at or during the time in question.
- (3) All Plan expenses properly chargeable to all Participants shall be allocated ratably among all Participants' accounts according to their account balances at or during the time in question.

(c) Alternate Payee Accounts.

Alternate Payee accounts under the Plan shall be created at such times as provided under Section 904.

§ 303 Participant-Directed Investments – In General.

The Administrator shall direct the appropriate officers of the Employer to invest the assets of the Fund in particular investments from time to time as designated by the Participants. The Administrator shall have no responsibility for the investments designated by the Participants, and neither the Employer nor the Administrator shall be liable for net losses on Fund investments nor the failure of any investment to earn any specific or expected return or to earn as much as any other investment opportunity, whether or not such other investment opportunity was offered to Participants in the Plan. Neither the Employer nor the Administrator guarantees the preservation of the total amount of compensation deferred by a Participant or the amount in any Participant's account on any given day.

§ 304 Investment Instructions.

(a) In General.

The Administrator shall identify a specific agent to receive investment instructions, and all investment instructions must be made through such agent. All Participant investment instructions shall be made on such written forms or in such other manner as may be prescribed by the Administrator or the identified agent. Instructions may relate to amounts allocated to the Participant's accounts to date and/or to amounts as they are so allocated in the future. Each Participant shall have an opportunity to obtain written confirmation of such instructions.

(b) Restrictions and Procedures.

(1) In General.

The Administrator may promulgate nondiscriminatory rules restricting Participant directions to such times, investments, amounts, and features as may be necessary or desirable to avoid undue administrative expenses or complexity in the overall operation of the Participant-directed investment program, *provided* that such rules comply with requirements of this subsection (b) and of Section 305. For example, without limiting the foregoing, the Administrator may restrict investment to identified specific investment alternatives.

(2) Range of Risk and Return Characteristics.

The Administrator shall permit a sufficient number and variety of investment alternatives to provide Participants with a reasonable opportunity to materially affect the potential return on amounts in their accounts and the degree of risk to which such amounts are subject.

(3) General Frequency Standard.

The rules applicable to any given investment alternative made available under the Participant-directed investment program must permit Participants to give investment instructions with a frequency which is appropriate in light of the market volatility to which the investment alternative may reasonably be expected to be subject.

(4) Core Investment Funds.

The rules applicable to each of the investment alternatives included in the group of “core funds” described in Section 305 must permit a Participant to give instructions no less frequently than once within any three month period.

(5) Investment Alternative Available to Receive Transfers.

Under the rules established by the Administrator, **either—**

(A) at least *one* of the “core funds” described in Section 305 must permit a Participant to designate a transfer *into* that fund as frequently as Participants are permitted to give investment instructions with respect to any investment alternative included in the Participant-directed investment program which permits Participants to give investment instructions more frequently than once within any three month period; **or**

(B) with respect to each investment alternative which permits Participants to give investment instructions more frequently than once within any three month period, Participants are permitted to change their investment

designation *from* such investment alternative *to* a Liquid Investment as frequently as they are permitted to give investment instructions with respect to such investment alternative, **and**, with respect to the Liquid Investment, Participants are permitted to change investment designations *from* the Liquid Investment *to* at least *one* of the “core funds” described in Section 305 as frequently as they are permitted to give investment instructions with respect to that core fund. For purposes of this subparagraph (B), a “Liquid Investment” is an income producing, low risk, liquid fund, subfund, or account.

(6) Employer Securities.

With respect to designations of transfers *from* an investment alternative which is designed to permit a Participant to directly or indirectly acquire or sell any Employer security (an “employer security alternative”), **either**—

- (A) *each* of the “core funds” described in Section 305 must permit a Participant to designate a transfer *into* that fund as frequently as Participants are permitted to give investment instructions with respect to the employer security alternative; **or**
- (B) Participants are permitted to designate investment changes *from* each employer security alternative *to* a Liquid Investment as frequently as they are permitted to give investment instructions with respect to such employer security alternative, **and**, with respect to the Liquid Investment, Participants are permitted to designate investment changes *from* the Liquid Investment *to each* of the “core funds” described in Section 305 as frequently as they are permitted to give investment instructions with respect to those core fund. For purposes of this subparagraph (B), a “Liquid Investment” is an income producing, low risk, liquid fund, subfund, or account.

(7) Annuity Contracts.

If the Administrator permits the designation of investments in individual annuity contracts under the participant-directed investment program, a Participant may only direct investment in annuity contracts which are on his own life.

(8) Default Investments.

From time to time, the Administrator shall designate a default investment which shall be irrebutably deemed to be the investment designation of any Participant who—

- (A) fails to make an investment designation;

- (B) revokes an earlier investment designation without making an affirmative selection of a successor designation; or
- (C) fails to make a new investment designation after being notified by the Plan that the investment previously designated is no longer available under the Plan's Participant-directed investment program.

Any default investment must be one of the "core funds" described in Section 305. No change in the default investment shall be effective until at least twenty (20) days after notice of the change is given to all Participants.

(c) Compliance With Instructions.

The agent receiving the instructions shall comply with such instructions to the extent the total of all Participant account balances equals the balance of the Fund, unless an instruction, if implemented—

- (1) would not be permitted under this Article III or would otherwise not be in accordance with the provisions of this Plan;
- (2) would not comply with the procedures, limitations, or restrictions established by the Administrator for the participant-directed investment program;
- (3) would cause the Employer to maintain the indicia of ownership of any assets of the Fund outside the jurisdiction of the district courts of the United States other than as permitted under the standards of ERISA § 404(b) and 29 C.F.R. § 2550.404b-1;
- (4) would jeopardize the Plan's tax status as an eligible deferred compensation plan under Code § 457;
- (5) could result in a loss in excess of a Participant's account balance;
- (6) would result in a prohibited transaction under ERISA or the Code;
- (7) would result in the acquisition of a "collectible", as that term is defined in Code § 408(m) and the regulations thereunder; or
- (8) would violate any applicable law, statute, regulation, rule, order, or decree.

§ 305 Investment Alternatives.

Throughout the time that a Participant-directed investment program is in effect under this Section, the permitted investment alternatives under the program shall include a group of at least three (3) investment funds—

- (a) each of whose underlying assets are diversified so as to minimize the risk of large losses;
- (b) each of which has materially different risk and return characteristics;
- (c) which in the aggregate enable the Participant by choosing among them to achieve a portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the Participant;
- (d) each of which, when combined with investments in either of the other funds in the group, tends to minimize through diversification the overall risk of a Participant's portfolio; **and**
- (e) each of which is either—
 - (1) An investment company described in § 3(a) of the Investment Company Act of 1940, or a series investment company described in § 18(f) of the Investment Company Act of 1940, or any of the segregated portfolios of such company;
 - (2) A common or collective trust fund or a pooled investment fund maintained by a bank or similar institution, a deposit in a bank or similar institution, or a fixed rate investment contract of a bank or similar institution; **or**
 - (3) A pooled separate account or a fixed rate investment contract of an insurance company qualified to do business in a state.

