Volume 25, Number 2 Winter 2020

JOURNAL OF DEFERRED COMPENSATION

Nonqualified Plans and Executive Compensation

Editor-in-Chief: Bruce J. McNeil, Esq.

Update: New Hardship Withdrawal Rules Create Fewer Hardships for Plan Sponsors

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INTRODUCTION

The Bipartisan Budget Act of 2018 (BBA 2018) made significant changes to the hardship withdrawal rules under Internal Revenue Code (Code) section 401(k) by eliminating the safe harbor for a hardship withdrawal to be deemed *necessary* and expanding the sources that may be withdrawn due to hardship from a 401(k) plan (but less so from a 403(b) plan).[1] This article describes the changes reflected in Code section 401(k)(14) and Treasury regulations published September 23, 2019, and contrasts the new rules with the prior hardship withdrawal rules.[2] The changes to the hardship distribution rules made by BBA 2018 are effective for plan years beginning after December 31, 2018. Changes in the final regulations apply to distributions made on or after January 1, 2020 (rather than, as in the proposed Regulations published November 14, 2018, to distributions made in plan years beginning after December 31, 2018). However, the changes optionally, may be applied to distributions made in plan years beginning after December 31, 2018.[3]

Prior to BBA 2018 and the 2019 regulations, there were two parts to the hardship safe harbor rules to avoid a "facts and circumstances" review before approving a safe harbor withdrawal. The first part consisted of the reasons a distribution is deemed to be made on account of an immediate and heavy financial need (*i.e.,* the safe harbor reasons).[4] The second part consisted of requirements for the distribution to be deemed necessary to satisfy an immediate and heavy financial need (*i.e.,* the necessity safe harbor).[5] Unless both parts of the safe harbor rules were satisfied, there would generally be a "facts and circumstances" determination for the plan sponsor or third-party administrator to make before permitting a valid hardship withdrawal.[6]

Both before and after the BBA 2018 changes, a distribution is made on account of hardship only if the distribution is both (1) made on account of an immediate and heavy financial need and (2) necessary to satisfy the financial need. Further, the determination of the existence of an immediate and heavy financial need and of the amount necessary to meet the need must be made in accordance with nondiscriminatory and objective standards set forth in the plan.[7]

HARDSHIP WITHDRAWAL SAFE HARBOR REASONS UNDER THE 2019 FINAL REGULATIONS

Applicable regulations under Code Sections 401(k) and 403(b) generally provide that the determination of whether an employee has an immediate and heavy financial need that would permit a hardship withdrawal must be based on all the relevant facts and circumstances.[8] The 2019 final regulations, however, provide that the following expenses are *deemed* to be for an immediate and heavy financial need (*i.e.*, are safe harbor reasons):[9]

1. Expenses for (or necessary to obtain) medical care that would be deductible under Code Section 213(d), determined without regard to whether the expenses exceed 10 percent of adjusted gross income, for the employee, the employee's spouse or dependent (as defined in Code Section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof), or the employee's primary beneficiary under the plan;

2. Costs directly related to the purchase of a principal residence for the employee (excluding mortgage payments);

3. Payment of tuition, related educational fees, and room and board expenses, for up to the next 12 months of post-secondary education for the employee, or the employee's spouse, child, or dependent (as defined in Code Section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof), or the employee's primary beneficiary under the plan;

4. Payments necessary to prevent the eviction of the employee from the employee's principal residence or foreclosure on the mortgage on that residence;

5. Payments for burial or funeral expenses for the employee's deceased parent, spouse, child, or dependent (as defined in Code Section 152, determined without regard to section 152(d)(1)(B)), or the employee's deceased primary beneficiary under the plan;

6. Expenses for the repair of damage to the employee's principal residence that would qualify for the casualty deduction under Code Section 165, determined without regard to Code Section 165(h)(5)[10] and without regard to whether the loss exceeds 10 percent of adjusted gross income; or

7. Expenses and losses, including loss of income, incurred by the employee on account of a disaster declared by the Federal Emergency Management Agency (FEMA), provided that the employee's principal residence or principal place of

employment was located at the time of the disaster in an area designated by FEMA for individual assistance with respect to the disaster.

