



RETIREMENT SYSTEMS DIVISION

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EXECUTIVE DIRECTOR

MEMORANDUM

TO: Supplemental Retirement Board of Trustees

FROM: Reid Chisholm, Assistant General Counsel

DATE: December 5, 2018

SUBJECT: Plan document changes regarding hardship withdrawals

The Bipartisan Budget Act of 2018, enacted in February of this year, expands the availability of hardship withdrawals from 401(k) and 403(b) plans in the following manner:

1. Participants are no longer required to take loans from the plans prior to being eligible for hardship withdrawals. (Note: Unlike a loan, a hardship withdrawal is considered a distributable event, and as such, taxes will apply to the amount withdrawn. An early withdrawal penalty may also apply if the participant requesting a hardship is younger than 59.5 years of age.); and
2. Participants are no longer prohibited from contributing to the plans in the six months following a hardship withdrawal.

Under the Act, plan sponsors are permitted to implement these changes effective January 1, 2019.

Staff recommends that the Board incorporate these changes into the NC 401(k) Plan and the NC 403(b) Program. The proposed changes to the plan documents for the NC 401(k) Plan and the NC 403(b) Program are in Attachments 1 and 2, respectively.

Attachment 1 – Changes to the NC 401(k) Plan Document

ARTICLE 7. WITHDRAWALS WHILE STILL EMPLOYED

7.01 Withdrawal After Age 59½

A Member who shall have attained age 59½ as of the effective date of any withdrawal pursuant to this Section may, subject to Section 7.03, elect to withdraw, in the following order, all or part of his Employer Account, his Transfer Account, his Rollover Account and his Deferred Account: Effective as of June 1, 2006, a Member who has withdrawn all of his Employer Account, Transfer Account and Rollover Account may, subject to Section 7.03, make a separate election under this Section 7.01 to withdraw next either all or part of his Roth Account, or all or part of Deferred Account, or any combination thereof.

7.02 Hardship Withdrawal

(a) A Member may, subject to the provisions of Section 7.03, elect to withdraw in the following order all or part of (i) his Rollover Account, (ii) his Transfer Account, (iii) his Employer Account, (iv) effective as of April 1 2008, his Roth Contributions, and then

(v) his Tax-Deferred Contributions (including any earnings credited to his Deferred Account prior to January 1, 1989), provided that he furnishes proof of “Hardship” satisfactory to the Primary Administrator in accordance with the provisions of paragraphs (b) and (c) below. Notwithstanding the foregoing, amounts held in a Member’s Employer Account cannot be withdrawn on or after June 1, 2008 under the provisions of this Section 7.02.

(b) A Member shall be considered to have incurred a “hardship” if, and only if, he meets the requirements of paragraphs (c) and (d) below or of Section 7.06 or 7.07.

(c) As a condition for Hardship there must exist with respect to the Member an immediate and heavy need to draw upon his Accounts. The Primary Administrator shall presume the existence of such immediate and heavy need if the requested withdrawal is on account of any of the following:

(i) expenses for medical care described in Section 213(d) of the Code previously incurred by the Member, his spouse or any of his dependents (as defined in Section 152 of the Code) or necessary for these persons to obtain such medical care;

- (ii) costs directly related to the purchase of a principal residence of the Member (excluding mortgage payments);
- (iii) payment of tuition, related educational fees, and expenses for room and board for the next 12 months of post-secondary education of the Member, his spouse or dependents;
- (iv) payment of amounts necessary to prevent eviction of the Member from his principal residence or to avoid foreclosure on the mortgage of his principal residence; or
- (v) payments for burial or funeral expenses for the Member's deceased parent, spouse, children or dependents (as defined in Section 152 of the Code and without regard to Section 152(d)(1)(B) of the Code);
- (vi) expenses for the repair of damages to the Member's principal residence that would qualify for the casualty deduction under Section 165 of the Code (determined without regard to whether the loss exceeds 10 percent of the Member's adjusted gross income); or
- (vii) the inability of the Member to meet such other expenses, debts or other obligations recognized by the Internal Revenue Service as giving rise to immediate and heavy financial need for purposes of Section 401(k) of the Code.

The amount of the withdrawal may not be in excess of the amount of the immediate and heavy financial need of the employee including any amounts necessary to pay any federal, state, or local income taxes and any amounts necessary to pay any penalties reasonably anticipated to result from the distribution.

In evaluating the relevant facts and circumstances, the Primary Administrator shall act in a nondiscriminatory fashion and shall treat uniformly those Members who are similarly situated. The Member shall furnish to the Primary Administrator such supporting documents as the Primary Administrator may request in accordance with uniform and nondiscriminatory rules prescribed by the Primary Administrator.