§ 306 Provision of Investment Information.

(a) Information Required to Be Furnished Automatically

The Administrator shall insure that each Participant who is qualified to participate in the participant-directed investment program is provided by an identified agent with the following information. The information shall be furnished before the Participant is permitted to give investment instructions. If, after the information described in paragraphs (1) through (7) has been provided to a Participant, there is a material change to such information, the Administrator shall provide updated information or notice of the material change to the Participant.

(1) Notice of Limited Liability.

An explanation that the Participant-directed investment program is intended to constitute the kind of plan described in ERISA § 404(c) and 29 C.F.R. § 2550.404-1, and that the fiduciaries of the Plan may be relieved of liability for any losses which are the direct and necessary result of investment instructions given by such Participant.

(2) Description of All Investment Alternatives.

A description of the investment alternatives available under the participant-directed investment program, and, with respect to each investment alternative under the program, a general description of the investment objectives and risk and return characteristics of each such alternative, including information relating to the type and diversification of assets comprising the portfolio of the investment alternative.

(3) Identification of Investment Managers.

Identification of any designated investment managers.

(4) Investment Instructions and Restrictions.

An explanation of the circumstances under which Participants may give investment instructions (including the persons to whom instructions may be given, the times when instructions may be given, and the manner in which instructions may be given), and an explanation of any specified limitations on such instructions under the terms of the Plan, including any restrictions on transfers to or from an investment alternative (such as absolute restrictions, minimum investment periods, penalties, or valuation adjustments), and any restrictions on the exercise of voting, tender, and similar rights appurtenant to a Participant's investment in an investment alternative (including whether the Plan does or does not pass through such right to Participants). To the extent that the Administrator does not pass through such rights to Participants, it shall not be protected for the exercise of those rights.

(5) Transaction Fees.

A description of any transaction fees, charges, and expenses which affect a Participant's account balance in connection with purchases or sales of interests in investment alternatives (*e.g.*, commissions, sales loads, deferred sales charges, and redemption or exchange fees).

(6) Provider of Information.

The name, address, and phone number of the Plan agent(s) responsible for providing the information described in subsection (b), below, upon the request of a Participant, and a description of the information described in subsection (b), below, which may be obtained upon request.

(7) Confidentiality Procedures Concerning Employer Securities.

If the Plan offers an investment alternative which is designed to permit a Participant to directly or indirectly acquire or sell any employer security, a description of the procedures established to provide for the confidentiality of information relating to the purchase, holding, and sale of employer securi-

ties, and the exercise of voting, tender, and similar rights, by Participants, and the name, address, and phone number of the Plan agent responsible for monitoring compliance with the procedures.

(8) Prospectuses.

In the case of an investment alternative which is subject to the Securities Act of 1933, and in which the Participant has *no* assets invested, a copy of the most recent prospectus provided to the Plan. This copy must be provided immediately following the Participant's initial investment, or immediately prior to the Participant's investment.

(9) Pass-Through Proxy Materials.

Subsequent to an investment in an investment alternative, any materials provided to the Plan relating to the exercise of voting, tender, or similar rights which are incidental to the holding in the account of the Participant of an ownership interest in such investment alternative, *to the extent* that such rights are passed through to Participants under the terms of the Plan and the participant-directed investment program, as well as a description of or reference to Plan provisions, or terms of the participant-directed investment program, relating to the exercise of voting, tender, or similar rights.

(b) Information That Must Be Supplied Upon Request.

The Administrator shall insure that each Participant who is qualified to participate in the participant-directed investment program is provided by an identified Plan agent with the following information, either directly or upon request, which shall be based on the latest information available to the Plan:

(1) Financial Reports.

Copies of any prospectuses, financial statements and reports, and of any other materials relating to the investment alternatives available under the participant-directed investment program, to the extent such information is provided to the Plan.

(2) Operating Expenses.

A description of the annual operating expenses of each investment alternative under the participant-directed investment program (*e.g.*, investment management fees, administrative fees, transaction costs) which reduce the rate of return to Participants, and the aggregate amount of such expenses expressed as a percentage of average net assets of the specific investment alternative.

(3) List of Assets.

A list of the assets comprising the portfolio of each investment alternative under the participant-directed investment program, the value of each such asset (or the proportion of the investment alternative which it comprises), and, with respect to each such asset which is a fixed rate investment contract issued by a bank, savings and loan association, or insurance company, the name of the issuer of the contract, the term of the contract, and the rate of return on the contract.

(4) Overall Investment Performance.

Information concerning the value of shares or units in each investment alternative, as well as the past and current investment performance of such investment alternatives, determined, net of expenses, on a reasonable and consistent basis.

(5) Individualized Investment Performance.

Information concerning the value of shares or units in any investment alternative designated for the account of the Participant. The Administrator may establish procedures which limit the frequency with which investment performance and account balance requests may be made or which provide that such requests may be made only at specified times, provided that such limitations do not deprive Participants of information which is necessary for them to make informed investment decisions.

§ 307 Independent Control by Participants.

(a) In General.

The Administrator shall not interfere with the exercise of independent control by Participants regarding transactions related to the participant-directed investment program (including, without limitation, the acquisition or disposition of investments, and the exercise of any voting, tender, and similar rights appurtenant to a Participant's ownership interest in an investment alternative).

(b) Improper Influence.

No Plan agent or sponsor shall subject any Participant to improper influence with regard to any transaction related to the participant-directed investment program.

(c) Concealment of Material Non-Public Facts.

No Plan agent shall conceal any material non-public facts regarding an investment from a Participant, *unless* the disclosure of

such information by the Plan agent to the Participant would violate any provision of federal law or any provision of state law which is not preempted by ERISA.

(d) Incompetent Participant.

No Plan agent shall accept the instructions of any person whom the Plan agent knows is legally incompetent.

(e) Transactions Involving a Plan Fiduciary.

In the case of any transaction permitted under the participant-directed investment program which involves the sale, exchange, or leasing of property between the Plan and a Plan fiduciary or agent or an Affiliate of a Plan fiduciary or agent, or a loan to a Plan fiduciary or agent or an Affiliate of a Plan fiduciary or agent, the Participant shall not be required to pay more than, or shall not receive less than, "adequate consideration" (as defined in ERISA § 3(18)) in connection with the transaction. (In general terms, "adequate consideration" for a security traded on a registered national securities exchange is the prevailing price on such market; for a security not so traded for which there is a generally recognized market, the current offering price for the security; and for an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the Plan fiduciary or agent.)

The term "Affiliate" shall include:

- (1) any person directly or indirectly controlling, controlled by, or under common control with the person. For purposes of this paragraph (1), the term "control" means, with respect to a person other than an individual, the power to exercise a controlling influence over the management or policies of such person;
- (2) any officer, director, partner, employee, an employee of an affiliated employer, relative (as defined in ERISA § 3(15)), brother, sister, or spouse of a brother or sister, of the person; **and**
- (3) any corporation or partnership of which the person is an officer, director, or partner.

