**CERTIFICATION FORM AND OPERATIONAL CHECKLIST**

**FOR 2019 HARDSHIP DISTRIBUTIONS AND RELIANCE ON PROPOSED REGULATIONS- UPDATE**

The IRS has just updated their [Operational Compliance List](https://www.irs.gov/retirement-plans/operational-compliance-list). This is a list of recent law changes which apply to qualified plans, on which plan sponsors either must act or can act.

Many in the retirement plan community have pointed out that the List states that taxpayers may rely on the proposed 401(k) hardship regulations until final regulations are issued. This is good news. The proposed regulations are generally favorable to plan participants, sponsors, and practitioners. We welcome the formal assurance that people can act on the proposed regulations with confidence.

None of this changes our [previously announced](http://www.relius.net/News/TechnicalUpdateDetails.aspx?T=P&1=1&ID=1121) strategy on releasing an interim hardship amendment. We plan to issue one some time after the Treasury publishes final regulations, but in any event before the end of 2019. The fact that we can rely on the proposed regulations does not detract from the reality that the regulations are still subject to change. Professional organizations, such as the [American Retirement Association](https://www.asppa.org/sites/asppa.org/files/PDFs/GAC/Comment%20Letter/19.1.14Final_ARA_Comment_letter_on_Hardship_Proposed_Regulations.pdf), have suggested several areas where the proposed regulations can be clarified and improved. It makes sense to give the Treasury time to absorb and respond to those comments and include the various changes in the ultimate interim amendments.

Easily lost amid the interest in the reliance statement is that Operational Compliance List reiterated that all amendments related to the proposed regulations will be treated as integral to a disqualifying provision. That means the deadline for employers to adopt those amendments will be no sooner than the due date of the employer’s 2020 tax return. The normal, earlier, discretionary amendment deadlines will not apply. Thus, the IRS is not requiring quick decisions from practitioners or their clients and is giving us the time we need to wait for the final regulations.

To assist practitioners in the meantime, we have provided a "Certification of Necessity for Hardship Distribution" form that can be used to comply with the requirement that a participant certify that the participant has insufficient other liquid assets to meet the stated hardship need. The proposed regulations require this certificate for distributions after December 31, 2019 (regardless of the plan year). Use before 2020 is optional. This form is for both 401(k) and 403(b) plans.

We are also providing an updated "Operational Checklist for 2019 Hardship Distributions" which can record an employer’s decisions as to how the plan is to be administered under the new hardship rules. We have added new options based on client feedback. There are two versions – one for 401(k) plans and one for 403(b) plans.

***Name of Plan***

**CERTIFICATION OF NECESSITY FOR HARDSHIP DISTRIBUTION**

I hereby certify that I am applying for a hardship distribution and that all supporting information provided with the application is true.

I understand that I must provide supporting documentation including bills, contracts, estimates, and other information that will support my request for a hardship distribution. I also understand that I am certifying that I have insufficient liquid assets and no other resources available to me to meet this financial hardship. In order to do so, I hereby certify that: <R03>

a. The distribution will not exceed the immediate financial need ($\_\_\_\_\_\_\_ (enter amount));

b. I have insufficient cash or other liquid assets to satisfy the immediate financial need.

**Acknowledgement/Authorization**

Date of execution:

 Signature of Participant

***Name of Plan***

**OPERATIONAL CHECKLIST**

**FOR 2019 HARDSHIP DISTRIBUTIONS – 401(k) PLANS**

NOTE: Most, if not all, of the following provisions will be the subject of an FIS Relius amendment that we will publish after the IRS releases final hardship regulations (see Notes at end of this checklist). The eventual amendment might contain a single effective date, or it might consolidate effective dates for "grouped" items (such as expanded sources of hardship distributions). For purposes of this checklist, we have nonetheless "enabled" separate effective dates for most provisions, so that each item can be evaluated separately in that regard (some employers may wish to use very tailored provisions in the hardship amendment as opposed to being covered by a sponsor-level amendment).

1. Overall effective date of amendment: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (except for any separate effective dates shown below) (must be effective during the 2019 plan year except as provided otherwise below)

2. The requirement that Plan loans must first be obtained: (There is no requirement to remove this provision) (select one)

 [ ]  Removed effective \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 [ ]  Or as soon as administratively feasible after the date shown above

 [ ]  Will be continued indefinitely (i.e., until a subsequent discretionary amendment is adopted to remove the provision) (generally used only by plans that historically have used the "safe harbor" hardship method)

3. The requirement that deferrals (and other employee contributions) cease to be subject to a 6‑month suspension shall be effective for new hardship distributions made after the first day of the 2019 plan year unless otherwise specified below: (must be selected for plans that currently require suspension of deferrals or employee contributions)

 [ ]  Special effective date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (not later than January 1, 2020)

[ ]  The first day of the 2019 plan year

[ ]  Or as soon as administratively feasible after the date shown above (but in no event later than January 1, 2020).

4. Treatment of suspended deferrals on the first day of the 2019 plan year: (select one)

A. [ ]  Suspensions ended [ ]  Special effective date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (e.g., January 1st, or any other date earlier than the close of the 6-month period for suspensions already underway)

B. [ ]  Continued through the end of each existing participant's original 6‑month suspension period

C. [ ]  Not applicable. (For example, this Item would not apply if January 1, 2020 is the effective date.)

5. Treatment of suspended deferrals on January 1, 2020 for distributions made prior to January 1, 2020: (select one)

A. [ ]  Suspensions ended (i.e, suspensions end) [ ]  Special effective date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (e.g., the close of the 6-month period for suspensions already underway)

B. [ ]  Continued through the end of each existing participant's original 6‑month suspension period

C. [ ]  Not applicable. (For example, this Item would not apply if January 1, 2020 is the effective date.)

6. Expansion of hardship sources:

 A. Earnings on Deferrals (select one)

 i. [ ]  First available effective: \_\_\_\_\_\_\_\_\_\_

[ ]  Or as soon as administratively feasible after the date shown above (but in no event later than January 1, 2020).

 ii. [ ]  Will not be made available (i.e., until a subsequent discretionary amendment is adopted to add the provision)

 B. [ ]  QNECs (select one)

 i. [ ]  First available effective\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

a [ ]  Or as soon as administratively feasible after the date shown above.

b [ ]  But only to the extent that hardships are already made available from all available potential sources (i.e., in addition to deferrals, profit sharing contribution when applicable, ordinary matching contributions when applicable, etc.). For example, a plan with profit sharing source funds that has limited hardships to deferrals only will continue to be limited to deferrals only (with or without earnings, as elected at 5.A.).

 ii. [ ]  Will not be made available (i.e., until a subsequent discretionary amendment is adopted to add the provision)

 C. [ ]  QMACs effective \_\_\_\_\_\_\_ (select one)

 i. [ ]  Same as for QNECs

 ii. [ ]  First available effective\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

a. [ ]  Or as soon as administratively feasible after the date shown above.

b. [ ]  But only to the extent that hardships are already made available from all available potential sources (i.e., in addition to deferrals, profit sharing contribution when applicable, ordinary matching contributions when applicable, etc. For example, a plan with profit sharing source funds that has limited hardships to deferrals only will continue to be limited to deferrals only.

 iii. [ ]  Will not be made available (i.e., until a subsequent discretionary amendment is adopted to add the provision).

Note for Item #5.: QNECs include ADP safe harbor nonelective contributions, and QMACs include ADP safe harbor matching contributions.

7. Expansion of hardship category related to casualty loss – Effective \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

A. [ ]  Keep the historical rule that a casualty loss is determined under IRC Section 165 without regard to the change made by the Bipartisan Budget Act of 2017 (which limited such casualty losses to just those losses occurring in a federally declared disaster area) (recommended).

B. [ ]  Retain the new statutory definition that limits such losses to only casualty losses that occur in disaster relief areas.

Notes:

1. The eventual amendment will limit the amount available for distribution to the amount of financial need, and starting January 1, 2020, will require a participant certification regarding the participant's inability to meet that need with readily available personal assets. Even so, the plan administrator will still need to secure adequate documentation to substantiate that a hardship event has occurred. The plan administration may use the participant certification prior to January 1, 2020.

2. The eventual amendment will reflect that there are no longer two separate methods for determining hardship necessity, i.e., the "safe harbor" and "facts and circumstances" methods will be combined into a single method in accordance with the eventual final regulation. However, the amendment will continue to acknowledge that a plan may limit hardship distribution to the regulatory safe harbor needs or may allow the adoption of hardship standards outside of those needs.

3. The eventual amendment will not address revisions to the hardship regulation that allow the participant's primary beneficiary to be entitled to certain hardship distributions because those provisions are already in our PPA documents (and were the subject of the interim amendment for PPA in 2009). The proposed hardship regulation mentions this change only because the regulation was never updated for the change made by PPA, and Congress directed the Treasury to include the PPA provision when updating the hardship regulation for the more recent statutory changes reflected on the Operational Checklist.

4. The Cycle 3 documents currently under review at the IRS will NOT contain any of these changes (the proposed regulation came after the IRS cut-off date for preapproved DC plans). That means you will need to reflect these effective dates when you restate for Cycle 4 (i.e., in 2027 or later). The hardship amendment will become a tack-on amendment to the PPA and Cycle 3 documents.

