



May 30, 2023

Submitted electronically via www.regulations.gov

Internal Revenue Service
CC:PA:LPD:PR (REG-122286-18)
Room 5203
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Use of Forfeitures in Qualified Retirement Plans (RIN 1545-BO98)

Dear Sir or Madam:

The American Benefits Council (the "Council") appreciates the opportunity to comment on the proposed regulations addressing the use of forfeitures in qualified retirement plans. Because the proposed regulations are consistent with positions previously announced in informal guidance from the Internal Revenue Service (IRS), we believe that the Council's plan sponsor and service provider members will generally be able to implement them without disruption. However, in order to prevent any inadvertent traps that may be created by the proposal, the Council is recommending: (1) additional relief for certain unused forfeitures; (2) express clarification on the treatment of plan amendments relating to the final regulations; and (3) additional relief for any defined contribution plan forfeitures incurred during any plan year that begins before January 1, 2024.

The Council is a Washington, D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and their families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

UNUSED ANNUAL FORFEITURES

According to the proposal, defined contribution plans would be required to expressly provide that forfeitures will be used for one or more of the following purposes: (i) to pay plan administrative expenses, (ii) to reduce employer contributions under the plan, or (iii) to increase benefits in other participants' accounts in accordance with plan terms. The plan must also expressly provide that forfeitures will be used no later than 12 months following the close of the plan year in which the forfeitures were incurred under the plan's terms.

The Council is concerned that there may be cases in which a plan has annual forfeitures that cannot be reasonably allocated to the uses that a plan sponsor has incorporated into the terms of its plan. This risk is particularly present when a plan sponsor has chosen, consistent with the proposed regulations, to only allocate forfeitures in accordance with one or two of the permitted uses, but not all of them. For example, if a plan only permits forfeitures to be used to pay for administrative expenses, there may be cases in which a plan cannot allocate all of its forfeitures to these expenses by the end of the following plan year. And while a plan sponsor could amend its plan to newly permit the allocation of forfeitures to offset employer contributions and/or increase benefits, the Council does not believe that plan sponsors should be required to allocate forfeitures among all permitted purposes.

This also presents a more fundamental concern with the proposal. We expect that most defined contribution plan sponsors will use forfeitures to pay for administrative expenses or offset employer contributions. But if the forfeitures in any year are more than is required for administrative expenses or existing required employer contributions, the proposal is effectively *requiring additional benefits*. While that may be a noble public policy goal, and many employers will be comfortable providing additional benefits, there is nothing in the Code that imposes such a requirement. Code section 414(i), which is cited in the preamble, simply states that a defined contribution plan is a plan that provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and "*any forfeitures of accounts of other participants which may be allocated to the participant's account.*" (emphasis added). The other authorities cited in the preamble similarly do not require that additional benefits be provided simply because of the existence of forfeitures.¹

To avoid the potential trap created by this rule, and to avoid a rule that effectively requires plans to allocate forfeitures among all permitted uses, the Council requests a

¹ The preamble cites Treas. Reg. section 1.401-1(b)(1) and Revenue Ruling 80-155, neither of which require the provision of additional benefits based on forfeitures. They are generally focused on a plan having a definite predetermined formula for allocating contributions and requiring at least an annual valuation.

modification to the proposal indicating that, if a plan cannot allocate unused forfeitures in accordance with its terms by the end of the 12-month period following the close of the plan year in which the forfeitures were incurred, the plan will not fail to be qualified as long as it allocates any unused forfeitures as soon as reasonably practicable in accordance with its terms. If a plan sponsor determines that forfeitures should only be allocated for one permitted purpose, it should not be required to allocate forfeitures among all permitted uses simply because there is significant number of forfeitures in a given year.

PLAN AMENDMENT DEADLINES

According to the proposal, every qualified plan must include an express provision describing how forfeitures will be allocated in accordance with the proposed regulations. Thus, because the proposed regulations would change the qualification requirements and address the actual terms of a plan, the Council requests confirmation that any amendments relating to the final regulations will be eligible for the extended amendment deadlines that are available when plans must be amended because of changes in the qualification requirements.

For example, in the case of individually-designed plans, IRS could state that any plan amendments relating to the final regulations will be treated as timely adopted if they are adopted by the end of the extended remedial amendment period that is available for changes in qualification requirements – i.e., the end of the second calendar year that begins after the issuance of the Required Amendments List on which the change in qualification requirements appears (with possible extensions for governmental plans). Similarly, in the case of pre-approved plans, IRS could state that any amendments that relate to the final regulations will be treated as timely adopted if they are adopted by the deadline for adopting interim amendments – i.e., no later than the end of the second calendar year following the calendar year in which the change in qualification requirements becomes effective with respect to the plan (with possible extensions for governmental plans).

FORFEITURES INCURRED BEFORE 2024

The proposal includes a transition rule that will treat defined contribution plan forfeitures incurred before January 1, 2024, as having been incurred in the first plan year that begins on or after January 1, 2024. Consequently, any plan with these unallocated forfeitures would have until the end of the 2025 plan year to allocate forfeited amounts in accordance with the final regulations. The Council is concerned that this timeframe may not provide plans that currently maintain these unallocated forfeitures with

enough time to comply with the final regulations.² Accordingly, we are requesting additional relief that would allow these forfeited amounts to be fully allocated in accordance with the final regulations by a date that is no earlier than two full years after final rules are published.

* * * * *

Thank you for the opportunity to provide our views and suggestions on the forfeiture proposal. If you have any questions or if we can be of further assistance, please contact me at 202-289-6700 or ldudley@abcstaff.org.

Sincerely,

A handwritten signature in black ink that reads "Lynn D. Dudley". The signature is written in a cursive, flowing style.

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy

² For example, if a closed defined contribution plan experienced significant forfeitures prior to 2024, it could be difficult for the plan to timely allocate forfeitures to pay for administrative expenses. In this case, forfeitures could not reasonably be used to increase benefits or reduce employer contributions.