Article IV — Plan-to-Plan Transfers

§ 401 Transfers Into this Plan.

No person may transfer any assets from other Code § 457 eligible deferred compensation plans to this Plan and the Fund.

§ 402 Transfers To Another Plan.

No Participant may transfer any property from the Fund to another Code § 457 eligible deferred compensation plan.

Article V – Loans & Withdrawals

§ 501 Loans.

The Administrator shall not make any loans to Participants or Beneficiaries from the Fund.

§ 502 Withdrawals.

A Participant may not elect to withdraw any funds from his/her account under this Plan prior to the time for distribution under Article VII, except as provided in Section 503.

§ 503 Unforeseeable Emergency.

(a) In General.

In the case of an Unforeseeable Emergency, a Participant may apply to the Administrator to withdraw from his Plan account and receive from the Fund an amount reasonably necessary to satisfy the emergency need. In no event may the amount of the withdrawal exceed the Participant's remaining account balance in the Plan, and all withdrawals shall reduce the Participant's account balance in the Plan.

(b) Definition of Unforeseeable Emergency.

For purposes of this Section, the term "Unforeseeable Emergency" means a severe financial hardship to the Participant resulting from a sudden and unexpected illness or accident of the Participant or of a dependent (as defined in Code § 152(a)) of the Participant, loss of the Participant's property due to casualty, or other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the Participant. Withdrawals for foreseeable expenditures normally budgetable, such as a down payment on a home, purchase of an automobile, or college expenses, will not be permitted.

- (1) is made on account of an Immediate and Heavy Financial Need of the Participant, **and**

- (2) is necessary to satisfy such Immediate and Heavy Financial Need.

(c) Necessary to Satisfy Need.

A withdrawal is not “reasonably necessary” to satisfy an Unforeseeable Emergency to the extent the hardship is or may be relieved—

- (1) through reimbursement of compensation by insurance or otherwise;
- (2) by liquidation of the Participant’s assets, to the extent the liquidation of such assets would not itself cause severe financial hardship; **or**
- (3) by cessation of deferrals under this Plan.

(d) Certification of Need.

No withdrawal shall be permitted on account of Unforeseeable Emergency unless the Participant provides a written certification to the Administrator, in a form provided by or acceptable to the Administrator, that the conditions described in subsections (b) and (c) have been satisfied. The Administrator may require additional information or certifications before granting an Unforeseeable Emergency withdrawal.

Article VI – Beneficiaries

§ 601 Designation of Beneficiaries.

Each Participant and Alternate Payee (if permitted by the Qualified Domestic Relations Order) may designate any person or persons (natural or legal) as his Beneficiary or Beneficiaries to whom his Plan benefits are to be paid if he dies before receipt of all such benefits (unless benefits have already commenced in a form which is based on the actual lifetime of the Participant or Alternate Payee such that the benefits terminate upon the death of the Participant or Alternate Payee). A Beneficiary may also designate his own Beneficiary, but his designation shall only take effect if—

- (a) the benefits are payable in a form which is not based on the actual lifetime of the Beneficiary and the benefits do not automatically terminate upon the death of the Beneficiary; **and**
- (b) the Participant or Alternate Payee has not already selected one or more persons to be the successor beneficiary in the event of the Beneficiary's death, **or** all persons so selected by the Participant or Alternate Payee predecease the Beneficiary.

Beneficiaries may be designated primarily, contingently, jointly (in equal or unequal amounts), or successively.

§ 602 Procedure.

Beneficiary designations shall be made on a form prescribed by the Administrator and will only be effective if filed with the Administrator during the Participant's, Alternate Payee's, or Beneficiary's lifetime.

§ 603 Revocation.

All beneficiary designations are revocable. Each effective beneficiary designation filed with the Administrator by a Participant, Alternate Payee, or Beneficiary will revoke all previously filed designations by such person. The revocation of a beneficiary designation shall not require the consent of any designated beneficiary.

§ 604 Default Beneficiaries.

If any benefits remain payable with respect to a Participant or Alternate Payee at any time after the death of the Participant or Alternate Payee, and no person has been designated as Beneficiary of such benefits in the manner provided in this Article (or all designated beneficiaries are deceased), the benefits with respect to the Participant or Alternate Payee shall be paid to those of his survivor(s) who are highest on the following list:

- (a) his Eligible Spouse;
- (b) his surviving spouse;
- (c) his children, in equal parts;
- (d) his parents, in equal parts;
- (e) his estate.

Article VII — Commencement of Benefits

§ 701 Separation from Service.

Except as provided in Sections 702 and 704 or any other provision of this Plan, the Plan benefits of a Participant (or his Beneficiary) shall commence no earlier than sixty-one (61) days and no later than ninety (90) days after the Participant has Separated from Service. The Separation from Service may be for any reason, including retirement, death, disability, voluntary quit, or involuntary termination.

§ 702 Election by Participant to Defer Commencement.

(a) In General.

Notwithstanding Section 701, if the Participant elects during the Election Period to defer the commencement of all or any portion of his Plan benefits to a date certain on or before the Required Beginning Date which is the first day of a calendar month, then the Plan benefits of the Participant (or the portion deferred) shall not commence at the time set forth in Section 701, but rather on the date elected by the Participant, unless the Participant dies before the date elected.

(b) Election Period.

For purposes of this Section, the “Election Period” shall mean the one hundred twenty (120) day period ending sixty (60) days after the date the Participant Separates from Service.

(c) Required Beginning Date.

For purposes of this Section, the “Required Beginning Date” shall mean—

- (1) April 1 of the calendar year following the calendar year in which the Participant attains age 70 1/2, if the Participant Separates from Service before the calendar year in which he attains age 70 1/2; **and**
- (2) April 1 of the calendar year following the calendar year in which the Participant Separates from Service, if the Participant Separates from Service during or after the calendar year in which he attains age 70 1/2.

(d) Irrevocable Elections.

All elections under this Section 702 are irrevocable.

§ 703 Death of Participant Before Commencement of Benefits.

Except as provided in Section 704 or any other provision of this Plan, if a Participant dies before the commencement of Plan benefits to the Participant, the Plan benefits of the Participant's Beneficiary(ies) shall commence no earlier than sixty-one (61) days and no later than ninety (90) days after the date of the Participant's death.

§ 704 Election by Beneficiary to Defer Commencement.

(a) In General.

Notwithstanding Sections 701 and 703, if the Beneficiary elects during the Election Period to defer the commencement of all or any portion of his Plan benefits to a date certain on or before the Required Beginning Date which is the first day of a calendar month, then the Plan benefits of the Beneficiary (or the portion deferred) shall not commence at the time set forth in Section 701, but rather on the date elected by the Participant, unless the Participant dies before the date elected.

(b) Election Period.

For purposes of this Section, the "Election Period" shall mean the sixty (60) day period beginning on the date of the Participant's death.

(c) Required Beginning Date.

