

TO: DEFERRED COMPENSATION ADVISORY
COMMITTEE

FROM: Emily Hendon

SUBJECT: Plan Amendment to allow 2nd Loans

DATE: December 3, 2020

Approved: *J. Behemtri*

Date: November 20, 2020

RECOMMENDATION

Review and provide recommendations regarding the proposed ordinance to the voluntary Deferred Compensation Plan (“Plan”) in the San Jose Municipal Code to define number of allowable loans, the minimum and maximum amount, and allow second General Loans for a specified period as a self-correction to an administrative error.

BACKGROUND

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was passed on March 27, 2020 in response to the economic fallout of the COVID-19 pandemic. Prior to the CARES Act, the Plan allowed eligible participants to have one residential loan and one general loan at any given time. On May 1, 2020, the City of San Jose Deferred Compensation Advisory Committee (DCAC) approved to adopt optional CARES Act provisions. One provision approved was a modification to the loan program for the City of San Jose Deferred Compensation Plan #666779 (Plan) to include the availability of a second general purpose loan. This second loan allowed participants who experienced financial impact due to COVID to receive a second general loan against their plan assets up to the maximum available under the CARES Act, effective immediately. Voya Financial, the City’s recordkeeper and Plan administrator, was responsible for qualifying all COVID loans.

The number of loans allowable was to remain the same after adopting the CARES Act provisions, however, Voya’s system and CARES Act loan processing was unable to fully “block” a second non-COVID certified loan despite two safeguards that were supposed to be in place. First, the City’s profile in VOYA’s customer service system was updated to make sure anyone taking calls would see that second loans were allowed only if COVID certified; and secondly, the online self-service loan request function on the participant website was to be disabled.

In late July of 2020, City staff discovered a second general loan during the bi-weekly file upload process and inquired of Voya. That launched a review of all second loans issued under the Plan, and it was identified that a group of 18 participants were issued a second general-purpose loan without proper COVID certification. Upon review of the cases, Voya found they had not turned off the on-line loan functionality and a majority of the second loans were derived from participant web requests. Voya has informed us that it corrected the problem.

Per staff's request, Voya conducted outreach to the 18 impacted participants and found that the majority of the erroneous second loans were found to be COVID related; however, the loans were issued without following the proper certification steps being followed and participants were not asked to submit the required self-certification forms. Voya confirmed there were no other requests for second loans during the period in which the second loans were issued.

Staff, in conjunction with the City Attorney's Office, worked with outside counsel and determined a path to correct the Plan. An ordinance has been prepared to amend the Plan to allow the second general loans from May 22, 2020 through August 7, 2020, which is the period Voya erroneously allowed second general loans.

NEXT STEPS

After receipt of the DCAC's recommendations, staff will request City Council approval of the proposed ordinance for the Deferred Compensation Plan in the San Jose Municipal Code to allow for second General Loans for the specified period as a self-correction to administrative error. The Plan document will be updated to reflect the adoption of the CARES Act provisions at a later date.



Emily Hendon
Division Manager

For questions about this memo, contact Amy.Morton@sanjoseca.gov.

DRAFT

ORDINANCE NO.

**AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING
SECTION 3.48.140 OF CHAPTER 3.48 OF TITLE 3 OF THE
SAN JOSE MUNICIPAL CODE TO _____**

WHEREAS, pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and Title 21 of the San José Municipal Code (collectively, "CEQA"), it has been determined that the provisions of this Ordinance do not constitute a project, under File No. PP17-008 (General Procedure and Policy Making resulting in no changes to the physical environment); and

WHEREAS, the City Council of the City of San José is the decision-making body for this Ordinance; and

WHEREAS, this Council has reviewed and considered the "not a project" determination under CEQA prior to taking any approval actions on this Ordinance;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

Section 3.48.140 of Chapter 3.48 of Title 3 of the San José Municipal Code is amended to read as follows:

3.48.140 Loans

- A. A participant who is an active employee may apply for and receive a loan from the balance of his or her account as provided in this Section 3.48.140. Any such loan may not be for an amount less than one thousand dollars (\$1,000.00).

B. No loan to a participant hereunder may exceed the lesser of:

1. Fifty thousand dollars (\$50,000.00), reduced by the excess (if any) of the highest outstanding balance on loans from the plan to the participant during the one(1)-year period ending on the day before the date the loan is approved (not taking into account any payments made during such one (1)-year period), over the outstanding balance of any loans from the plan to the participant on the date the loan is made; or
2. One-half of the value of the participant's vested account balance as of the day immediately preceding the date on which such loan is approved.

C. For purposes of Subsection B. above:

1. Any loan from any other plan maintained by the eCity shall be treated as if it were a loan made from the plan and the balance of all loans under all plans maintained by the eCity shall be aggregated in determining the maximum loan available; and
2. The amount of any loan fee shall be deducted from the participant's account balance before the determination of the maximum loan amount available.