The first six safe harbor reasons predate the final regulations. Although similar to IRS relief provided after federally declared disasters, the new disaster-related safe harbor differs in that it is limited to disaster-related expenses and losses of an employee who lived or worked in the disaster area (and not the employee's relatives and dependents). There is no specific deadline by which the disaster-related distribution must be made, and there is no extended deadline to amend a plan to add the new disaster-related reason. Therefore, a plan sponsor that does not add disaster-related hardship distribution provisions as part of an amendment reflecting the final regulations, but instead waits until a disaster occurs, would need to adopt the amendment by the end of the plan year the amendment is first effective.[11] The final regulations provide that the safe harbor reasons above apply to distributions made after December 31, 2019, but may be applied to distributions made on or after a date as early as January 1, 2018.[12]

Many plans limit the expenses eligible for a hardship withdrawal to safe harbor reasons, although some plan documents also allow for other expenses to be considered for hardship, in which case a facts and circumstances review of the reason for a hardship withdrawal would be required.[13] In the preamble to the final regulations, the Treasury Department and the Internal Revenue Service (IRS) indicate that a plan making hardship distributions for some, but not all, of the safe harbor expenses is considered to be using the safe harbor standards for hardship distributions.[14] If a hardship withdrawal is on account of one of the above seven safe harbor reasons, there need not be a facts and circumstances determination of whether the employee has an immediate and heavy financial need for a hardship withdrawal. However, there is still the separate question of whether the hardship withdrawal is *necessary* to satisfy an immediate and heavy financial need.

HARDSHIP WITHDRAWAL NECESSITY TEST UNDER THE FINAL REGULATIONS

A hardship withdrawal is treated as *necessary* to satisfy an immediate and heavy financial need of an employee only to the extent the amount of the hardship withdrawal is not in excess of the amount required to satisfy the financial need. The amount required to satisfy the financial need may include any amounts necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the hardship withdrawal.[15] Nevertheless, a withdrawal "is not treated as necessary to satisfy an immediate and heavy financial need of an employee unless the employee has obtained all other currently available distributions (including distributions of ESOP dividends under section 404(k), but not hardship distributions) under the plan and all other plans of deferred compensation, whether qualified or nonqualified, maintained by the employer."[16] A withdrawal that does not satisfy the necessity test is not a valid hardship withdrawal.

The final regulations eliminate the hardship withdrawal necessity safe harbor of the prior regulations,[17] which required an employee taking a hardship withdrawal to suspend elective deferrals (including Roth contributions) and after-tax contributions under the plan and all other plans maintained by the employer for six months and to first obtain loans from the plan and all other plans maintained by the employer that are nontaxable at the time of the loan. These changes were because BBA 2018 directed that the six-month suspension requirement be deleted from the Treasury regulations and added Code Section 401(k)(14)(B), which states that a withdrawal does not fail to be a hardship withdrawal solely because the employee does not take any available loan under the plan.[18] Thus, the final regulations require that the 6-month suspension requirement must be eliminated with respect to distributions made after December 31, 2019, but the final regulations clarify that this required elimination of suspensions only applies to qualifies plans (*e.g.*, 401(k) plans), 403(b) plans, and governmental 457(b) plans, not to unfunded nonqualified plans. Under the final regulations, a plan may require that, before a hardship distribution may be made, a participant obtain all nontaxable loans available under the plan and all other plans maintained by the employer, but such requirement is no longer mandatory under a necessity safe harbor.[19] The final regulations also eliminate the facts and circumstances determination as to whether a hardship withdrawal is necessary to satisfy the financial need, except as an optional additional condition (discussed below).