For purposes of this Section, the "Required Beginning Date" shall mean—

- (1) April 1 of the calendar year following the calendar year in which the Participant would have attained age 70 1/2, if the Beneficiary is the Participant's surviving spouse; **and**
- (2) the earlier of the date described in paragraph (1) or the fifth anniversary of the Participant's death, if the Beneficiary is not the Participant's surviving spouse.

(d) Irrevocable Elections.

All elections under this Section 704 are irrevocable.

Article VIII — Form of Benefits

§ 801 Definitions.

When used in this Article, the words and phrases defined in this Section shall have the following meaning, unless the context in which they are used clearly indicates a different meaning:

(a) Annuity Starting Date.

(1) Annuity.

In the case of a distribution in the form of a commercial annuity, the term “Annuity Starting Date” shall mean the first day of the first period for which an amount is paid under the annuity.

(2) Lump Sum.

In the case of a Lump Sum distribution, the term “Annuity Starting Date” shall mean the date the Lump Sum is distributed.

(b) Joint & Survivor Annuity

The term “Joint and Survivor Annuity” shall mean a non-transferable single-premium immediate commercial annuity contract which provides a level payment monthly annuity for the life of the Participant, with a survivor annuity for the life of the Participant’s Eligible Spouse which provides monthly payments in an amount equal to 50%, 66.67%, or 100% (as elected by the Participant) of the amount of each payment during their joint lives. All annuities purchased under this Plan shall be based on unisex mortality tables.

(c) Life Annuity

The term “Life Annuity” shall mean a nontransferable single-premium immediate commercial annuity contract which provides monthly level payments for the life of the annuitant. All annuities purchased under this Plan shall be based on unisex mortality tables.

(d) Lump Sum

The term “Lump Sum” shall mean the distribution of a given amount of benefits in a single cash payment.

(e) Ten Year Certain Annuity

The term “Ten Year Certain Annuity” shall mean a nontransferable single-premium immediate commercial annuity contract which provides level monthly payments during a period equal to the *greater* of the life of the annuitant *or* 120 months. Any amounts payable after the death of the primary annuitant shall be paid to the beneficiary(ies) selected by the primary annuitant or the default beneficiary(ies) provided under the annuity. All annuities purchased under this Plan shall be based on unisex mortality tables.

§ 802 Form of Distribution.

(a) Living Participant.

Except as provided in Section 904 (relating to Qualified Domestic Relations Orders), **if** the Participant is living at the time benefits commence with respect to his Plan account, then the benefits which commence shall be used to purchase a Life Annuity for the life of the Participant and the Participant’s benefits shall be distributed in that form, **except that** if the Participant files a timely election under Section 803 to receive the benefits in an optional form under Section 804, **then** the Participant’s benefits shall be paid in the optional form selected.

(b) Deceased Participant.

Except as provided in Section 904 (relating to Qualified Domestic Relations Orders), **if** the Participant is not living at the time benefits commence with respect to his Plan accounts, **and** —

(1) Beneficiary is Eligible Spouse.

The Participant’s Beneficiary is his Eligible Spouse, **then** the benefits which commence shall be used to purchase a Life Annuity for the life of the Eligible Spouse and be distributed in that form, **except that** if the Participant’s Eligible Spouse files a timely election under Section 803 to receive the benefits in an optional form under Section 804, **then** the Participant’s benefits shall be paid to the Eligible Spouse in in the optional form selected.

(2) Beneficiary is not Eligible Spouse.

The Participant’s Beneficiary is not his Eligible Spouse (or there is no Eligible Spouse), **then** the benefits which commence shall be distributed to the Beneficiary in a Lump Sum, **except that** if the Beneficiary files a timely election under Section 803 to receive the benefits in an optional form under Section 804, **then** the Participant’s benefits shall be paid to the Beneficiary in the optional form selected.

§ 803 Election to Receive Benefits in an Optional Form.**(a) In General.**

To be valid under this Section, a Participant's or Beneficiary's election to receive benefits in an optional form must:

- (1) be filed with the Administrator during the 60 day period ending on the Annuity Starting Date;
- (2) be in writing on forms provided by the Administrator;
- (3) contain an acknowledgment that the Participant has received the notice required under subsection (b); **and**
- (4) be signed by the Participant.

(b) Notice by Administrator.

Whenever benefits may commence under this Plan, the Administrator shall provide the affected Participant with a general description of the material features of the optional forms of benefit available under the Plan and an explanation of their relative values.

§ 804 Optional Forms of Benefits.**(a) In General.**

The optional forms of benefits specified by this Section shall be—

(1) Lump Sum.

One immediate Lump Sum payment.

(2) Life Annuity.

The purchase of and delivery to the Participant or Beneficiary of a Life Annuity for his/her lifetime.

(3) Joint and Survivor Annuity.

The purchase of and delivery to the Participant of a 50% Joint and Survivor Annuity, a 66.67% Joint and Survivor Annuity, or a 100% Joint and Survivor Annuity. (This option is not available to a Beneficiary.)

(4) Ten Year Certain Annuity.

The purchase of and delivery to the Participant or Beneficiary of a Ten Year Certain Annuity with the Participant or Beneficiary as the primary annuitant.

(5) Other Options.

Any other form of benefit offered by the Administrator in a nondiscriminatory manner.

(b) Limitations.

Notwithstanding anything in subsection (a) to the contrary, any form of benefit which is selected under this Section, and any payments to be made under a commercial annuity selected under this Section, must satisfy the requirements of Sections 805 and 806.

§ 805 Minimum Distribution Requirements—In General.

The following minimum distribution requirements, as construed in accordance with the provisions of Section 806, shall apply to any benefits received under an optional form permitted by Section 804, including any payments to be made under a commercial annuity:

(a) Benefits to a Living Participant.

If a given group of benefits commence to a living Participant, the benefit payments in that group of benefits must be distributed over a period not extending beyond the life or life expectancy of the Participant or the lives or joint life and last survivor life expectancy of the Participant and a designated Beneficiary, **and** the amount required to be distributed for each calendar year beginning with the calendar year in which the Participant attains age 70 1/2 (or, if later, Separates from Service) shall be no less than—

- (1) the remaining amount of the Participant's benefits under that group of benefits, **divided by**
- (2)
 - (A) if benefits are distributed over a period not extending beyond the life expectancy of the Participant: the life expectancy of the Participant;
 - (B) if subparagraph (A) does not apply, and the designated Beneficiary is the Participant's spouse: the joint and last survivor life expectancy of the Participant and the designated Beneficiary;
 - (C) if subparagraph (A) does not apply, and the designated Beneficiary is not the Participant's spouse: the **lesser** of—
 - (I) the joint and last survivor life expectancy of the Participant and the designated Beneficiary, **or**
 - (II) the applicable divisor determined from the table set forth in Treas. Regs. § 1.401(a)(9)-2, Q&A 4(a)(2).

Notwithstanding the foregoing, the distributions shall be made more rapidly than stated above if so provided after the effective date of any regulations promulgated under Code § 457(d)(2)(B)(i)(I).

