**AMENDMENT FOR**

 **Terminating Defined Contribution Plan**

**Instructions**

**Terminating plan.** The sole purpose of this Amendment is to facilitate plan termination. The Amendment assumes the employer has adopted timely all applicable interim and discretionary amendments. See Interim Amendments, below.

**Determination letter**. No plan that has adopted one or more amendments (other than IRS model amendments) since its last restatement is entitled to automatic reliance on plan termination. Therefore, if an employer wants to have reliance that the plan and the applicable amendments meet the qualification requirements, the employer must submit a favorable determination letter request using IRS Form 5310. The employer should ensure that all applicable amendments for which the deadline (as an ongoing plan) has passed have been timely adopted before applying for a determination letter. Even if the plan document is presumed to be perfect, a Form 5310 application will also cover the administrative steps taken in terminating the plan.

**Plan restatement.** The IRS does not require a terminating preapproved plan to be restated prior to termination. However, we recommend that it be restated to the latest document available prior to termination so it will have reliance on previous interim amendments incorporated in that restatement, particularly if the employer will not file a determination letter request. This is particularly true if the assets will not be distributed until after the restatement deadline.

**Execution.** The employer must execute the Amendment.

**Modification.**  The employer may need to make modifications to the Amendment to reflect the operation of the employer's plan. For example, if the employer terminates a 401(k) plan and maintains an “alternative defined contribution plan,” and the employer intends to transfer, rather than distribute, the plan assets upon termination of this plan (see Treas. Reg. §1.401(k)-1(d)(4)), the employer should modify Section 2.3. Some plans impose an hour of service requirement (e.g., 1,000 hours of service) to receive an allocation of employer contributions. The employer may wish to add a provision to section 2.4 to pro-rate the hours required (or to adjust plan defaults).

**Interim Amendments.** This Amendment does not include provisions for which FIS has provided a separate “tack-on” amendment. For example, as of this writing, March 2021, Congress has passed four statutes which are not reflected in third cycle defined contribution plans, the Bipartisan Budget Act (which impacted hardship distributions), SECURE, CARES, and the Consolidated Appropriations Act (which provided relief related to 2020 natural disasters). While ongoing plans have an extended period to adopt amendments related to these laws, terminating plans must adopt any needed interim amendments prior to plan termination. FIS amendments are available at the [Relius Other Resources](https://www.relius.net/News/OtherResources.aspx?T=P) page.

**Other Documents.** In addition to the amendment, we have provided a sample Certificate of Adopting Resolution (for an employer to evidence adoption of the Amendment, if applicable), a termination checklist (for administrative convenience), a Notice of Plan Termination (to comply with Code §4980F and ERISA §204(h) for money purchase pension and target benefit plans, as discussed on item 2 of the checklist), and a sample Summary of Material Modifications (SMM) (if applicable). We have not provided a unanimous written consent or other form to actually adopt the amendment, because this will vary depending on local law and on the structure of the employer.

# AMENDMENT FOR TERMINATING DEFINED CONTRIBUTION PLAN

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, (“Employer”), adopts this Amendment to the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Plan”).

**ARTICLE I**

**PREAMBLE**

1.1 **Adoption and effective date of Amendment**. The Employer adopts this Amendment to terminate the Plan effective as of the “Effective Date of Plan Termination” specified in Amendment Section 2.1 below.

1.2 **Superseding of inconsistent provisions**. This Amendment supersedes the provisions of the Plan to the extent those provisions are inconsistent with the provisions of this Amendment.

1.3 **Construction.** Except as otherwise provided in this Amendment, any reference to “Section” in this Amendment refers only to sections within this Amendment and is not a reference to the Plan. The Article and Section numbering in this Amendment is solely for purposes of this Amendment, and does not relate to the Plan article, section or other numbering designations.

**ARTICLE II**

**EFFECTIVE DATE, CONTRIBUTIONS, AND DISTRIBUTION**

*The Employer must complete 2.1.a. below.*

2.1 **Plan Termination.** The Plan is terminated as of the Effective Date of Plan Termination.

a. **The Effective Date of Plan Termination** is: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

2.2 **Cessation of contributions.** No employees shall enter the Plan after the Effective Date of Plan Termination, and there will be no contributions for periods after such date. Furthermore, in determining any contributions prior to the Effective Date of Plan Termination, the Plan will not take into account Compensation paid after such Effective Date.

2.3 **Distributions**. The Plan Administrator shall direct that distributions be made to Participants and Beneficiaries within a reasonable period of time after the Effective Date of Plan Termination. Notwithstanding any provision in the Plan to the contrary, if the Plan is a Profit Sharing or 401(k) Plan that is not required to provide for distributions in the form of a qualified joint and survivor annuity pursuant to Code §§ 401(a)(11) and 417 and the Employer does not maintain another defined contribution Plan (other than an ESOP), then the Plan will distribute benefits to Participants and Beneficiaries in a lump-sum payment, regardless of the Participant's or Beneficiary’s consent to such distribution.

2.4 **Plan Year.** The Plan Administrator will administer the Plan as though the Plan Year that includes the Effective Date of Plan Termination ends on the Effective Date of Plan Termination. This provision applies for all plan administration purposes, including the application of the Top-Heavy requirements under Code §416, the limitation year under Code §415, and any allocation conditions imposed by the Plan. However, the plan termination does not change the Plan Year for purposes of ERISA, including ERISA’s reporting and disclosure requirements.

\* \* \* \* \* \* \*

This Amendment has been executed this day of , .