For a hardship withdrawal made after December 31, 2019, the requesting employee must represent—in writing, by an electronic medium, or in such other form as may be prescribed by guidance from the Internal Revenue Service (IRS)—that the employee has insufficient cash or other liquid assets to satisfy the financial need. The plan administrator may rely on the employee's representation unless the plan administrator has actual knowledge to the contrary.[20] The final regulations relax the employee representation requirement of the 2018 proposed regulations to provide that the employee must only represent he or she has cash or other liquid assets "reasonably available" to satisfy the need. An employee could make such a representation even if the employee had cash or other liquid assets on hand, provided those assets are earmarked for another financial obligation in the near future. The final regulations also clarify, by reference to the definition of "electronic medium" in Treasury Regulation Section 1.401(a)-21(e)(3), that such representation can be made via email or website, and a verbal representation via telephone can be used if it is recorded.[21]

The final regulations also permit a plan to:

> provide for additional conditions, such as those described in 26 CFR 1.401(k)–1(d)(3)(iv)(B) and (C) (revised as of April 1, 2019), to demonstrate that a distribution is necessary to satisfy an immediate and heavy financial need of an employee.[22]

Prior to the 2019 final regulations, Treasury Regulation Section 1.401(k)–1(d)(3)(iv)(B) provided the following conditions, which under the final regulations a plan may optionally impose in addition to those required under the final regulations:[23]

> *No alternative means available.* A distribution is not treated as necessary to satisfy an immediate and heavy financial need of an employee to the extent the need may be relieved from other resources that are reasonably available to the employee. This determination generally is to be made on the basis of all the relevant facts and circumstances. For purposes of this paragraph (d)(3)(iv), the employee's resources are deemed to include those assets of the employee's spouse and minor children that are reasonably available to the employee. Thus, for example, a vacation home owned by the employee and the employee's spouse, whether as community property, joint tenants, tenants by the entirety, or tenants in common, generally will be deemed a resource of the employee. However, property held for the employee's child under an irrevocable trust or under the Uniform Gifts to Minors Act (or comparable State law) is not treated as a resource of the employee.

Prior to the final regulations, Treasury Regulation Section 1.401(k)–1(d)(3)(iv)(C) provided the following conditions relative to an employee's representation, which a plan may optionally impose in addition to conditions required under the final regulations:

> *Employer reliance on employee representation.* For purposes of paragraph (d)(3)(iv)(B) of this section, an immediate and heavy financial need generally may be treated as not capable of being relieved from other resources that are reasonably available to the employee, if the employer relies upon the employee's representation (made in writing or such other form as may be prescribed by the Commissioner), unless the employer has actual knowledge to the contrary, that the need cannot reasonably be relieved—

(1) Through reimbursement or compensation by insurance or otherwise;

(2) By liquidation of the employee's assets;

(3) By cessation of elective contributions or employee contributions under the plan;

(4) By other currently available distributions (including distribution of ESOP dividends under Code Section 404(k)) and nontaxable (at the time of the loan) loans, under plans maintained by the employer or by any other employer; or

(5) By borrowing from commercial sources on reasonable commercial terms in an amount sufficient to satisfy the need.

Therefore, under the final regulations a plan may (but is not required to) provide that, before a hardship withdrawal can be made, an employee must obtain all nontaxable loans available under the plan and all other plans maintained by the employer (nontaxability determined at the time a loan is made), but a plan may not provide for suspending deferrals or employee contributions as a condition to obtain a hardship withdrawal made after December 31, 2019.[24] Earlier elimination of the suspension of contributions as a condition for obtaining a hardship distribution may be applied as of the first day of the first plan year beginning after December 31, 2018, even if the hardship withdrawal was made in the prior plan year. In such case, the plan may be amended to provide that an employee who received a hardship withdrawal before January 1, 2019 will be prohibited from making contributions only until January 1, 2019, or the plan may be amended to provide that contributions of such employee will be suspended for the originally scheduled six months.[25]

EXPANDED HARDSHIP WITHDRAWAL SOURCES UNDER THE FINAL REGULATIONS

BBA 2018 added Code Section 401(k)(14)(A), which expands the types of contributions that may be withdrawn due to hardship of the employee by adding sources (b), (c), and (d) in the following list of source amounts available for hardship withdrawal:[26]

(a) Elective deferrals (including Roth contributions) to a profit-sharing or stock bonus plan;

(b) Qualified nonelective contributions (QNECs) as defined in Code Section 401(m)(4)(C);

(c) Qualified matching contributions (QMACs) as described in Code Section 401(k)(3)(D)(ii)(I); and

(d) Earnings on any contributions described in (a), (b), or (c) above.

