



**DISASTER TAX RELIEF ACT PROVISIONS AFFECTING RETIREMENT PLANS
HURRICANES HARVEY, IRMA, AND MARIA
QUESTIONS AND SUGGESTIONS FOR GUIDANCE**

The SPARK Institute is pleased to submit this list of questions and suggestions to the Department of the Treasury and the Internal Revenue Service (IRS) regarding section 502 of the Disaster Tax Relief and Airport and Airway Extension Act of 2017 (DTRA), which included special retirement plan tax relief for individual taxpayers that have been affected by Hurricanes Harvey, Irma, and Maria. Those provisions are nearly identical to the retirement-related provisions contained in the Katrina Emergency Tax Relief Act (KETRA) and Gulf Opportunity Zone (GO Zone) Act of 2005.

Shortly after Congress passed KETRA, the IRS published interpretive guidance on KETRA's retirement-related provisions through Notice 2005-92. Additional guidance was also offered through Publication 4492 (Information for Taxpayers Affected by Hurricanes Katrina, Rita, and Wilma) and Form 8915 (Qualified Hurricane Retirement Plan Distributions and Repayments).

Except where otherwise noted, we recommend that the IRS's DTRA guidance follow the guidance in Notice 2005-92. In many cases, the questions below were **not** addressed by Notice 2005-92. Therefore, we recommend that any new guidance be prospective only and IRS should confirm that it will not apply any new guidance to previous qualified hurricane distributions (including distributions made for Harvey, Irma, and Maria prior to the issuance of any guidance).

Three-Year Repayment Period for Qualified Hurricane Distributions

- **Accepting Repayments:** Are eligible retirement plans that otherwise accept rollovers required to accept qualified hurricane distribution rollovers during the 3-year repayment window? What if a plan accepts certain types of rollover contributions (e.g., pre-tax) but not other types of contributions (e.g., Roth)?
 - *SPARK **recommends** the IRS make clear that plans are not required to accept qualified hurricane distribution repayments to the extent that a plan would not otherwise permit such amounts to be rolled over (e.g., plans that do not accept rollovers should not be required to accept qualified hurricane distribution repayments, plans that do not have Roth accounts should not be required to accept repayments of qualified hurricane distributions from other Roth accounts, and plans that have Roth accounts, but do not accept rollovers of Roth amounts, should not be required to accept qualified hurricane distribution repayments consisting of Roth amounts).*

- **Documentation:** What documentation is required for a repayment of a qualified hurricane distribution?
 - *SPARK **recommends** the IRS permit plans to rely on an individual’s self-certification as to whether a rollover is a permitted repayment of a qualified hurricane distribution.*

- **Repayment Destination:** Can individuals repay qualified hurricane distributions to any eligible retirement plan that accepts eligible rollover distributions? Or, are individuals only permitted to repay qualified hurricane distributions to the eligible retirement plan from which such distributions were initially taken?
 - *Regardless of how the IRS resolves this question, SPARK **recommends** that, if the repayment must be made to the same plan, that the receiving plan not be required to match up the repayment and the original distribution, but can instead rely on the certification of the participant.*

- **Treatment of Recontributed Amounts:** How should qualified hurricane distribution repayments be treated? Should they be treated as rollover contributions or, if deposited back to the plan from which the initial distribution was made, should they be treated as the qualified hurricane distribution’s original “source” – e.g., elective deferrals. (This treatment will affect eligibility for distributions in the future.)
 - *SPARK **recommends** the IRS clarify that all qualified hurricane distribution repayments should be treated as rollover contributions for all purposes.*

- **Beneficiaries and Inherited IRAs:** Are non-spouse beneficiaries eligible to repay qualified hurricane distributions to an IRA? IRS Notice 2005-92 said that Katrina distributions paid to a non-spouse beneficiary could not be recontributed to an eligible retirement plan. That 2005 guidance, however, was published prior to the addition of Code section 402(c)(11).
 - *SPARK **recommends** the IRS clarify that non-spouse beneficiaries are permitted to repay qualified hurricane distributions to the extent that such repayments are made to an individual retirement plan satisfying the requirements of Code section 402(c)(11).*

Eligibility for Qualified Hurricane Distributions

- **Self-Certification:** In determining whether an individual is eligible for a qualified hurricane distribution, can employers rely on an individual’s self-certification when determining the maximum amount of any qualified hurricane distribution (up to \$100,000), whether a recipient experienced an “economic loss,” and whether a recipient’s principal place of abode is located within an eligible disaster area.

