



May 30, 2023

Internal Revenue Service  
Attn: CC:PA:LPD:PR (REG-122286-18)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

**SUBMITTED VIA REGULATIONS.GOV**

**Re: NPRM Regarding Use of Forfeitures in Qualified Retirement Plans RIN 1545-BO98**

The American Retirement Association (ARA) is writing in response to the request for comments in the Department of Treasury's and Internal Revenue Service's ("Service") Notice of Proposed Rulemaking regarding the use of forfeitures in qualified retirement plans, published in the Federal Register on February 27, 2023, and referenced above (the "Proposed Rule"). ARA thanks the Service and the Department of the Treasury for the opportunity to provide input on these matters.

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), the American Society of Enrolled Actuaries (ASEA), and the Plan Sponsor Council of America (PSCA). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement savings plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has over 30,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

ARA thanks the Service for previously providing guidance on the use of forfeitures in the Spring 2010 Retirement News for Employers, Vol. 7, and for expanding upon and formalizing that prior guidance by issuing the Proposed Rule. The timely and efficient use of forfeitures has been a challenge for plan sponsors, and particularly difficult for small businesses that may not employ dedicated benefits personnel. The ability of plan sponsors to have straightforward and practical guidance on the use of forfeitures will greatly simplify plan administration.

**ARA recommends** that the Service:

- Modify the Proposed Rule to provide that forfeitures must be utilized for contributions or expenses that relate to a date that is no later than the deadline (as opposed to being "utilized" by that date);
- Ensure there is an extended deadline to adopt amendments regarding the use of forfeitures; and
- Provide relief under section 411(d)(6) of the Code for amendments adopted to conform to the Proposed Rule.

ARA believes that each of the suggestions will resolve significant uncertainties regarding the use of forfeitures, promote overall compliance, simplify and reduce the burdens of plan administration, and will be easily understood by plan sponsors and practitioners.

## Discussion

- I. Modify the Proposed Rule to provide that forfeitures must be utilized for contributions and expenses that relate to a date that is no later than the deadline (as opposed to actually being utilized by that date).

§1.401–7(b)(2) of the Proposed Rule states that forfeitures must be used no later than 12 months following the close of the plan year in which the forfeitures were incurred under plan terms. Pre-approved plan documents have long included language requiring plan forfeitures to be disposed of by the end of the plan year following the end of the plan year in which they occurred. In operation, many plan administrators and their service providers have considered forfeitures to be used by this deadline if the forfeitures were allocated with respect to the plan year following the plan year in which they occur, even if the forfeitures were not actually allocated until a later date. In addition, in certain cases, plan expenses and/or contributions for a plan year may not be able to be determined until after the close of the plan year.

To illustrate the adjustment suggested, consider the following examples:

### Example 1:

- Plan year is the calendar year, and the plan provides that forfeitures can be used to pay plan expenses, reduce employer contributions, or be reallocated as an employer contribution.
- During the plan year ended December 31, 2024, \$10,000 in forfeitures occur under the terms of the plan.
- Before December 31, 2025, \$1,000 of the 2024 forfeitures is used to pay expenses and \$6,000 of the 2024 forfeitures is used to reduce the per payroll employer match contribution. Therefore, as of December 31, 2025, the remaining forfeitures from the 2024 plan year total \$3,000.
- The plan provides for a nonelective contribution equal to 3% of each participant's plan year compensation if the participant is employed on the last day of the plan year. The contribution for the plan year ending December 31, 2025, is calculated in January 2026 to be \$20,000. On February 1, 2026, the Employer deposits \$17,000 to the plan to fund the contribution, with the remainder funded by the \$3,000 in remaining forfeitures from 2024. The \$20,000 nonelective contribution is allocated and credited to the participants' plan accounts on that same date.

### Example 2:

- Plan has the same provisions as Example 1, but the nonelective contribution for the calendar year ended December 31, 2025, is calculated to be only \$2,000.
- The Employer has directed the Plan Administrator to allocate any remaining forfeitures that must be used by December 31, 2025, as an additional nonelective contribution for the plan year ended December 31, 2025, pursuant to the terms of the plan.
- The \$3,000 in remaining forfeitures from 2024 is moved from the plan's forfeiture account and allocated to the eligible plan participants on February 1, 2026, resulting in a total allocation to eligible plan participants of \$5,000 for the 2025 plan year.

Example 3:

- Plan has the same provisions as Example 1, but there is no non-elective contribution.
- The plan's third-party administrator bills the plan for its services annually, in arrears. On January 15, 2026, the Employer receives an invoice for \$3,000 for services provided for the plan year ended December 31, 2025. The Employer directs the Plan Administrator to pay the expense from plan assets. The \$3,000 in remaining forfeitures from the 2024 plan year is used to pay the third-party administrator's invoice and is wired from the plan to the third-party administrator on January 20, 2026.

