IRS GUIDANCE REGARDING CHANGES TO HARDSHIP WITHDRAWAL RULES

The IRS recently issued guidance regarding the changes made to 401(k) and 403(b) plan hardship withdrawal requirements under the Tax Cuts and Jobs Act of 2017 and the Bipartisan Budget Act of 2018. This guidance is in the form of proposed regulations which are subject to change.

GUIDANCE SUMMARY

- **Elimination of Six-Month Suspension**. All 401(k) and 403(b) plans must eliminate the six-month suspension beginning with hardship distributions made during plan years beginning on and after January 1, 2020. Plan sponsors can choose to eliminate the six-month suspension as early as plan years beginning on or after January 1, 2019. In addition, the proposed regulations clarify that plan sponsors may eliminate suspensions that are already in place as of December 31, 2018.

- **Elimination of Requirement to First Take a Loan from the Plan**. The proposed regulations allow plans to eliminate this loan requirement for plans years beginning on or after January 1, 2019, However, the proposed regulations still require that the participant take all available distributions under the employer's deferred compensation plans (whether qualified or nonqualified).

- **Reliance on Participant Representations Concerning Financial Need.** For any distribution made on or after January 1, 2020, the participant must provide a written representation that he or she has insufficient cash to satisfy the financial need and the plan administrator may rely on such representation in the absence of actual knowledge that this is untrue.

- **Expansion of Available Hardship Sources**. Plans will be allowed to make the following previously restricted sources available for hardship withdrawal for plan years beginning on or after January 1, 2019:

    - earnings on elective deferrals; and

    - qualified nonelective contributions (QNECs), and qualified matching contributions (QMACs) and earnings on these contributions (including safe harbor 401(k) plan contributions, whether matching or nonelective).

  Important Note for 403(b) Plan Sponsors: Although 403(b) plans generally follow the hardship rules applicable to 401(k) plans, the proposed regulations <u>do not</u> modify the 403(b) rules to permit withdrawal of earnings on 403(b) elective deferrals or QNECs/QMACs that are in custodial accounts.

- **Expansion of Safe Harbor Circumstances**. The proposed regulations expand the hardship withdrawal circumstances to include:

    - medical, educational, or funeral expenses of primary beneficiaries;

    - Expenses related to losses arising from fire, storm, shipwreck or other casualty (Note: The Tax Cuts and Jobs Act previously limited casualty loss hardships to losses incurred in federally declared disaster areas beginning January 1, 2018); and

    - expenses related to losses (including loss of income) incurred on account of a federally declared disaster if the participant's principal residence or principal place of employment is located in the area designated by the Federal Emergency Medical Agency for individual assistance at the time of the disaster.

- **Hurricanes Florence and Michael Relief.** The same loan and hardship relief has been extended to participants adversely affected by Hurricane Florence and Hurricane Michael that was extended to participants adversely affected by Hurricane Maria or the California wildfires in IRS Announcement 2017-15.

PLAN AMENDMENTS

The exact date that plan amendments will be required to implement the changes described above is not yet known. The preamble to the proposed regulations indicates that the normal rules for determining the deadline to adopt an amendment to fix a disqualifying provision (which the IRS indicated these changes fall within) apply. Therefore, individually designed plans should have until the end of the second calendar year that begins after the IRS issues its annual “Required Amendment List” that includes the changes in the hardship rules.

Sponsors of pre-approved plan programs (i.e. plan sponsors who have adopted a pre-approved document sponsored by BOKF, NA) will need to adopt interim amendments to address these changes, which we anticipate will be required in 2019 after the final regulations are issued.

Unless there are subsequent modifications made to the hardship regulations as proposed, we expect the “Best Practices” to be:

- Eliminate the requirement for a six-month suspension with plan years beginning in 2019 (remember this is mandatory for plan years beginning in 2020);
- Eliminate the requirement that a participant first obtain a plan loan before requesting a hardship withdrawal;
- Allow a 401(k) participant to access earnings on their elective deferral contributions (remember this is not an allowable option for 403(b) plan participants); and
- Do not allow participants to request a hardship withdrawal of QNEC/QMAC (including 401(k) safe harbor) contributions and earnings.

NEXT STEPS

The Internal Revenue Manual provides that taxpayers generally may not rely on proposed regulations for planning purposes, except if there are no applicable final or temporary regulations in force and there is an express statement in the preamble to the proposed regulations that taxpayers may rely on them currently. In this instance, there are existing final hardship withdrawal regulations and the recently issued proposed regulations do not clearly provide that plan sponsors may rely on the proposed provisions until such time as they are finalized. The IRS is seeking comments on these proposed regulations through January 14, 2019.

Until the proposed regulations are finalized or the IRS issues additional guidance providing plan sponsors may rely on the proposed regulations, please note the following:

- BOKF, NA is currently evaluating and planning for changes to its recordkeeping systems. Due to the lateness of the issuance of the proposed regulations and the still pending nature of the regulations, we will only implement at this time the following proposed hardship withdrawal changes:

    - Removal of the six-month suspension requirement for <u>new</u> hardship requests **(but only if requested as this removal is not required until plan years beginning in 2020).**

    - Lifting of the six-month suspension for <u>existing</u> hardship requests **(but only if requested).**

    - Expansion of the acceptable hardship circumstances for 2019 to include:

        - Expenses related to losses arising from fire, storm, shipwreck or other casualty;

        - Expenses related to losses (including loss of income) incurred on account of a federally declared disaster if the participant's principal residence or principal place of employment is located in the area designated by the Federal Emergency Medical Agency for individual assistance at the time of the disaster; and

        - Expenses related to losses incurred on account of Hurricanes Florence and Michael.

- An amendment to a BOKF, NA - sponsored document is not required at this time. As soon as the proposed regulations are finalized or additional guidance allowing reliance on the proposed regulations is issued by the IRS, an appropriate amendment will be drafted and provided to you. If your plan utilizes an individually designed plan document, you should discuss these provisions with your document provider or qualified ERISA legal counsel.

- We strongly encourage you to discuss these proposed changes and the impact on your specific plan with your qualified ERISA legal counsel.

If you have any questions, please contact your Relationship Management team.