(b) Benefits to a Beneficiary which Originally Commenced to a Living Participant.

If any group of benefits which commenced to a living Participant are not completely distributed during the Participant's lifetime—

(1) Death After Code § 401(a)(9) Required Beginning Date or Under Annuity.

If the Participant died on or after the April 1 following the calendar year in which he attained age 70 1/2 (or, if later, that he Separated from Service), **or** if the distribution to the Participant was made in the form of a commercial annuity which satisfies the requirements of Treas. Regs. § 1.401(a)(9)-1 [F-3] and [F-4], **then** any distributions made to Beneficiaries of those benefits must be made at least as rapidly as were distributions to the Participant during his lifetime. However, subparagraph (a)(2)(C)(II) shall not apply after the death of the Participant.

(2) Death Before Code § 401(a)(9) Required Beginning Date In A Form Other Than An Annuity.

If paragraph (1) does not apply, any distributions made to Beneficiaries of those benefits must be made in accordance with the rules stated in subsections (c) and (d) below, as if those remaining benefits had commenced after the death of the Participant, **and** must also be made at least as rapidly as were distributions to the Participant during his lifetime

(c) Benefits which Commence to a Beneficiary.

If the Participant dies before a given group of benefits commence, the benefit payments in that group of benefits must meet **one** of the following two criteria (*except* as provided in subsection (d)):

(1) Five Year Period.

The entire amount of the benefits in such group of benefits must be distributed by December 31 of the calendar year containing the fifth anniversary of the Participant's death.

(2) Over Life Expectancy of Beneficiary.

(A) Spousal Beneficiary.

If the designated Beneficiary is the surviving spouse of the Participant, **and** no other individual is designated as a primary beneficiary in addition to the surviving spouse as of the date of the Participant's death—

- (I) The benefits must be distributed to the spouse-Beneficiary (and any contingent Beneficiaries) over the course of the spouse's life or a period not extending beyond the spouse's life expectancy;
 - (II) the distributions must begin not later than the **later** of—
 - (i) December 31 of the calendar year immediately following the calendar year in which the Participant died, **or**
 - (ii) December 31 of the calendar year in which the Participant would have attained age 70 1/2;
 - (III) the method of distribution must be *elected* (irrevocably) by the Participant or by his surviving spouse not later than the **earlier** of—
 - (i) December 31 of the calendar year which contains the fifth anniversary of the death of the Participant, **or**
 - (ii) the date specified in clause (II); **and**
 - (IV) the amount required to be distributed for each calendar year beginning with distributions for the **later** of—
 - (i) the calendar year immediately following the calendar year in which the Participant died, **or**
 - (ii) the calendar year in which the Participant would have attained age 70 1/2,
shall be no less than—
 - (iii) the remaining amount of the Participant's benefits under that group of benefits, **divided by**
 - (iv) the life expectancy of the spouse-Beneficiary.
- (B) *Nonspouse Beneficiary.*

If subparagraph (A) does not apply, but there is a designated Beneficiary—

- (I) The benefits must be distributed to all Beneficiaries (primary or contingent) over the **shorter of** the course of the designated Beneficiary's life or a period not extending beyond his life expectancy, **or** fifteen (15) years;
- (II) the distributions must begin not later than December 31 of the calendar year immediately following the calendar year in which the Participant died;

- (III) the method of distribution must be *elected* (irrevocably) by the Participant or by his Beneficiary not later than the date specified in clause (II); **and**
- (IV) the amount required to be distributed for each calendar year beginning with distributions for the calendar year immediately following the calendar year in which the Participant died shall be no less than—
 - (i) the remaining amount of the Participant's benefits under that group of benefits, **divided by**
 - (ii) the life expectancy of the designated Beneficiary.

(d) Benefits Which Commence to Another Beneficiary Because Surviving Spouse Died.

If the Participant's surviving spouse is the Participant's designated Beneficiary (and only Beneficiary, other than beneficiaries contingent upon the death of the spouse) and such spouse dies after the Participant but before the date specified in subparagraph (c)(2)(A)(II) and before the date benefits actually commence (or, in the case of the distribution of a commercial annuity which satisfies the requirements of Treas. Regs. § 1.401(a)(9)-1 [F-3] and [F-4], before the date payments begin under the annuity), the remaining benefit payments in that group of benefits must meet **one** of the following two criteria:

(1) Five Year Period.

The entire amount of the remaining benefits in such group of benefits must be distributed by December 31 of the calendar year containing the fifth anniversary of the death of the surviving spouse.

(2) Over Life Expectancy of Beneficiary.

If there is a new designated Beneficiary—

- (A) The remaining benefits must be distributed to all remaining Beneficiaries over the course of the new designated Beneficiary's life or a period not extending beyond his life expectancy;
- (B) The distributions must begin not later than December 31 of the calendar year immediately following the calendar year in which the Participant's surviving spouse died;
- (C) The method of distribution must be *elected* (irrevocably) by the Participant or by his Beneficiary not later than the date specified in subparagraph (B); **and**
- (D) The amount required to be distributed for each calendar year beginning with distributions for the calendar year

immediately following the calendar year in which the Participant's spouse died shall be no less than—

- (I) the remaining amount of the Participant's benefits under that group of benefits, **divided by**
- (II) the life expectancy of the designated Beneficiary.

(e) Substantially Non-increasing Amounts.

In all cases, distributions which are made over a period of more than one (1) year must be made in substantially non-increasing amounts paid not less frequently than annually.

§ 806 Minimum Distribution Requirements—Special Rules.

(a) Treatment of Payments to Children.

For purposes of Section 805, any amount paid to a child of the Participant shall be treated as if it had been paid to the surviving spouse of the Participant if such amount will become payable to the surviving spouse when such child reaches majority.

(b) Designated Beneficiary.

For purposes of Section 805, the existence and identity of “designated” Beneficiaries, and of “the” designated Beneficiary for purposes of measuring life expectancies, shall be determined in accordance with Treas. Regs. § 1.401(a)(9)-1 [part D] and [E-5] (which contain special rules for multiple beneficiaries, substitute beneficiaries, class beneficiaries, trust beneficiaries, the date for determining designated beneficiaries, etc.).

(c) Spouse.

For purposes of Section 805 and this Section, the existence and identity of a Participant's “spouse”, shall be determined in accordance with Treas. Regs. § 1.401(a)(9)-1 [H-3A] and [H-4] (which contain special rules for determining the date as of which the spouse is identified and the effect of Qualified Domestic Relations Orders, etc.).

(d) Life Expectancies.

(1) In General.

For purposes of Section 805, life expectancies and joint and last survivor expectancies are computed by the use of the return multiples contained in Treas. Regs. § 1.72-9, Tables V and VI.

(2) Participant and Spouse.