Name of Plan:

Name of Employer:

By:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 *[Print Name, Title]*

#### CERTIFICATE OF ADOPTING RESOLUTION

The undersigned authorized representative of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (the Employer) hereby certifies that the following resolutions were duly adopted by Employer on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_\_, and that such resolutions have not been modified or rescinded as of the date hereof;

RESOLVED, the Amendment to modify and terminate the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Plan (the Amendment) is hereby approved and adopted and that an authorized representative of the Employer is hereby authorized and directed to execute and deliver to the Administrator of the Plan one or more copies of the amendment.

The undersigned further certifies that attached hereto is a copy of the Amendment approved and adopted in the foregoing resolution.

Date:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Signed:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 [print name/title]

**SUMMARY PLAN DESCRIPTION**

**MATERIAL MODIFICATIONS**

**I**

**INTRODUCTION**

This is a Summary of Material Modifications regarding the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Plan”). This is merely a summary of the most important changes to the Plan and information contained in the Summary Plan Description (“SPD”) previously provided to you. It supplements and amends that SPD so you should retain a copy of this document with your copy of the SPD. If you have any questions, contact the Administrator. If there is any discrepancy between the terms of the Plan, as modified, and this Summary of Material Modifications, the provisions of the Plan will control.

**II**

**SUMMARY OF CHANGES**

**Plan Termination.** The Plan is terminated effective as of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ . This means that no more contributions will be made after this date and the Plan Administrator will begin the process of making distributions, in accordance with the terms of the Plan, within a reasonable period of time after the termination date.

**CHECKLIST FOR DEFINED CONTRIBUTION PLAN TERMINATION**

An employer should consider the following items if the employer terminates a qualified defined contribution plan:

❑ 1. **Date.** Identify a termination date.

❑ 2. **Notice.** If the plan is a pension plan (e.g., a money purchase plan), provide an ERISA §204(h) notice to the participants. Generally, large plans (at least 100 participants) must give the notice to all participants no later than 45 days prior to the effective date of the amendment. Small plans must give the notice no later than 15 days prior to the effective date of the amendment. See Treas. Reg. §54.4980F-1. Profit sharing plans, stock bonus plans, and ESOPs need not give such a notice, even if the plan requires employer contributions. However, if the plan is a safe harbor 401(k) plan, and the termination occurs in the middle of a plan year, the plan must give 30 days prior notice. (unless the termination is on account of a “substantial business hardship” or an acquisition or disposition transaction). See Treas. Reg. §§1.401(k)-3(g) and 1.401(m)-3(h).

❑ 3. **Amendments.** Adopt any required interim and discretionary amendments for which the adoption deadline as an ongoing plan has not yet occurred. The IRS takes the position that plan termination ends the retroactive remedial amendment period, so all required amendment should be adopted before or at termination. Additionally, unless already adopted, adopt a plan amendment to freeze the plan if the plan is a pension plan or there are required employer contributions (such as a fixed matching contribution). The amendment should separately provide for termination of the plan as of the selected termination date. In preparing the amendment, the employer should consider the impact of termination on contributions for the final plan year.

❑ 4. **Notice to** **Interested Parties.** Provide a Notice to Interested Parties if the employer will file Form 5310. The employer must provide the notice prior to submitting the determination letter request. The identification of interested parties and the deadline for distributing the notice should be made in accordance with current IRS guidance. See Treas. Reg. §1.7476-1.

❑ 5. **5310.** File Form 5310 to request a favorable determination letter on termination of the plan. This step is optional. The only way for the plan to have reliance on all provisions effective on the termination date, including recent interim amendments, is to file a determination letter on plan termination.

❑ 6. **Distribution forms.** Provide required distribution forms to the participants. This would include a Code §402(f) direct rollover notice and may include a distribution election form to waive out of a joint and survivor annuity form of benefit payment. A profit sharing plan exempt from the qualified joint and survivor annuity rules may distribute in a lump sum without consent, provided the employer does not have another defined contribution plan.

❑ 7. **Locate missing/unresponsive participants.** Take appropriate measures to locate missing or unresponsive participants. See FAB 2014-01.

❑ 8. **Final contributions.** Make any final contributions to the plan. This can include pension contributions, fixed nonelective or matching contributions, safe harbor contributions, top heavy minimum contributions, elective deferrals, and other amounts accrued prior to the date of freezing or terminating the plan. It can also include discretionary matching or profit sharing contributions for the plan’s final year.

❑ 9. **Purchase annuities.** Purchase a commercial annuity for any participant who is required to receive his or her benefit in the form of a joint and survivor annuity, if the participant (and the participant’s spouse, if any) does not consent to an alternative form of distribution.

❑ 10. **Distribute.** Make direct rollovers participants have requested. Distribute remaining account balances, following plan procedures. All participants are automatically fully vested as a result of the termination. This includes participants who terminated employment prior to plan termination but who still have an account balance in the plan (perhaps because a forfeiture had not occurred). In the case of a missing participant, the plan may need to roll the participant’s account to an IRA, transfer the funds to the PBGC (see FAB 2021-01), a state unclaimed property fund, or a bank account.

❑ 11. **Final 5500.** File a final Form 5500 (or if applicable, Form 5500-SF) for the plan. The form is due on the last day of the 7th month after the plan has distributed all its assets. If current forms are not then available, use the prior year’s form and change the date. Indicate that the Form 5500 (or Form 5500-SF) is a final return and show all year end balances as zero. If the plan is a pension plan, line 3 of Schedule R should include all participants other than those receiving annuities.

**NOTICE OF PLAN TERMINATION**

We are providing this notice to inform you that the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Plan") is terminated effective as of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ . This means that contributions under the Plan will cease and the Plan Administrator will begin the process of making distributions, in accordance with the terms of the Plan, within a reasonable period of time after the termination date. The account balance that you have already earned will not be affected.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Date of Notice

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Plan Administrator