Thus, the sources for a hardship withdrawal from a 401(k) plan are expanded to include QNECS and QMACs and earnings on those amounts, as well as earnings on elective deferrals.

The sources for a hardship withdrawal from a 403(b) plan are different because BBA 2018 did not amend Code Section 403(b). Although Code Section 403(b)(11) allows access to elective deferrals (including Roth contributions) for hardship withdrawals, it expressly excludes income on such deferrals from hardship withdrawals. Because BBA 2018 did not amend this statutory language, income attributable to 403(b) elective deferrals continues to be ineligible for hardship withdrawal.[27] Further, to the extent a 403(b) plan is invested in custodial accounts, rather than annuity contracts, Code Section 403(b)(7)(A)(ii) only allows access to elective deferrals for hardship withdrawals, although there are no in-service restrictions on employee non-Roth after-tax contributions and earnings thereon.[28] BBA 2018 did not amend this statutory language either, so QNECs and QMACs in a 403(b) plan custodial account continue to be ineligible for hardship withdrawal even if later transferred to an annuity contract.[29] Because hardship is not among the permitted reasons for a distribution from a 403(b) custodial account with respect to amounts other than elective deferrals, many (if not most) 403(b) plans limit hardship withdrawals to elective deferrals (exclusive of earnings).

IN CONCLUSION

The 2019 final regulations make significant changes to the hardship distribution rules for 401(k) and 403(b) plans that may create fewer administrative hardships for employers by simplifying the rules. There is often a tension between an employer's desire to have hardship determinations made by someone else and a third-party administrator's willingness to make hardship determinations. The final regulations presumably reduce such tension by replacing the necessity safe harbor and the facts and circumstances review, which is otherwise required to determine whether a hardship withdrawal is necessary to satisfy the financial need, with a representation from the employee of having insufficient cash or other liquid assets to satisfy the employee's financial need.[30]

Not having to suspend elective deferrals (including Roth contributions) and non-Roth after-tax contributions, not only to the plan from which the hardship withdrawal is taken but also to any other deferred compensation plan of the employer, should also create fewer hardships for employers. It is the author's experience that some plan sponsors and third-party administrators failed to suspend deferrals and employee contributions to other plans of the employer, particularly nonqualified plans of the employer, when applying the necessity safe harbor. This was often caused by the third-party administrators and/or the plan sponsor's human resources personnel being unaware of the nonqualified plans. Eliminating the necessity safe harbor requirement to suspend deferrals and contributions will eliminate this issue.

Plan sponsors will need to make decisions whether to require plan loans be taken prior to an employee receiving a hardship withdrawal and whether to include additional optional conditions for an employee's representation or optionally apply a facts and circumstances test to the determination of whether a hardship withdrawal is necessary to satisfy an employee's financial need. In the interest of simplicity and outsourcing administration, most plan sponsors will probably not opt to include the optional additional conditions permitted under the final regulations. Some plan sponsors may wish to continue to require plan loans be taken prior to receiving a hardship withdrawal in the interest of reducing retirement plan leakage and assisting employees in avoiding the tax consequences of a hardship withdrawal.

Sponsors of 401(k) plans may want to consider the extent to which the sources of plan contributions available for hardship withdrawals should be expanded, if at all. Sponsors of 403(b) plans may also want to consider the extent to which the sources of plan contributions available for hardship withdrawals. However, hardship withdrawals cannot be taken from any source in a 403(b) custodial account other than employee non-Roth after-tax contributions and elective deferrals (including Roth contributions), even if those other sources are later transferred to an annuity contract, and no earnings on elective deferrals (including Roth after-tax contributions) are available for hardship withdrawal.[31] Thus the opportunity for expanding hardship withdrawal source amounts in a 403(b) plan are limited to QNECs, QMACs, and earnings on those amounts in an annuity contract, but only to the extent those QNECs, QMACs, and earnings were never transferred from a 403(b) custodial account into the annuity contract. Sponsors of 403(b) plans will want to weigh a desire to extend the contribution sources from which hardship withdrawals can be taken from annuity contracts against the burden of tracking transfers of amounts other than elective deferrals from custodial accounts to annuity contracts.