D. The terms of the loan shall:

1. Require level amortization with payments not less frequently than biweekly throughout the repayment period, except that, to the extent permitted by the Internal Revenue Code and the applicable treasury regulations:

- a. A borrower who is on a bona fide unpaid leave of absence may elect to suspend payments during the unpaid leave of absence, provided that the suspension of payments shall be for a period not to exceed one (1) year, and further provided that the term of the loan shall not be extended and the borrower must repay the loan within the term of the loan.
 - b. A borrower who is on a leave of absence for the performance of uniformed service within the meaning of Section 414(u) of the Internal Revenue Code may elect to suspend payment for the period of uniformed service. If the borrower so elects, then upon the borrower's return from uniformed service, the loan repayment period shall be extended by a period equal to the length of the uniformed service.
2. Require that the loan be repaid within five (5) years unless the participant certifies in writing to the loan administrator that the loan is to be used to acquire a dwelling unit which within a reasonable time is to be used (determined at the time the loan is made) as a principal residence of the participant ("residential loan"); and
 3. Provide for interest at a reasonable rate, as determined by the loan administrator, commensurate with interest rates charged by persons in the business of lending money for loans which would be made under similar circumstances.

E. Security for loan; default.

1. Security. Any loan to a participant under the plan shall be secured by the pledge of the portion of the participant's interest in the plan invested in such loan.
2. Default. In the event that a participant fails to make a loan payment by the last business day of the calendar quarter following the calendar quarter in which the payment is due, a default on the loan shall occur. In the event of such default:
 - a. All remaining payments on the loan shall be immediately due and payable;
 - b. The participant shall not be allowed to initiate another loan from the plan until the defaulted amount is repaid.
3. In the case of any default on a loan to a participant, the loan administrator shall apply the portion of the participant's interest in the plan held as security for the loan in satisfaction of the loan on the date of severance from employment.
4. Notwithstanding anything elsewhere in this chapter to the contrary, in the event a loan is outstanding on the date of a participant's death, his or her estate shall be his or her beneficiary as to the portion of the interest in the plan invested in such loan (with the beneficiary or beneficiaries as to the remainder of his or her interest in the plan to be determined in accordance with otherwise applicable provisions of the plan).

Repayment.

1. The participant shall be required, as a condition to receiving a loan, to enter into an irrevocable agreement authorizing the eCity to make payroll deductions from the participant's compensation as long as the participant is an employee and to transfer such payroll deduction amounts to the loan administrator in payment of such loan plus interest. Repayments of a loan shall be made by payroll deduction of equal amounts (comprised of both principal and interest) from each paycheck, with the first such deduction to be made as soon as practicable after the loan funds are disbursed.
2. Notwithstanding paragraph 1., a participant may prepay the entire outstanding balance of his loan at any time, in whole or in part, provided that a partial prepayment shall not change the payment schedule or the interest rate on the loan.
3. If any payroll deductions cannot be made in full because a participant is on an unpaid leave of absence and the loan suspension provision is not in effect or the participant's paycheck is insufficient for any other reason, the participant shall pay directly to the loan administrator the full amount that would have been deducted from the participant's paycheck, with such payment to be made by the last business day of the calendar month in which the amount would have been deducted.

F. Severance from eCity employment. In the event a participant has a severance event, effective February 4, 2013, participants have the following loan repayment options:

- 1a. The outstanding balance of any loan may be paid no later than the last day of the month immediately following the month in which the participant receives his or her final compensation from the eCity. For the purpose of

this paragraph, "final compensation" includes any payments for unused accrued leave for which the participant may be eligible; or

- 2b. Participant may enter into an agreement with the eCity for a loan repayment plan for a period not greater than five (5) years from the date the loan is granted. If, at the time of the loan, the participant certified in writing to the loan administrator that the loan was to be used to acquire a dwelling unit which within a reasonable time was to be used as a principal residence of the participant, the loan can be repaid over a period of up to twenty (20) years.
- G. Loan fee. The loan administrator, with the approval of the committee, may charge a loan fee for any loan made pursuant to this Section 3.48.140. The loan fee will be deducted from the participant's account balance.
- H. For the purpose of this Section 3.48.140, "loan administrator" means the person or entity authorized by the committee to administer the loan program for the plan. The committee may change the loan administrator at any time.
- I. The committee may establish such rules with respect to the loan program as the committee deems advisable, ~~including without limitation, rules regarding the maximum number of loans that may be outstanding for any participant at any time.~~
- J. Loans are not available from an employee's Roth elective deferral account or Roth rollover account, but these Roth accounts may be taken into account in determining the maximum loan that a participant may obtain under the provisions of Section 3.48.140B.

K. Notwithstanding any other provision of this Section 3.48.140,

1. Participants shall be limited to having no more than one (1) residential loan and one (1) general purpose loan outstanding at any time.

2. From May 22, 2020 through August 7, 2020, a participant may apply for and receive a second general purpose loan from the balance of his or her account, provided that the second general purpose loan must satisfy all of the requirements and limits applicable under this Section 3.48.140.

PASSED FOR PUBLICATION of title this _____ day of _____, 2020, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk