Voya Alert!

January 25, 2018

Hardship Availability Due to Modification of Deduction for Personal Casualty Losses Under the Tax Cuts and Jobs Act

For 401(a)/(k) and 403(b) plans with Voya Retirement Insurance and Annuity Company ("VRIAC") and ReliaStar Life Insurance Company.

The recently enacted tax reform legislation, commonly referred to as the Tax Cut and Jobs Act, made a change to the types of personal casualty losses that qualify for a casualty deduction under Section 165 of the Internal Revenue Code. This change affects many 401(a), 401(k), and 403(b) plans that permit hardship distributions to be made available to their participants and beneficiaries. Voya Financial® is providing information concerning this change and its potential impact to these plans and to confirm that Voya® will continue to provide services consistent with direction from the plan sponsor and plan rules.

Background -The Internal Revenue Service's hardship distribution regulations provide that a hardship distribution may only be made on account of a participant's immediate and heavy financial need. This "immediate and heavy financial need" requirement may be satisfied through either a "facts and circumstances" analysis or through the application of a set of "safe harbor" categories. The safe harbor categories identify specific events that are deemed to be on account of an "immediate heavy and financial need", including expenses for the repair of damage to the participant's principal residence that would qualify for the casualty deduction under Internal Revenue Code Section 165 (determined without regard to whether the loss exceeds 10% of adjusted gross income). See Treas. Reg. §1.401(k)-1(d)(3)(iii)(B)(6). Many plans offering hardship withdrawals may either incorporate these safe harbors into their plan documents or utilize a facts and circumstances approach in order to assess a hardship distribution request. Some plans using the facts and circumstances approach base their objective criteria for determining a participant's immediate and heavy financial need on the safe harbor categories, including the personal casualty deduction described above. Prototype documents, including the Voya prototype document, require the use of the safe harbor hardship withdrawal categories.

The Tax Cut and Jobs Act amended Internal Revenue Code Section 165 to provide that, for tax years 2018 through 2025, a casualty deduction is available only with respect to losses attributable to a federally declared disaster. A federally declared disaster means any disaster subsequently determined by the President of the United States to warrant assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. This change in definition limits a plan using the safe harbor reasons for a hardship distribution by precluding casualty losses that are not part of a federally declared disaster. For example, if a participant/homeowner experiences a total loss of his/her home due to a fire that was not connected to a federally declared disaster, then the request would fall outside the newly defined casualty loss. The change in definition similarly impacts hardship distributions for plans that rely on the Internal Revenue Code Section 165 definition as part of their facts and circumstances analysis of the participant's immediate and heavy financial need.

Next Steps - Plan Sponsors maintaining plans that permit hardship withdrawals under the safe harbor standards should be aware of this important change under the recently enacted Tax Cut and Jobs Act. Accordingly, before approving a hardship withdrawal request for repair to damage of the participant's principal residence it is important to make sure that the "immediate and heavy financial need" has been caused by an event that meets the revised definition of "disaster" under Internal Revenue Code Section 165. To meet this new requirement the event must be the result of a federally declared disaster.

While use of the safe harbor withdrawal standards is required under prototype plans, volume submitter and individually designed plans may use the "facts and circumstances" approach which provides some flexibility as to what qualifies as a permissible hardship "event". However, if plan sponsors maintaining such plans either choose to apply the safe harbor standard, or the plan defines a casualty loss disaster with reference to Internal Revenue Code Section 165 under the facts and circumstances rule, the new disaster definition will apply.

Voya will keep you updated of any further developments, including the potential for any technical corrections legislation that would impact this provision of the Tax Cut and Jobs Act.

 1/18