- *SPARK **recommends** the IRS clarify that employers can rely on self-certification for these purposes.*
- **Maximum Qualified Hurricane Distribution:** The maximum amount that can be treated as a qualified hurricane distribution under section 502(a)(2)(A) of DTRA is reduced by “the aggregate amounts treated as qualified hurricane distributions received by such individual for *all prior taxable years*.” Does this include hurricane distributions described under section 101 of KETRA or section 201 of the GO Zone Act?
 - *SPARK **recommends** the IRS make clear that any hurricane distributions received in connection with any hurricanes preceding Hurricanes Harvey, Irma, or Maria will not be taken into account for purposes of determining the maximum amount of any individual’s qualified hurricane distribution.*
- **Economic Loss:** IRS Notice 2005-92 indicated that Katrina distributions were “permitted without regard to the qualified individual’s need and the amount of the distribution [was not] required to correspond to the amount of the economic loss suffered by the qualified individual.”
 - *SPARK **recommends** the IRS make clear that a similar standard applies to qualified hurricane distributions received by individuals affected by Hurricanes Harvey, Irma, and Maria.*
- **Reclassification of Hardship Distributions:** Can an individual that is eligible to receive a qualified hurricane distribution reclassify a hardship distribution or unforeseeable emergency distribution taken prior to the passage of DTRA as a qualified hurricane distribution? If so, can the individual repay such distribution within three years?
 - *Regardless of how the IRS resolves this question, SPARK **recommends** that the receiving plan: (a) need not alter its records, and (b) can accept the certification of the individual regarding repayment. Plan administrators should not be required to reissue Form 1099-R to any individual who wants to reclassify a hardship or other eligible rollover distribution as a qualified hurricane distribution.*

If the IRS permits reclassification of hardship distributions, it must also provide guidance for employers on how such amounts should be treated when determining the maximum amount of any available qualified hurricane distribution during the relief period.
- **Disaster Areas:** We believe that the hurricane “disaster areas” for purposes of section 502 of DTRA includes all areas of Florida, Georgia, Puerto Rico, and the Virgin Islands where affected taxpayers have been given extended deadlines to file tax returns, pay taxes, and perform other time-sensitive acts until January 31, 2018 under Rev. Proc. 2007-56, and not just those counties eligible for *individual* assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. Also, we believe that all areas

of Texas declared a disaster area before September 21, 2017, are eligible for DTRA's retirement-related tax relief. Please confirm.

The IRS recently announced tax relief for additional counties affected by Hurricane Harvey in Texas and Louisiana, and counties in South Carolina affected by Hurricane Irma. Can the IRS clarify whether DTRA's retirement-related tax relief extends to individuals in those Texas, Louisiana, and South Carolina counties that were not declared a major disaster area before September 21, 2017?

- **Employer Contributions**: Are employers permitted to expand their plans' distribution options to allow for the distribution of all amounts attributable to any vested portions of a participant's account as a qualified hurricane distribution (e.g., nonelective contributions and matching contributions), other than in-service distributions of money purchase and other pension plan benefits as noted in Notice 2005-92?
 - *SPARK **recommends** that, consistent with KETRA's legislative history,¹ a profit-sharing plan may make distributions of any vested employer contributions.*

DTRA's Relief Affecting Loans from Qualified Plans

- **Increased Loan Limits**: Are qualified employer plans required to permit individuals affected by the storms to take loans in excess of the Code section 72(p)(2)(A) plan loan limits in accordance with section 502(c)(1) of DTRA?
 - *SPARK **recommends** the IRS confirm that DTRA's increased loan limits are permissive, rather than mandatory. We understand that it was relatively uncommon for employers to increase their loan limits as a result of KETRA and the GO Zone Act, because for most employees, the distribution opportunity (with the possibility of repayment within three years) was more useful and relevant for those severely affected by the storms.*
- **Loan Repayment Extension**: Are qualified employer plans required to extend a qualified individual's loan repayment schedule in accordance with section 502(c)(2) of DTRA? Also, does the IRS intend to issue a safe harbor for satisfying those provisions similar to the loan repayment safe harbor described in IRS Notice 2005-92, section 5.B?
 - *SPARK **recommends** that IRS make clear that DTRA's extended loan repayment rules are permissive, not mandatory. Also, SPARK recommends the IRS confirm*

¹ "A qualified disaster-relief distribution is a permissible distribution from a 401(k) plan, 403(b) annuity, or governmental 457 plan, regardless of whether a distribution would otherwise be permissible. A plan is not treated as violating any Code requirement merely because it treats a distribution as a qualified disaster-relief distribution." Joint Committee on Taxation, *Technical Explanation of H.R. 3768, the "The Hurricane Katrina Tax Relief Act of 2005," as amended by the Senate on September 15, 2005*, (JCX-67-05), September 20, 2005. With respect to nonelective and matching contributions to a profit-sharing plan, we would note that Revenue Ruling 71-224 states that a profit-sharing plan may make distributions upon the occurrence of a hardship without violating Treasury Regulation section 1.401-1.

that the loan suspension “safe harbor” in IRS Notice 2005-92, section 5.B applies to extended loan repayment under DTRA.