- (d) As a condition for a Hardship withdrawal, the Member must demonstrate that the requested withdrawal is necessary to satisfy the financial need described in paragraph (c). To demonstrate such necessity, the Member who requests a hardship withdrawal to

satisfy a financial need described in (c) above must comply with either (i) or (ii) as follows:

(i) The Member must certify to the Primary Administrator, on such form as the Primary Administrator may prescribe, that the financial need cannot be fully relieved (A) through reimbursement or compensation by insurance or otherwise,

(B) by reasonable liquidation of the Member's assets, (C) by cessation of Deferred Cash Contributions, or (D) by other distributions ~~or nontaxable (at the time of the loan) loans~~ from the Plan or other plans of the Employer or by borrowing from commercial sources at a reasonable rate in an amount sufficient to satisfy the need. The actions listed are required to be taken to the extent necessary to relieve the hardship but any action which would have the effect of increasing the hardship need not be taken. For purposes of this clause (i) there shall be attributed to the Member those assets of the Member's spouse and minor children which are reasonably available to the Member. The Member shall furnish to the Primary Administrator such supporting documents as the Primary Administrator may request in accordance with uniform and nondiscriminatory rules prescribed by the Primary Administrator. If, on the basis of the Member's certification and the supporting documents, the Primary Administrator finds it can reasonably rely on the Member's certification, then the Primary Administrator shall find that the requested withdrawal is necessary to meet the Member's financial need.

(ii) The Member must request, on such form as the Primary Administrator may prescribe, that the Primary Administrator makes its determination of the necessity for the withdrawal solely on the basis of his application. In that event, the Primary Administrator shall make such determination, provided ~~all of the following requirements are met: (A) the Member has obtained all distributions, other than distributions available only on account of Hardship, and all nontaxable loans currently available under all other plans of the Employer and (B) if the Hardship withdrawal will be made from a Member's Deferred Account (or, effective as of April 1, 2008, Roth Account), (1) the Member is prohibited from making contributions (other than Rollover or Transfer Contributions) to the Plan~~

~~and all other plans of the Employer under the terms of such plans or by means of an otherwise legally enforceable agreement for at least six months after receipt of the distribution.~~ Effective for hardship withdrawals received in 2001, the Member is prohibited from making contributions (other than Rollover or Transfer Contributions) to the Plan and all other plans of the Employer under the terms of such plans or by means of an otherwise legally enforceable agreement until the later of January 1, 2002 or the date that is six months after receipt of the distribution. For purposes of this subparagraph (ii), "all other plans of the Employer" shall include qualified and non-qualified deferred compensation plans and such other plans as may be designated under regulations issued under Section 401(k) of the Code, but shall not include health and welfare benefit plans or the mandatory employee contribution portion of a defined benefit plan.

Attachment 2 – Changes to the NC 403(b) Program’s Plan Document

Section 3.4 Contribution Agreement

- (a) **Effective Date of a Contribution Agreement.** An Eligible Employee’s initial, modified, or other subsequent Contribution Agreement shall take effect as soon as administratively practicable. An Eligible Employee shall have at least 60 days tfrom his or her becoming an Eligible Employee to complete his or her initial Contribution Agreement
- (b) **Modification of a Contribution Agreement.** An Active Participant may modify his or her Contribution Agreement at any time and any number of times during the Plan Year by filing a new Contribution Agreement with the Plan Administrator. A new Contribution Agreement will take effect as soon as administratively practicable. To the extent provided in the Adoption Agreement, an adjustment due to the automatic increase provision shall be deemed to be a modification of an existing Contribution Agreement.
- (c) **Termination of a Contribution Agreement – Participant Election.** An Active Participant may elect at any time to terminate his or her Contribution Agreement. This election will take effect as soon as administratively practicable.
- (d) **Termination of a Contribution Agreement – Severance from Employment.** An Active Participant’s Contribution Agreement automatically terminates as of the end of the payroll period in which the Active Participant’s Severance from Employment occurs; provided, however, that such Contribution Agreement shall apply to any post-Severance from Employment pay that is considered Benefitable Compensation that is eligible for deferral pursuant to Code section 403(b) and the Treasury Regulations thereunder.
- (e) ~~[INTENTIONALLY LEFT BLANK]Suspension of Contribution Agreement—Hardship Distributions. An Active Participant’s Contribution Agreement shall be suspended in the event of a hardship withdrawal as set forth in Section 6.2(g) and restarted pursuant to the rules set forth in Section 6.2(h).~~
- (f) **Legally Binding and Irrevocable.** A Contribution Agreement is legally binding and irrevocable with respect to amounts currently available while the Contribution Agreement is in effect.

