

Submitted Electronically

May 30, 2023

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

Re: Use of Forfeitures in Qualified Retirement Plans (RIN 1545-BO98, REG-122286-18)

To Whom It May Concern:

On behalf of The ERISA Industry Committee (ERIC), thank you for the opportunity to comment on the proposed rulemaking (Proposal or Proposed Rule) by Internal Revenue Service (IRS) titled “Use of Forfeitures in Qualified Retirement Plans.”¹ We support the proposed rule, which largely codifies existing guidance and, we understand, generally reflects current practice.

ERIC is a national nonprofit organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans.

Americans engage with an ERIC member company many times a day, such as when they drive a car or fill it with gas, use a cell phone or a computer, watch TV, dine out or at home, enjoy a beverage or snack, use cosmetics, fly on an airplane, visit a bank or hotel, benefit from our national defense, receive or send a package, or go shopping.

ERIC member companies sponsor retirement plans, including both defined benefit and defined contribution plans, that are governed by the *Employee Retirement Income Security Act of 1974*, as amended (ERISA) and the Internal Revenue Code (Tax Code). Because millions of workers and retirees participate in these plans, ERIC has a strong interest in rules that promote efficient plan administration.

¹ 88 Fed. Reg. 12282 (Feb. 27, 2023).

ERIC Generally Supports the Proposed Rule, but Requests Additional Clarification and Flexibility

Pursuant to the *Tax Reform Act of 1986*, forfeitures of accrued benefits arising in any defined contribution plan can be either reallocated to the accounts of other participants in a nondiscriminatory fashion, or used to reduce future employer contributions or administrative costs.² In 2010 subregulatory guidance, the IRS noted that the Tax Code does not permit a plan administrator to place forfeited amounts into a plan “suspense account” to accumulate for several years.³ Instead, the guidance stated that forfeitures “*must be used or allocated in the plan year incurred.*”

Under the Proposed Regulation, forfeitures must generally be used within 12 months after the end of the plan year in which the forfeiture is incurred. The Proposed Rule would be effective as of the first day of the plan year beginning after January 1, 2024; therefore, forfeitures occurring during 2024 would need to be used within 12 months after the end of that plan year. ERIC appreciates the built-in transition time, however, more flexibility would be helpful. It is possible that this proposal will not be finalized for several months after the close of the comment period, perhaps even late in 2023. Because a plan may only use forfeitures pursuant to the plan document, it is possible that some plans may wish to amend their plan document after the regulation is finalized. This could result in a time crunch or the risk of an operational failure with unused forfeiture monies. We request the IRS consider additional transition relief, especially to the extent the rule is not finalized until late in 2023, such as additional time to utilize forfeitures incurred prior to the effective date of the final rule.

Additionally, the term “incur” should be clarified. In a situation where a contribution is based on compensation for a non-vested employee that separates near the end of the plan year, it’s possible that the amount of the actual forfeiture may not be determined until some months later. This would cut significantly into the amount of time that the plan sponsor would have to “use” the forfeitures, potentially resulting in less than 12 months. In these cases, the IRS should clarify that the forfeiture is not “incurred” at the date of separation, and it would be appropriate to provide some additional relief for sponsors to use the forfeiture.

Furthermore, ERIC is appreciative of the ongoing conversation we have had with the regulatory agencies regarding the unique challenges large employers face in addressing the benefits of missing and unresponsive participants. Current regulations contemplate conditional forfeiture of these benefits, so long as the plan provides for reinstatement if a claim is made by the participant or beneficiary for the forfeited benefit.⁴ Under the proposal, new forfeitures can be used to restore conditionally-forfeited accounts that might otherwise have required new employer contributions.⁵ Additional clarification of the application of the proposed rules in the context of

² *Id.* at 12283

³ “Fixing Common Plan Mistakes: Improper Forfeiture Suspense Accounts,” RETIREMENT NEWS FOR EMPLOYERS: TAX INFORMATION FOR SPONSORS OF RETIREMENT PLANS 4 (Spring 2010), available at <https://www.irs.gov/pub/irs-pdf/p4278.pdf>.

⁴ 26 CFR § 1.411(a)-4(b)(6).

⁵ Proposal, *supra* note 1, at 12284.

missing participants would be helpful. For example, does the proposed regulation change the law with respect to when the forfeiture “incurred,” and how does this interact with the requirement to use these funds within 12 months?

Finally, ERIC is supportive of the Proposed Regulation’s provisions related to defined benefit plans, which updates 60-year-old guidance. More specifically, under regulations issued in 1963, forfeitures in a pension plan must be used as soon as possible to reduce employer contributions.⁶ However, these regulations do not reflect the various minimum funding standards and requirements applicable to defined benefit plans, including those contained in ERISA, as amended throughout the years.⁷ Those rules do not permit forfeitures to be used to satisfy plan funding requirements; instead, the provisions require plans to use reasonable actuarial assumptions to determine the effect of expected forfeitures on plan liabilities. These effects are then reflected in the minimum funding rules. The Proposed Regulation clarifies how forfeitures are to be incorporated into the anticipation of costs under the plan.

Conclusion

ERIC appreciates the work that has been done to ensure clear guidelines regarding forfeitures, which will help efficient plan administration. Please do not hesitate to contact me if you have any questions or would like to discuss further.

Sincerely,

Andy Banducci

⁶ 26 CFR § 1.401-7(a).

⁷ Proposal, *supra* note 1, at 12283.