Sponsors of either a 401(k) or 403(b) plan also may want to consider whether to limit the available reasons for taking a hardship withdrawal to one or more of the seven safe harbor hardship withdrawal reasons provided by the final regulations or, instead, apply a facts and circumstances determination to an employee's reason for a hardship withdrawal. Limiting hardship reasons to the safe harbors generally makes it easier and more practical to delegate hardship withdrawal administration.

Sponsors of plans using an actual deferral percentage (ADP) and/or actual contribution percentage (ACP) safe harbor design will need to provide participants with an participants with an updated ADP/ACP safe harbor notice reflecting the final regulations and provide a reasonable opportunity for participants to change their contribution elections.[32] Plan sponsors will also need to amend hardship distribution provisions to reflect the final regulations and any such amendment must be effective for distributions beginning no later than January 1, 2020 (subject to optional earlier applicability dates for some provisions). For example, if the final regulations are included in the 2019 Required Amendments List published by the IRS, the deadline to amend individually designed plans will be December 31, 2021.[33] Plan sponsors should work with their third-party administrators, consultants, legal counsel, and other advisors to consider how best to implement the hardship withdrawal rule changes to meet the needs of the plan and plan sponsor, as well as how and when to amend their plans to reflect the changes.

NOTES

1. The BBA 2018 changes to the hardship withdrawal rules did not affect 457(b) plans or plans subject to Code § 409A, because 457(b) and 409A plans are subject to the unforeseeable emergency distribution rules of Code §§ 457(b) or 409A, whichever is applicable, and are not subject to the hardship distribution rules of Code § 401(k). See, e.g., D. Schwallie, "Is It an Unforeseeable Emergency or a Hardship Distribution?," 43 *Journal of Pension Planning & Compliance* 47 (Summer 2017).
2. In this sense, the article is an update to "Hardship Withdrawals Create Hardships for Plan Sponsors," 22 *Journal of Deferred Compensation* 17 (Spring 2017). The final regulations also update the hardship withdrawal rules to reflect the addition of Code § 165(h)(5) by the Tax Cuts and Jobs Act of 2017, which generally limits the deductibility of personal casualty losses for taxable years 2018 through 2015 to losses attributable to a federally declared disaster, and the requirement of Section 826 of the Pension Protection Act of 2006 to modify the regulations to permit a participant's beneficiary under the plan the same as the participant's spouse or dependent for purposes of determining whether the participant has incurred a hardship.
3. *See* 84 Fed. Reg. 49655 (Sept. 23, 2019) and Treas. Reg. § 1.401(k)-1(d)(3)(v).
4. *See* Treas. Reg. § 1.401(k)-1(d)(3)(iii)(B) as in effect immediately prior to BBA 2018 and Treas. Reg. § 1.403(b)-6(d)(2).
5. *See* Treas. Reg. § 1.401(k)-1(d)(3)(iv)(E) as in effect immediately prior to BBA 2018 and Treas. Reg. § 1.403(b)-6(d)(2).
6. *See* Treas. Reg. § 1.401(k)-1(d)(3)(iii)(A) and Treas. Reg. § 1.401(k)-1(d)(3)(iv)(B) as in effect immediately prior to BBA 2018.
7. *See* 84 Fed. Reg. 49652 (Sept. 23, 2019) and Treas. Reg. §§ 1.401(k)-1(d)(3)(i) and 1.403(b)-6(d)(2).
8. *See* Treas. Reg. §§ 1.401(k)-1(d)(3)(ii)(A) and 1.403(b)-6(d)(2).
9. *See* Treas. Reg. § 1.401(k)-1(d)(3)(ii)(B). Treas. Reg. § 1.401(k)-1(d)(3)(ii)(C) defines primary beneficiary under the plan as "an individual who is named as a beneficiary under the plan and has an unconditional right, upon the death of the employee, to all or a portion of the employee's account balance under the plan." IRS Notice 2007-7 modified the hardship distribution rules for 401(k) and 403(b) plans (in accordance with Section 826 of the Pension Protection Act of 2006) to permit (but not require) such plans to treat a participant's beneficiary under the plan the same as the participant's spouse or dependent in determining whether the participant has incurred a hardship. It is not clear, but the wording of the final regulations appears to now require (rather than merely permit) 401(k) and 403(b) plans treat a participant's beneficiary under the plan the same as the participant's spouse or dependent in determining whether the participant has incurred a hardship, although the preamble to the proposed regulations makes historical reference to Notice 2007-07 as providing "guidance for applying this provision." *See* 83 Fed. Reg. 54765 (Nov. 14, 2018).
10. Because TCJA 2017 added Code § 165(h)(5), which limited deductible personal casualty losses to the amount attributable to a Federally declared disaster (for taxable years beginning after December 31, 2017 and before January 1, 2026), Code § 165(h)(5) was carved out of the sixth listed safe harbor reason.