Unless the Participant or his spouse affirmatively elects to the contrary before the Required Beginning Date, the life expectancy of a Participant and his spouse shall be *recalculated* in each calendar year, using the attained age of each individual as of the individual's birthday during the calendar year. Upon the death of the Participant or his spouse, the recalculated life expectancy of the Participant or spouse will be reduced to zero in the calendar year following the calendar year of death. Joint and last survivor life expectancies in cases where one life expectancy is being recalculated and the other is not are illustrated in Treas. Regs. § 1.401(a)(9)-1 [E-8].

(3) Non-spouse Beneficiary.

The life expectancy of a non-spouse Beneficiary may not be recalculated. The life expectancy of a non-spouse Beneficiary in any given calendar year is equal to—

(A) the life expectancy of such Beneficiary as of his birthday during:

(I) in the case of a commercial annuity which meets the requirements of Treas. Regs. § 1.401(a)(9)-1 [F-3] and [F-4]: the calendar year in which payments commence under the annuity;

(II) except as provided in subclause (I), for purposes of Section 1305(a): the calendar year in which the Participant attains age 70 1/2;

(III) except as provided in subclause (I), for purposes of Section 1305(c)(2)(B): the calendar year following the calendar year in which the Participant died;

(IV) except as provided in subclause (I), for purposes of Section 1305(d)(2): the calendar year following the calendar year in which the Participant's surviving spouse died;

minus

(B) the number of years between the first day of the given calendar year and the first day of the calendar year specified in subparagraph (A).

(e) Time of Distributions.

The minimum distribution required under Section 805 for any given calendar year must be made on or before December 31 of such calendar year, **except** that the minimum distribution required under Section 805(a) for the calendar year in which the Participant attains age 70 1/2 (or, if later, Separates from Service) must be made on or before April 1 of the following calendar year. Any amount distributed under this exception between January 1 and April 1 of the

following calendar year shall **not** be treated as a distribution which satisfies the minimum distribution required under Section 805 for the following calendar year.

(f) Remaining Amount of Benefits.

For purposes of Section 805, the “remaining amount of a Participant’s benefits” as of any given calendar year is the balance of the Participant’s benefits valued as of the last valuation date in the calendar year immediately preceding the given calendar year **less** all distributions of such benefits since that time.

(g) Annuities.

If a commercial annuity contract is purchased to pay benefits from this Plan, only the payments under the annuity contract, and not the distribution of the contract, will be considered in determining whether the distribution satisfies the minimum distribution rules of Section 1305 and this Section. An annuity contract must also meet the applicable requirements of Treas. Regs. § 1.401(a)(9)-1 [F-1(e)], [F-3], [F-3A], and [F-4], and § 1.401(a)(9)-2 [Q&A 4(b), 5, 6, and 7]. The provisions of those regulations expressly supersede Sections 805(a)(1), 805(a)(2), 805(c)(2)(A)(IV), 805(c)(2)(B)(IV), 805(d)(2)-(D) (all relating to the minimum amount to be distributed in each year), and Section 806(d)(2) (relating to recalculation of life expectancies) in the case of annuity contracts.

(h) Compliance with Regulations.

This Section and Section 805 shall be interpreted in accordance with the more detailed provisions of Treas. Regs. §§ 1.401(a)(9)-1 and -2, and any future regulations under Code § 457, and are intended to comply with those regulations. To the extent that this Section and Section 805 are in conflict with such regulations, this Section and Section 805 shall be deemed modified so as to comply with such regulations.

Article IX — Benefits: Miscellaneous Provisions

§ 901 Provision of Benefits.

The Administrator shall provide benefit payments to the appropriate recipients from time to time in accordance with the provisions of this Plan. The **entire** portion of all accounts created with respect to a Participant shall be used to provide benefits for the Participant or his Beneficiaries or Alternate Payees under this Plan.

§ 902 Determination of Marital Status by the Administrator.

Before receiving any benefits under this Plan in the form permitted only for the Participant's surviving spouse, the recipient must establish to the satisfaction of the Administrator the current marital status of the Participant (or the marital status of a deceased Participant at the time of his death). A Participant will be deemed not married at any given time if no spouse can be located or if other circumstances described in regulations issued by the U.S. Secretary of the Treasury exist.

§ 903 Spendthrift Provisions.

(a) General Rule.

Except as provided in subsection (b), benefits payable under this Plan (whether made directly from the Plan or as payments under annuity contracts purchased by the Plan and transferred to the recipient) shall not be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, change, garnishment, execution, or levy of any kind, either voluntary or involuntary, including any such liability which is for alimony or other payments for support of a spouse, former spouse, or any other relative or dependent of the Participant before actually being received by the Participant, Former Participant, Beneficiary, or Alternate Payee under the terms of the Plan, **except** with respect to federal income tax withholding. Any attempt to anticipate, alienate, transfer, assign, pledge, encumber, change, or otherwise dispose of any right to benefits payable under this Plan shall be void. The Administrator and the Employer shall not be liable for or subject to, in any manner, the debts, contracts, liabilities, engagements or torts of any person entitled to benefits under this Plan.

(b) Qualified Domestic Relations Orders.

Notwithstanding the provisions of subsection (a), the Administrator may comply with a Qualified Domestic Relations Order (as described in Section 904).

§ 904 Qualified Domestic Relations Orders.

(a) Definition.

A Qualified Domestic Relations Order is a judgment, decree, or order (including approval of a property settlement agreement) made pursuant to a state domestic relations law (including community property law) that relates to the provision of child support, alimony payments or marital property rights to a spouse, former spouse, child, or other dependent of a Participant (hereinafter referred to as an “Alternate Payee”), which—

(1) Rights Recognized.

Creates or recognizes a right on the part of the Alternate Payee to receive all or a portion of the benefits payable on behalf of a Participant under this Plan;

(2) Required Provisions.

Specifies—

- (A) the name and last known mailing address (if any) of the Participant and each Alternate Payee covered by the order;
- (B) the amount or percentage of the Participant’s Plan benefits to be paid to any Alternate Payee, or the manner in which such amount or percentage is to be determined;
and
- (C) the number of payments or the period to which the order applies and each Plan to which the order relates;

(3) Prohibited Provisions.

Does not require the Plan to do any of the following:

- (A) provide any type or form of benefit or any option not otherwise provided under the Plan;
- (B) pay any benefit in the form of a Joint and Survivor Annuity with respect to the Alternate Payee and his or her subsequent spouse;
- (C) pay any benefits to an Alternate Payee before the date on which the Participant is entitled to a distribution under the Plan;

- (D) provide increased benefits; **or**
- (E) pay benefits to an Alternate Payee that are required to be paid to another Alternate Payee under a prior Qualified Domestic Relations Order; **and**

(4) Permitted Provision.

May or may not provide that an Alternate Payee who had been married to the Participant for at least one year will be treated as an Eligible Spouse with respect to the portion of the Participant's benefit in which such Alternate Payee has an interest.

(b) Procedure.

(1) Notification.

Upon receipt of any judgment, decree, or order (including approval of a property settlement agreement) relating to the provision of payment by the Plan to an Alternate Payee pursuant to a state domestic relations law, the Administrator shall promptly notify the affected Participant and any Alternate Payee of:

- (A) the receipt of such judgment, decree, or order; **and**
- (B) the Administrator's procedure for determining whether or not the judgment, decree, or order is a Qualified Domestic Relations Order.