5. Under the proposed regulation, the elimination of the six-month deferral suspension requirement must be effective no later than January 1, 2020, for all plans (including, notably, plans that do not use the calendar year as the plan year).

6. Under the final regulations (when published), it may be necessary for a plan with ADP/ACP safe harbor contributions to remove the suspension-of-deferral provisions in order to retain ADP/ACP safe harbor status for plan years beginning in 2019 (presumably without any grace period for administrative delays). However, such a requirement does not appear in the proposed regulation.

7. Any non-401(k) profit sharing plan that provides for employee after-tax contributions will be affected if the employer maintains a 401(k) plan that uses the "safe harbor" hardship provisions, since the current suspension provisions also apply to all employee after-tax contributions under all Employer plans (including any non-adopting affiliated employers).

8. Unless this issue is addressed by the final regulations, plans that have plan years that do not coincide with the calendar year may be unable to adopt a change to reflect the revised hardship regulations mid-year. That is because the change in the hardship rules cannot be made effective prior to the plan year beginning in 2019, and thus an eventual amendment for such a plan might need to use an effective date that is later than January 1, 2019. If that is the case, any sponsor-level amendment may need to use an effective date of January 1, 2020 if a uniform effective specific date (i.e., that is not based on the beginning of the 2019 plan year) is desired for all adopting employers.

9. The proposed regulations add a new safe harbor hardship distribution event for expenses and losses related to a federally declared disaster. The eventual FIS Relius amendment will most likely automatically include this change. This should not be confused with earlier IRS disaster relief announcements, or the disaster relief provided by the Disaster Tax Relief and Airport and Airway Extension Act of 2017 and the California Wildfires by the Bipartisan Budget Act of 2018 (the "Disaster Tax Relief Acts"). FIS Relius previously published a separate amendment dealing with the Disaster Tax Relief Acts. This is an incredibly complex area of guidance that cannot be covered here.

***Name of Plan***

**OPERATIONAL CHECKLIST**

**FOR 2019 HARDSHIP DISTRIBUTIONS – 403(b) PLANS**

NOTE: Most, if not all, of the following provisions will be the subject of an FIS Relius amendment that we will publish after the IRS releases final hardship regulations (see Notes at end of this checklist). The eventual amendment might contain a single effective date, or it might consolidate effective dates for "grouped" items (such as expanded sources of hardship distributions). For purposes of this checklist, we have nonetheless "enabled" separate effective dates for most provisions, so that each item can be evaluated separately in that regard (some employers may wish to use very tailored provisions in the hardship amendment as opposed to being covered by a sponsor-level amendment).

1. Overall effective date of amendment: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (except for any separate effective dates shown below) (must be effective during the 2019 plan year except as provided otherwise below)

2. The requirement that Plan loans must first be obtained: (There is no requirement to remove this provision) (select one)

 [ ]  Removed effective \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 [ ]  Or as soon as administratively feasible after the date shown above

 [ ]  Will be continued indefinitely (i.e., until a subsequent discretionary amendment is adopted to remove the provision) (generally used only by plans that historically have used the "safe harbor" hardship method)

3. The requirement that deferrals (and other employee contributions) cease to be subject to a 6‑month suspension shall be effective for new hardship distributions made after the first day of the 2019 plan year unless otherwise specified below: (must be selected for plans that currently require suspension of deferrals or employee contributions)

 [ ]  Special effective date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (not later than January 1, 2020)

[ ]  The first day of the 2019 plan year

[ ]  Or as soon as administratively feasible after the date shown above (but in no event later than January 1, 2020).

4. Treatment of suspended deferrals on the first day of the 2019 plan year: (select one)

A. [ ]  Suspensions ended [ ]  Special effective date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (e.g., January 1st, or any other date earlier than the close of the 6-month period for suspensions already underway)

B. [ ]  Continued through the end of each existing participant's original 6‑month suspension period

C. [ ]  Not applicable. (For example, this Item would not apply if January 1, 2020 is the effective date.)

5. Treatment of suspended deferrals on January 1, 2020 for distributions made prior to January 1, 2020: (select one)

A. [ ]  Suspensions ended (i.e, suspensions end) [ ]  Special effective date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (e.g., the close of the 6-month period for suspensions already underway)

B. [ ]  Continued through the end of each existing participant's original 6‑month suspension period

C. [ ]  Not applicable. (For example, this Item would not apply if January 1, 2020 is the effective date.)

6. Expansion of hardship sources:

 A. [ ]  QNECs (select one)

 i. [ ]  First available effective\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

a [ ]  Or as soon as administratively feasible after the date shown above.

 ii. [ ]  Will not be made available (i.e., until a subsequent discretionary amendment is adopted to add the provision)

 B. [ ]  QMACs effective \_\_\_\_\_\_\_ (select one)

 i. [ ]  Same as for QNECs

 ii. [ ]  First available effective\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

a. [ ]  Or as soon as administratively feasible after the date shown above.

 iii. [ ]  Will not be made available (i.e., until a subsequent discretionary amendment is adopted to add the provision).