11. *See* 84 Fed. Reg. 49653 (Sept. 23, 2019).
12. *See* Treas. Reg. § 1.401(k)-1(d)(3)(v).
13. The IRS has indicated that, if plan language allows hardship distributions only under specific circumstances, then the plan cannot be more liberal in its operation. For example, although the law permits hardships for funeral expenses, a plan cannot distribute funds for funeral expenses unless the plan has payment of funeral expenses as a stated hardship. *See* Hardship Distribution Tips from EP Exam: *https://www.irs.gov/retirement-plans/hardship-distribution-tips-from-ep-exam.* Most plans limiting hardship withdrawals to safe harbor reasons include all of the safe harbor reasons, but some limit hardship withdrawals to a subset of the safe harbor reasons.
14. *See* 84 Fed. Reg. 49656 (Sept. 23, 2019).
15. *See* Treas. Reg. § 1.401(k)-1(d)(3)(iii)(A) and Treas. Reg. § 1.403(b)-6(d)(2).
16. *See* Treas. Reg. § 1.401(k)-1(d)(3)(iii)(B) and Treas. Reg. § 1.403(b)-6(d)(2). The author's experience is that many plan sponsors and third-party administrators gloss over the inclusion of all other deferred compensation plans of the employer, whether qualified or not. For example, when the six-month suspension applied, many only suspended employee deferrals and contributions to the plan from which the hardship distribution was taken and did not require (non-hardship) distributions to be taken from other plans. It remains to be seen whether plan sponsors and third-party administrators will operationally require (non-hardship) distributions to be taken from other plans, as mandated by the final regulations.
17. Prior to the 2019 regulations, Treas. Reg. § 1.401(k)-1(d)(3)(iv)(E) described a necessity safe harbor by which a withdrawal would be *deemed* necessary to satisfy an immediate and heavy financial need of an employee, provided both of the following requirements are satisfied: (1) The employee has obtained all other currently available distributions (including distribution of employee stock ownership plan (ESOP) dividends under Code Section 404(k), but not hardship distributions) and nontaxable (at the time of the loan) loans, under the plan and all other plans maintained by the employer; and (2) the employee is prohibited, under the terms of the plan or an otherwise legally enforceable agreement, from making elective contributions and employee contributions to the plan and all other plans maintained by the employer for at least six months after receipt of the hardship distribution.
18. BBA 2018 § 41113 directed the deletion of the 6-month suspension and BBA 2018 § 41114 added Code § 401(k)(14)(B).
19. *See* 84 Fed. Reg. 49654 (Sept. 23, 2019) and Treas. Reg. § 1.401(k)-1(d)(3)(iii)(C).
20. *See* Treas. Reg. § 1.401(k)-1(d)(3)(iii)(B) and Treas. Reg. § 1.403(b)-6(d)(2). If the new hardship rules are applied to distributions made before January 1, 2020 in plan years beginning after December 31, 2018, then the rules relating to an employee representation in Treas. Reg. §§ 1.401(k)-1(d)(3)(iii)(B)(2) and (3) may be disregarded with respect to such distributions. *See* Treas. Reg. § 1.401(k)-1(d)(3)(v)(C).
21. *See* 84 Fed. Reg. 49654 (Sept. 23, 2019) and Treas. Reg. § 1.401(k)-1(d)(3)(iii)(B)(2).
22. *See* Treas. Reg. § 1.401(k)-1(d)(3)(iii)(C) and Treas. Reg. § 1.403(b)-6(d)(2). The final regulations also eliminate the provision that an employee need not take counterproductive actions, which had been set forth in Treas. Reg. § 1.401(k)-1(d)(3)(iv)(D). Except as otherwise

noted, the hardship rules in 26 CFR 1.401(k)–1(d)(3) (revised as of April 1, 2019) apply to hardship withdrawals made before January 1, 2020. *See* Treas. Reg. § 1.401(k)-1(d)(3)(v)(A).