(2) Establishment of Procedure.

The Administrator shall establish a procedure to determine the status of a judgment, decree, or order as a Qualified Domestic Relations Order and to administer Plan distributions in accordance with them. Such procedure shall—

- (A) be in writing;
- (B) permit an Alternate Payee to designate a representative for receipt of communications from the Administrator;
- (C) include a provision specifying the notification requirements set forth in paragraph (1);
- (D) include a provision describing the Alternate Payee Accounts provided in subsection (c); **and**
- (E) include such other provisions as may be required by regulations promulgated by the Secretary of the Treasury.

(c) Alternate Payee Accounts.

(1) Creation.

During any period in which the Administrator or a court (or other tribunal) of competent jurisdiction is determining whether a judgment, decree, or order is a Qualified Domestic Relations Order, the Administrator shall create separate accounts under this Plan (“**Alternate Payee accounts**”) and shall credit such accounts with the amounts, if any, which would have been payable to each Alternate Payee during such period (as they would have become due) if the judgment, decree, or order had already been determined to be a Qualified Domestic Relations Order. The amounts credited to the Alternate Payee accounts shall be debited from the accounts of the Participant potentially subject to the putative Qualified Domestic Relations Order. The Alternate Payee accounts need not be segregated from the general assets of the Fund; they only must be accounted for separately.

(2) Disposition.

(A) To Alternate Payee.

If a judgment, decree, or order is determined to be a Qualified Domestic Relations Order within 18 months after the date on which the first payment would be required to be made under the judgment, decree, or order, the Administrator shall pay the amounts in Alternate Payee accounts created with respect to such judgment, decree, or order to the Alternate Payees.

(B) Return to Participant's Accounts.

All amounts in Alternate Payee accounts created with respect to such judgment, decree, or order shall be returned to the accounts with respect to the Participant from which they were derived upon the **earliest** of the following events:

- (I) the date 18 months after the date on which the first payment would be required to be made under the judgment, decree, or order;
- (II) the conclusive determination that such judgment, decree, or order is **not** a Qualified Domestic Relations Order; **or**
- (III) the termination of the Plan.

Such returned amounts shall be paid at such time and in such manner as is otherwise provided in this Plan (*except* that any amounts already due for distribution shall be paid to the proper recipient immediately).

(d) Compliance with Qualified Domestic Relations Order.

If a judgment, decree, or order is conclusively determined to be a Qualified Domestic Relations Order, the Administrator shall provide benefits under the Plan in accordance with such Qualified Domestic Relations Order.

§ 905 Facility of Payment.

Whenever the Administrator determines that a person entitled to receive any payment of a benefit or installment is under a legal disability or is incapacitated in any way so as to be unable to manage his financial affairs, the Administrator may make payments to such person, to his legal representative, to a relative, or to a friend of such person for his benefit. Any payment of a benefit or installment in accordance with the provisions of this Section shall be a complete discharge from any liability for the making of such payment under the provisions of the Plan.

§ 906 Unclaimed Distribution.

If, after diligent inquiry, the Administrator is unable to locate a person for the purpose of distribution of benefits under this Plan, amounts which remain unclaimed at the time when such property shall escheat under applicable state law (or be delivered to the state under applicable abandoned and unclaimed property law), shall be distributed to the state with jurisdiction over the amounts. In the event of a distribution under this subsection, the Plan and Fund shall have no further responsibility for such amounts.

Article X — Claims Procedure

§ 1001 Filing a Claim.

A Participant, Beneficiary, or Alternate Payee shall make a claim for benefits under this Plan by filing a written request with the Administrator on a form supplied by the Administrator.

§ 1002 Notice of Denial.

If the Administrator denies a request for benefits under Section 1001 in whole or in part, it shall notify the claimant of the same in writing within 60 days of the date the request was filed with the Administrator. Any notice of denial shall contain—

- (a) the reason for the denial;
- (b) specific references to the Plan provisions on which the denial is based;
- (c) a description of any additional information needed to perfect the claim and an explanation of why such information is necessary; **and**
- (d) an explanation of the Plan's claim procedure, including the opportunity for review under Section 1003.

§ 1003 Review of Denial.

(a) Petition.

Within 60 days of the receipt of a notice of denial under Section 1002, a claimant may petition the Administrator in writing for a review of the denial.

(b) Rights.

With respect to any review under this Section, the claimant shall have the right—

- (1) to a hearing;
- (2) to representation;

- (3) to review pertinent documents;
- (4) to submit comments in writing within 60 days of the receipt of the notice of denial under Section 1002; and
- (5) to all rights afforded under subsection (d).

(c) Decision.

The Administrator shall issue a written decision at the conclusion of a review under this Section within 60 days following its receipt of a petition for such review under subsection (a). Such decision shall give specific reasons for the decision and provide specific references to the plan provisions on which it is based.

(d) Compliance with Local Agency Law.

All reviews under this Section 1003 shall comply with the provisions of the Local Agency Law, 2 PA. CONS. STAT. § 551 *et seq.*

Article XI — Administration

§ 1101 In General.

The Plan Administrator and named fiduciary of this Plan shall be the Borough of Alburdis Pension Committee.

§ 1102 Powers & Duties.

(a) In General.

The Administrator shall administer the Plan in accordance with its terms, shall direct the Borough Treasurer to make payments in accordance with the Plan from the Fund, and shall have all powers necessary to carry out the provisions of the Plan. The Administrator shall have absolute and exclusive discretion to decide all issues arising in the administration, interpretation, and application of the Plan, including eligibility for benefits. The Administrator may from time to time set forth rules of interpretation and administration, subject to modification as appropriate in the light of experience. No such rule will be ineffective by reason of the fact that such rule may amend the purely administrative provisions of the Plan or conform to any changes in the Plan or applicable law relating to qualified retirement plans. Decisions and rules established by the Administrator shall be conclusive and binding on all persons. The Administrator shall act without discrimination among persons similarly situated at any given time, although it may change its policies from time to time.

(b) Delegation.

The Administrator may delegate to any person or group of persons its authority to perform any act under this Plan and the Fund, including those matters involving the exercise of discretion, *provided* that such delegation shall be subject to revocation at any time at the Administrator's discretion.

(c) Selection and Review of Investment Alternatives.

The Administrator shall select and review, from time to time, the investment alternatives to be offered to Participants under the Plan, and the standards and criteria for the selection of investment alternatives and the financial institutions, insurance companies, or

other organizations which may be qualified as managers of funds deferred under this Plan.

(d) Employment of Professionals & Others.

The Administrator may appoint such accountants, counsel, specialists, consultants, and other persons as it may deem necessary or desirable in connection with the administration of this Plan, including persons who may also be engaged by the Employer. The Administrator shall be entitled to rely exclusively upon, and shall be fully protected in any action taken in good faith by it in relying upon, any opinions or reports which shall be furnished to it by any such accountant, counsel, specialist, or other consultant.