- **Self-Certification:** Will the IRS permit employers to rely on self-certification when determining whether a retirement plan participant is a qualified individual for purposes of determining eligibility for the loan relief described in section 502(c) of DTRA?
 - *SPARK **recommends** the IRS make clear that employers are permitted to rely on self-certification for purposes of determining whether a retirement plan participant is a qualified individual when determining eligibility for the loan relief described in section 502(c) of DTRA.*

- **Loan Repayments Upon Termination of Employment:** Can the IRS clarify how DTRA’s extended loan repayment rules apply to retirement plan loan repayments that become due upon an employee’s termination of employment or some other distributable event?
 - *SPARK **recommends** the IRS make clear that DTRA’s extended loan repayment rules do not apply to loan acceleration provisions that make a loan repayment due upon termination of employment or some other distributable event (e.g., death, disability, or attainment of the plan’s normal retirement age).*

- **Loan Offsets vs. Deemed Distributions:** Can the IRS provide further guidance on the treatment of different loan defaults? For example, we would like additional guidance on when deemed distributions and loan offsets can be repaid over three years. Further, what happens if a participant has a loan default and a deemed distribution, but is otherwise eligible for a qualified hurricane distribution – can the loan be offset because of the existence of a distributable event? (Because of DTRA’s extended loan repayment relief, this will be rare unless the participant *wants* to default and have an offset to take advantage of the three-year income inclusion rule, or the plan does not allow extended repayment.)
 - *SPARK **recommends** the IRS make clear that a deemed distribution for a person that is otherwise eligible for a qualified hurricane distribution is entitled to all of the qualified hurricane distribution relief described in section 502(a) of DTRA.*

- **Adequate Security:** We recommend that Treasury and IRS work with the Department of Labor to confirm that Labor will not treat any person as having violated the provisions of Title I of the Employee Retirement Income Security Act (ERISA), including the adequate security and reasonably equivalent basis requirements in ERISA section 408(b)(1) and 29 CFR 2550.408b-1, solely because the person made a plan loan to a qualified individual in accordance with section 502(c) of DTRA, Code section 72(p), and the provisions of any relevant IRS guidance.

Miscellaneous Administrative Hardship and Loan Relief Issues

- Plan Amendments: What plan amendments are required in order for employers to rely on the hardship, unforeseeable emergency, and loan relief described in IRS Announcements 2017-11 and 2017-13? Are employers that already permit loans, hardship distributions, and unforeseeable emergency distributions required to amend their plans in order to rely on the Announcements? Will the answer be the same regardless of whether the employer sponsors a 401(k), 403(b), or 457(b) plan? What if a 401(k) or 403(b) plan permits hardship distributions, but only for safe harbor hardship reasons? Would that plan need to be amended in order to be eligible for the relief described in Announcements 2017-11 and 2017-13 if it makes non-safe harbor hardship distributions between the storms and January 31, 2018?
- Hurricane Maria Hardship and Loan Relief: There has been confusion over whether the hardship, unforeseeable emergency, and loan relief described in IRS Announcements 2017-11 and 2017-13 has been extended to individuals affected by Hurricane Maria in Puerto Rico municipalities not designated under Hurricane Irma. Please confirm that the relief in IRS Announcements 2017-11 and 2017-13 applies to the entire island of Puerto Rico.

Withholding and Reporting

- Mandatory Withholding: Are employers required to treat all distributions to affected individuals as qualified hurricane distributions for purposes of the withholding rules? For example, can employers continue to impose mandatory 20% withholding for eligible rollover distributions?
 - *SPARK **recommends** that the IRS confirm the guidance in Notice 2005-92, namely that an employer is permitted to choose whether to treat distributions under its plan as qualified hurricane distributions and is permitted to develop any reasonable procedures for identifying which distributions are treated as qualified hurricane distributions under its plan. The IRS should also make clear that, if an employer does not treat a distribution as a qualified hurricane distribution during the relief period, including because the plan has decided not to offer a new distribution option, DTRA's exception to mandatory 20% withholding does not apply to distributions that otherwise qualify as eligible rollover distribution.*
- Withholding on Previous Distributions: Since a distribution made before the passage of DTRA can be characterized now as a qualified hurricane distribution, what should a plan do with respect to the 20% withholding that was applied to an eligible rollover distribution that is subsequently determined to be eligible to be treated as a qualified hurricane distribution?
 - *SPARK **recommends** the IRS clarify that payors are not required to make any changes with respect to withheld amounts on distributions that were not treated by the plan as qualified hurricane distributions. Our members do not have*

systems that are designed to return any amounts previously withheld from a payee.

- Form 5498 for IRAs: We are also requesting guidance on how IRA trustees and issuers should report qualified hurricane distribution repayments on the Form 5498. For example, Box 2 of the Form 5498 reports rollovers and Box 14a reports repayments of federally designated disaster withdrawals. If qualified hurricane distributions repaid to an IRA are to be treated as having been transferred in a direct trustee to trustee transfer within 60 days of the distribution, should repayments be reported in Box 2, Box 14a, or both?