Section 6.2 Distribution On Account of Hardship

- (a) **General Rule.** Unless otherwise provided for the Adoption Agreement, and subject to the provisions of this Section 6.2, a Participant, upon written application, may request a hardship withdrawal from his or her Elective Deferrals Account if:

- (1) **Immediate and Pressing Financial Need.** The Participant has an immediate and heavy financial need as described in Section 6.2(d); and
- (2) **Necessary to Satisfy Financial Need.** The withdrawal is necessary to satisfy the immediate and heavy financial need pursuant to Treasury Regulation section 1.401(k)-1(d)(3)(iv)(E).

A hardship distribution made pursuant to this Section 6.2 shall be paid in a lump sum.

- (b) **Inclusion of Taxes and Penalties.** An “immediate and pressing financial need” includes all taxes and penalties attributable to a distribution.
- (c) **Approval.** If provided for in the Adoption Agreement, the Plan Administrator’s approval is required for each hardship withdrawal request. Otherwise, the Funding Agent shall process each hardship withdrawal request.
- (d) **Immediate and Pressing Financial Need.** Under Section 6.2(a)(1), in accordance with Treasury Regulation section 1.401(k)-1(d)(3)(iii)(B), a withdrawal is treated as on account of an immediate and heavy financial need of the Participant if the withdrawal is on account of:
- (1) **Medical Care.** Expenses for medical care described in Code section 213(d) previously incurred by the Participant, the Participant’s Spouse, any dependents of the Participant (as defined in Code section 152), or a primary Beneficiary, or amounts necessary for these persons to obtain medical care described in Code section 213(d);
 - (2) **Principal Residence.** Purchase (excluding mortgage payments) of a principal residence of the Participant;
 - (3) **Educational Fees.** Tuition payment and related educational fees for the next twelve months of post-secondary education for the Participant, a dependent (as defined in Code section 152, without regard to Code sections 152(b)(1), (b)(2) and (d)(1)(B)) in his or her immediate family, or a primary Beneficiary;

- (4) **Eviction.** Need to prevent the eviction of the Participant from his or her principal residence or foreclosure on the Participant's principal residence;
 - (5) **Funeral Expenses.** Payments for burial or funeral expenses for the Participant's deceased parents, Spouse, children, dependents (as defined in Code section 152, without regard to Code section 152(d)(1)(B)), or primary Beneficiary; and
 - (6) **Casualty.** Expenses for the repair of damage to the Participant's principal residence that would qualify for the casualty deduction under Code section 165 (determined without regard to whether the loss exceeds 10% of adjusted gross income).
- (e) **Necessary to Satisfy Financial Need.** In order to satisfy the requirement described in Section 6.2(a)(2), the Plan Administrator shall, unless it has actual knowledge to the contrary, rely on a Participant's certification that the need cannot be reasonably relieved by:
- (1) **Insurance.** Reimbursement or compensation by insurance or otherwise;
 - (2) **Liquidation of Assets.** Liquidation of the Participant's assets;
 - (3) **Cessation of Contributions.** Cessation of Salary Reduction Contributions;
 - (4) **Distributions and Loans.** Distributions ~~or nontaxable loans~~ from this Plan or any other plan of the Employer or any other employer; and
 - (5) **Commercial Loans.** Loans from commercial sources at reasonable commercial terms.
- (f) **Source of Hardship Withdrawal.** The Investment Funds that serve as the source of a hardship withdrawal shall be based on the hierarchy established by the Plan Administrator. Unless otherwise provided for in the Adoption Agreement, only contributions described in Section 3.2, with no adjustment for earnings, may be distributed in a hardship withdrawal. If provided for in the Adoption Agreement, Matching Contributions, Nonelective Contributions, rollover contributions, and Roth rollover contributions and earnings on such contributions may be distributed in a hardship withdrawal. Any contributions otherwise available to the Participant for a hardship withdrawal shall be reduced by the amount of any distributions of such contributions previously made to the Participant.
- (g) ~~[INTENTIONALLY LEFT BLANK] Suspension and Limitation of Salary Reduction Contributions. A Participant's Salary Reduction Contributions under this Plan, and his or her contributions under all other plans except Code section~~

~~125 plans and any other plans exempt from this requirement pursuant to applicable Code requirements that are maintained by the Employer must be suspended for six months upon approval of the hardship withdrawal request.~~

- (h) ~~[INTENTIONALLY LEFT BLANK] **Contribution Agreement.** After the suspension period described in Section 6.2(g) has ended, the Plan Administrator shall notify the Participant that a new Contribution Agreement must be filed to resume contributions and, if applicable, to restart an automatic increase election effective as soon as administratively practicable after the last day of the suspension period, provided the Participant is an Eligible Employee at the time.~~