(e) Records.

The Administrator shall keep a record of all its proceedings and acts, and shall keep all such books of account, records, and other data as may be necessary for the proper administration of the Plan under ERISA.

(f) Notifications.

When required by law, the Administrator shall notify any interested persons of its actions.

(g) Reports, Documents, and Communications.

The Administrator shall prepare and file all reports and documents required to be filed with a governmental agency, shall prepare and provide or make available all reports and documents required to be provided or made available to persons with an interest under the Plan, **and** shall communicate with employees and other persons with respect to all matters relating to the Plan and the Fund, including rights and benefits under this Plan.

§ 1103 Expenses.

All expenses incident to the administration of the Plan by the Administrator (but not costs of investments), including but not limited to the expenses arising from allowing Participants to participate in an eligible deferred compensation plan, selecting and reviewing investment alternatives and managers, deducting from compensation amounts deferred under the Plan and transferring those amounts to investment managers, fees of accountants, counsel, consultants, and other specialists, and other costs of administering the Plan, shall be paid by the Employer. All costs incident to the investment of amounts deferred under the Plan shall be assessed against the Plan accounts of Participants. All taxes of any and all kinds whatsoever that may be levied or assessed (under existing or future laws) upon or with

respect to the Fund or the income of the Fund shall be paid from the Fund and assessed against the Plan accounts of Participants.

§ 1104 Duty of Loyalty.

(a) Self-Dealing.

No member of the Administrator shall deal with the income or assets of the Plan in his own interests or for his own account, nor shall any member of the Administrator receive any consideration for his own personal accounts from any party dealing with the Plan in connection with a transaction involving the income or assets of the Plan or the Fund. No member of the Administrator who is a Participant in the Plan shall participate in any discretionary decision relating to his own participation in the Plan.

(b) Adverse Interests.

A member of the Administrator shall not act in any transaction involving the Plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the Plan or the interests of the Participants, Alternate Payees, or Beneficiaries, whether in his individual capacity or any other.

§ 1105 Indemnification.

The Employer hereby agrees to indemnify any officer, director, elected official, or employee of the Employer for any expenses, penalties, damages, or other pecuniary losses which such person may suffer as a result of his responsibilities, obligations, or duties in connection with the Plan or the Fund or fiduciary activities actually performed in connection with the Plan or the Fund, **but only** to the extent that—

- (a) fiduciary liability insurance is not available to cover the payment of such item; **and**
- (b) the person is not being relieved of his fiduciary responsibilities and liabilities to the Plan or the Fund for breaches of fiduciary obligations.

Article XII – Amendment & Termination

§ 1201 Amendment.

(a) In General.

Subject to the provisions of subsection (b), the Borough Council of the Sponsor shall have the right at any time, and from time to time, to amend in whole or in part, any or all of the provisions of this Plan and the Fund, by Ordinance.

(b) Prohibited Amendments.

No amendment under this Section shall be effective to the extent that it shall affect the rights of a Participant, Beneficiary, or Alternate Payee to the receipt of benefits with respect to any Compensation deferred before the time of the amendment, as adjusted for the investment income, net gains, expenses, net losses, and distributions prior to or subsequent to the amendment.

§ 1202 Termination.

(a) Right to Terminate Plan.

The Sponsor shall have the right to terminate this Plan at any time by Ordinance.

(b) Plan Accounts.

Following a termination of the Plan, the Participants in the Plan will be deemed to have terminated their compensation deferral elections as of the date of such termination. The Employer shall not distribute Plan benefits at the time of such termination. Rather, the Employer shall retain all amounts in the Fund and only pay or dispose of Plan benefits as otherwise provided in this Plan and according to the terms and conditions of this Plan.

Article XIII — Miscellaneous

§ 1301 **Acquittance.**

This Plan is purely voluntary on the part of the Employer. Except as provided in this Ordinance, neither the establishment of the Fund nor the payment of any benefits shall be construed as giving to any Participant or any other person any legal or equitable right against the Employer, any officer or Employee of the Employer, or the Administrator. Neither the Administrator nor the Employer in any way guarantees the Fund from loss or depreciation or attachment by creditors, nor do they guarantee any payment to any person.

§ 1302 **Delegation of Authority by Employer.**

Whenever any Employer is permitted or required to do or perform any act, matter, or thing under this Plan, it shall be done or performed by any officer duly authorized to perform same by the Employer.

§ 1303 **Construction.**

This Ordinance shall be construed and administered so as to conform to the applicable requirements for Code § 457 eligible deferred compensation plans, and shall be deemed amended automatically to conform to such legal requirements as in effect from time to time to the extent necessary.

§ 1304 **Gender & Number.**

Whenever any words are used in this Ordinance in the masculine gender, they shall be construed as though they were also used in the feminine gender in all appropriate cases. Whenever any words are used in either the singular or plural form, they shall be construed as though they were also used in the other form in all appropriate cases.

§ 1305 Headings.

Article, section, subsection, paragraph, subparagraph, clause, subclause, and other headings are included in this Ordinance for convenience only and shall in no manner be construed as a part of the Plan.

§ 1306 Severability.

Any provision of this Plan which is prohibited or unenforceable shall be ineffective to the extent of such prohibition or unenforceability without invalidating or rendering unenforceable the remaining provisions of this Plan. To the extent permitted by applicable law, the Employer hereby waives any provision of law which renders any provision of this Plan prohibited or unenforceable in any respect.

§ 1307 Employment Rights.

Nothing contained in this Ordinance shall be construed or interpreted as giving any employee of the Employer the right to be retained in the service of any Employer or shall affect or impair any terms of employment with any Employer, the right of any Employer to control its employees, and the right of any Employer to terminate the service of any employee at any time.

§ 1308 Communications.**(a) To the Administrator.**

All elections, designations, requests, notices, instructions, or other communications made to the Administrator shall be in such form as may be prescribed by the Administrator and shall be mailed by first-class mail or delivered in such fashion and to such location as shall be specified by the Administrator. The communication shall be deemed to have been given and delivered only upon actual receipt thereof at such location.

(b) By the Administrator or Employer.

All notices, statements, reports, or other communications from the Administrator or the Employer to any person with an interest under this Plan shall be deemed to have been duly given when delivered to, or when mailed by first-class mail, postage prepaid and addressed to such person at his address last appearing on the records of the Administrator or the Employer, or when actually received by such person by some other means of delivery.

§ 1309 **Type of Plan.**

This Plan is a Code § 457 eligible deferred compensation plan.

DULY ORDAINED and **ENACTED** by the Borough Council of the Borough of Alburdis, this 13th day of March, 1996, in lawful session duly assembled.

**BOROUGH COUNCIL
BOROUGH OF ALBURDIS**

Steven R. Hill, President

Attest:

Louise Stahley, Secretary

AND NOW, this 13th day of March, 1996, the above Ordinance is hereby APPROVED.

Ronald J. DeIaco, Mayor