23. Presumably, the plan document would need to reflect such optional provisions. Although consideration of facts and circumstances is not required by the hardship withdrawal necessity test of the final regulations, it appears that a plan could provide for a facts and circumstances determination as part of the additional conditions permitted by the final regulations. It remains to be seen whether plan sponsors would want to include facts and circumstances when the final regulations clearly permit reliance on an employee's representation of insufficient cash or other liquid assets to satisfy the financial need.
24. *See* Treas. Reg. § 1.401(k)-1(d)(3)(iii)(C) and Treas. Reg. § 1.403(b)-6(d)(2). Presumably, any of these optional conditions would need to be reflected in the plan document. Although it is rare for a defined benefit plan to offer loans to participants, it is interesting to note that the final regulations do not carry over the express exclusion of the mandatory contribution portion of a defined benefit plan from the definition of deferred compensation plans (provided in Treas. Reg. § 1.401(k)-1(d)(3)(iv)(F) as in effect prior to the 2019 final regulations) from which an employee might be required to take loans before being eligible for a hardship withdrawal from a 401(k) or 403(b) plan.
25. *See* Treas. Reg. § 1.401(k)-1(d)(3)(v)(B). If the new hardship rules are applied to distributions made before January 1, 2020, in plan years beginning after December 31, 2018, then the rules prohibiting the suspension of contributions as a condition of obtaining a hardship withdrawal in Treas. Reg. §§ 1.401(k)–1(d)(3)(iii)(C) may be disregarded with respect to such distributions See Treas. Reg. § 1.401(k)–1(d)(3)(v)(C).
26. Note that the definitions of qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs) were amended to provide that QMACs and QNECs must satisfy the applicable nonforfeitability requirements and distribution limitations at the time they are allocated to a participant's account but need not meet these requirements or limitations when they are contributed to the plan. These amendments apply to plan years beginning after June 30, 2018 but can be applied to earlier periods. *See* 83 Fed. Reg. 34471 (July 20, 2018).
27. *See* 83 Fed. Reg. 56766 (Nov. 14, 2018) and 84 Fed. Reg. 49655 (Sept. 23, 2019).
28. The preamble to the 2007 final 403(b) regulations states that "after-tax employee contributions are not subject to any in-service distribution restrictions." *See* 72 Fed. Reg. 41133 (July 26, 2007). *See also* Treas. Reg. § 1.403(b)-6(b).
29. *See* Treas. Reg. § 1.403(b)-6(c). Hardship is not among the permitted reasons for a distribution from a 403(b) custodial account with respect to amounts other than elective deferrals, exclusive of earnings thereon.
30. Of course, there are still the questions of whether a plan administrator has actual knowledge that contradicts the employee's representation and how actual knowledge is determined. The preamble to the final regulations states that, "The requirement [that a plan administrator not have 'actual knowledge'] does not impose upon plan administrators an obligation to inquire into the financial condition of employees who seek hardship distributions. Rather, the rule is limited to situations in which the plan administrator already possessed sufficiently accurate

information to determine the veracity of an employee representation." *See* 84 Fed. Reg. 49654 (Sept. 23, 2019).

31. *See* Code §§ 403(b)(7)(A)(ii) and 403(b)(11) and Treas. Reg. §§ 1.403(b)-6(b), (c) & (d).
32. *See* 84 Fed. Reg. 49655 (Sept. 23, 2019) and Treas. Reg. § 1.401(k)-3(c)(6)(v) and 1.401(m)-3(d)(6)(v).
33. *See* 84 Fed. Reg. 49655-49656 (Sept. 23, 2019).