Note for Item #5.: QNECs include ADP safe harbor nonelective contributions, and QMACs include ADP safe harbor matching contributions. QNECs and QMACs cannot be distributed on account of hardship from custodial accounts of mutual funds. However, they can be distributed from annuity contracts or retirement income accounts.

7. Expansion of hardship category related to casualty loss – Effective \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

A. [ ]  Keep the historical rule that a casualty loss is determined under IRC Section 165 without regard to the change made by the Bipartisan Budget Act of 2017 (which limited such casualty losses to just those losses occurring in a federally declared disaster area) (recommended).

B. [ ]  Retain the new statutory definition that limits such losses to only casualty losses that occur in disaster relief areas.

Notes:

1. The eventual amendment will limit the amount available for distribution to the amount of financial need, and starting January 1, 2020, will require a participant certification regarding the participant's inability to meet that need with readily available personal assets. Even so, the plan administrator will still need to secure adequate documentation to substantiate that a hardship event has occurred. The plan administration may use the participant certification prior to January 1, 2020.

2. The eventual amendment will reflect that there are no longer two separate methods for determining hardship necessity, i.e., the "safe harbor" and "facts and circumstances" methods will be combined into a single method in accordance with the eventual final regulation. However, the amendment will continue to acknowledge that a plan may limit hardship distribution to the regulatory safe harbor needs or may allow the adoption of hardship standards outside of those needs.

3. The eventual amendment will not address revisions to the hardship regulation that allow the participant's primary beneficiary to be entitled to certain hardship distributions because those provisions are already in our PPA documents (and were the subject of the interim amendment for PPA in 2009). The proposed hardship regulation mentions this change only because the regulation was never updated for the change made by PPA, and Congress directed the Treasury to include the PPA provision when updating the hardship regulation for the more recent statutory changes reflected on the Operational Checklist.

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5. Under the proposed regulation, the elimination of the six-month deferral suspension requirement must be effective no later than January 1, 2020, for all plans (including, notably, plans that do not use the calendar year as the plan year).

6. Under the final regulations (when published), it may be necessary for a plan with ADP/ACP safe harbor contributions to remove the suspension-of-deferral provisions in order to retain ADP/ACP safe harbor status for plan years beginning in 2019 (presumably without any grace period for administrative delays). However, such a requirement does not appear in the proposed regulation.

7. Any non-401(k) profit sharing plan that provides for employee after-tax contributions will be affected if the employer maintains a 401(k) plan that uses the "safe harbor" hardship provisions, since the current suspension provisions also apply to all employee after-tax contributions under all Employer plans (including any non-adopting affiliated employers).

8. Unless this issue is addressed by the final regulations, plans that have plan years that do not coincide with the calendar year may be unable to adopt a change to reflect the revised hardship regulations mid-year. That is because the change in the hardship rules cannot be made effective prior to the plan year beginning in 2019, and thus an eventual amendment for such a plan might need to use an effective date that is later than January 1, 2019. If that is the case, any sponsor-level amendment may need to use an effective date of January 1, 2020 if a uniform effective specific date (i.e., that is not based on the beginning of the 2019 plan year) is desired for all adopting employers.

9. The proposed regulations add a new safe harbor hardship distribution event for expenses and losses related to a federally declared disaster. The eventual FIS Relius amendment will most likely automatically include this change. This should not be confused with earlier IRS disaster relief announcements, or the disaster relief provided by the Disaster Tax Relief and Airport and Airway Extension Act of 2017 and the California Wildfires by the Bipartisan Budget Act of 2018 (the "Disaster Tax Relief Acts"). FIS Relius previously published a separate amendment dealing with the Disaster Tax Relief Acts. This is an incredibly complex area of guidance that cannot be covered here.

10. Unlike 401(k) plans, 403(b) plans cannot make a hardship distribution from earnings on elective deferrals. Code §403(b)(11). Additionally, while hardship distributions are permitted from employer contributions (including QNECs, QMACs, and safe harbor contributions) held in annuity contracts or retirement income accounts, hardship and other in-service distributions are prohibited from employer contributions held in custodial accounts containing mutual funds. Code §403(b)(7)(A)(ii).