The Proposed Rule would treat the use of the \$3,000 in forfeitures as late under all the examples provided above. ARA believes the use of forfeitures in each example should be treated as timely and the Proposed Rule revised accordingly.

**ARA recommends** that the Service revise the Proposed Rule to provide that forfeitures are used timely as long as the forfeitures are utilized for contributions or expenses that relate to a date that is no later than twelve (12) months following the end of the plan year in which the forfeiture occurred. Allowing the plan sponsor to follow currently permitted administration practices of determining contributions and using forfeitures with respect to the plan year after the forfeiture occurs rather than by the end of that plan year will reduce confusion and inadvertent errors. Further, ARA believes this practice is reasonable and does not contravene the policy expressed in the Proposed Rule. Continuing to permit this reasonable practice would reduce the costs and burdens of implementing the Proposed Rule because systems already operate in this manner. Finally, this position would also promote consistency across IRC provisions because §415(c) of the Code bases annual additions allocated under the terms of a plan for a particular limitation year, even though the allocation may not actually be made until after the limitation year.

- II. Clarify that an extended amendment deadline similar to the extended discretionary amendment deadline provided under the SECURE 2.0 Act will also apply to discretionary amendments that allow plan sponsors to use forfeitures to increase plan participants' benefits.

The Proposed Rule provides three methods by which defined contribution plans may utilize forfeitures: (i) to pay plan expenses, (ii) to reduce employer contributions and/or (iii) to increase participants' benefits. ARA believes this flexibility is essential for proper plan administration. ARA anticipates that plans may need to be amended in certain circumstances to permit use of these methods and such need may not be apparent by the deadline for use of the forfeitures. Under §401(b)(3) of the Code, as added by SECURE 2.0, ARA believes it is clear that a plan could be amended after the deadline set forth in Proposed Rule to provide that forfeitures may be used to increase a nonelective contribution for participants for the prior year. However, it is not clear whether the plan also could be amended retroactively under that provision to provide that forfeitures may be used to pay plan expenses or reduce employer contributions that relate to a prior year. Because use of forfeitures to pay plan expenses ultimately does result in higher accrued benefits (by not allocating expenses to the participant's account), ARA believes that an amendment permitting use of forfeitures to pay plan expenses should be included in the retroactive amendments permitted under §401(b)(3) of the Code. In addition, ARA anticipates that certain plans may not automatically provide for use of forfeitures to reduce employer contributions. While an amendment to provide this use of forfeitures after the plan year would not increase accrued benefits, providing sponsors the ability to retroactively amend the plan to use forfeitures timely would promote overall compliance. Therefore, **ARA recommends** that the Service (i) clarify that the extended amendment deadline set forth in §401(b)(3) of the Code (as added by the SECURE 2.0 Act) applies to discretionary amendments that increase participants' benefits by permitting forfeitures to be used to pay plan expenses and (ii) provide an extended

remedial amendment period similar to the period under §401(b)(3) of the Code for amendments that allow forfeitures to be used to reduce employer contributions for a plan year.

- III. Provide relief under section 411(d)(6) of the Code for amendments adopted to conform to the Proposed Rule.

Defined contribution plan sponsors will need to adopt plan amendments to conform to the Proposed Rule. The amendment deadline will differ depending upon whether the plan is a pre-approved plan or an individually designed plan. Regardless of the type of plan, the deadline applies to provisions that must be amended to conform to the law, as well as any integrally related provisions. an amendment relating to the timing on the use of forfeitures would be required (presumably this would also include the transition rule), and changes to plan provisions on how forfeitures are used would presumably be integrally related to the change in the timing requirements. There is concern, however, that some amendments to change the use of forfeitures (the preamble to the Proposed Rule suggests that plan include all three permitted uses) might result in a violation of the anti-cutback rules of section 411(d)(6) of the Code. If that is the case, then an amendment to change the use of forfeitures may be required sooner than the deadline for amending the plan due to required changes in the law. Therefore, **ARA recommends** that the Service provide section 411(d)(6) relief with respect to amendments that are made to conform to the required provisions, or integrally related to those provisions, provided the amendment is adopted no later than the applicable deadline for adopting required amendments.

These comments are submitted on behalf of and were prepared by ASPPA's IRS Subcommittee, Claire P. Rowland, Esq., QPA, QKA, Chair, on behalf of the ARA. If you have any questions regarding the matters discussed herein, please contact Kelsey N.H. Mayo, Director of Regulatory Policy, at (704) 342-5307. Thank you for your time and consideration.

Sincerely,

/s/

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Executive Director/CEO  
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/s/

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