**AMENDMENT RELATED TO FORFEITURES**

**INSTRUCTIONS**

This is an optional amendment for qualified and 403(b) plans to comply with Prop. Treas. Reg. §1.401-7 dealing with forfeitures. At this writing, the regulations are proposed to be effective for Plan Years beginning after 2023. Taxpayers can rely on the proposed regulations.

This amendment allows a Document Provider to adopt the Forfeiture Amendment on behalf of employers who have adopted the Provider’s plans. The amendment can be used for all types of qualified plans and 403(b) plans. It will apply to all pre-approved plans the Provider maintains, unless the Provider elects in Section 1.6 to exempt a category of plans from the amendment, such as defined benefit plans.

Providers can simply check one of the options at Election 2.3 and sign the amendment. For an employer to override the provider’s choices, the employer should complete 2.1, enter the appropriate selections at 2.3 (and 2.2 if a different effective date is desired), and sign the amendment.

**Is it mandatory to adopt this amendment?**

No. This is an optional provision. Relius documents comply with the proposed regulations and have done so for years. Moreover, the regulations are not final, and the final regulations could make changes to the proposed regulations. As a result, there is no deadline for Employers to amend their plans to conform to the regulations.

**If this is an optional amendment, why would an employer wish to adopt it?**

The proposed regulations include a transition rule which allows defined contribution forfeitures which (erroneously) were not allocated in prior years to be allocated or used in the 2025 plan year. While this relief could be seen as an extension of IRS correction programs, some of our customers have asked for an amendment to specifically authorize the use of this approach.

In addition, the amendment has optional provisions which can be used to address concerns about recent litigation dealing with the use of forfeitures in defined contribution plans. In these cases, the Plan Administrator used discretion granted in the plan document to apply forfeitures to reduce Employer Contributions (rather than using forfeitures to pay plan expenses or to increase Participant allocations). The plaintiffs contend that using forfeitures to offset contributions benefits the Employer and is a fiduciary breach and a prohibited transaction. No court has yet ruled on these cases, although one case has survived a motion to dismiss, while in another case the court granted a motion to dismiss with leave to amend.

In general, Relius documents allow plan sponsors to select multiple options for using forfeitures and, except for our IDP-formatted document, provide that the Plan Administrator has discretion to select between those options. This approach is consistent with long-standing IRS policy but could be subject to challenge if courts accept the arguments brought by the plaintiffs in these cases.

If an employer wishes to avoid the possibility of such a lawsuit, the easiest way to do so is to have the Plan Administrator avoid using forfeitures to reduce employer contributions. No plan amendment is required to achieve this result.

The amendment provides four alternative approaches to the issue for a Plan with an FIS Adoption Agreement format:

* **Election 2.3(a). Do not modify the Plan’s forfeiture use provisions** (except with regard to timing as described in the proposed regulations).
* **Election 2.3(b). Remove the option to use forfeitures to reduce Employer Contributions**. As mentioned above, this approach can be implemented without a plan amendment except for our IDP-formatted product.
* **Election 2.3(c). Provide that forfeitures are used first to reduce Employer Contributions**. This takes away any fiduciary discretion and thereby avoids the issues presented in the lawsuits.
* **Election 2.3(d). Provide that the choice of forfeiture allocation methods rests with the Employer**, acting as such, and in the absence of Employer direction, as the Plan Administrator operationally determines. This retains maximum flexibility. Note that FIS has used this approach in its Cycle 2 403(b) document, which has passed its second level review (although the IRS could still challenge this approach before its final ruling). However, there is a concern that using this approach in an interim amendment could cause the plan to lose reliance on its opinion letter, especially for our IDP-formatted plan.

There is one further approach that can be used. Many documents offer a describe line where the employer can list forfeiture ordering provisions. The Employer can use the existing Adoption Agreement option to address the issue as it wishes, consistent with any parameters in the document.

**When must plans be amended?**

As stated above, there is no deadline to adopt the amendment. Inasmuch as it is a discretionary amendment, it should be adopted by the last day of the Plan Year it is put in operation.

**Can I adopt this Amendment on behalf of all of my employer clients?**

Yes. The attached amendment is designed for a Provider to use. We provide a separate package tailored to individual Employer amendments.

**Can I modify the Amendment?**

Yes. **This Amendment is not an IRS model amendment and has not been reviewed by the IRS.** This Amendment is intended to be a good‑faith amendment. The Cycle 4 Relius defined contribution plan will incorporate this amendment, and the Cycle 2 403(b) plan currently incorporates Election 2.3(d) (although it does not include the transition rule in Section 3.2(a)).

**How does a Document Provider complete the amendment?**

* Complete election 1.6(a) if the amendment will be limited to specified plan types
* Enter the effective date in Section 2.2 if other than the first day of the 2024 Plan Year.
* Select one option in Section 2.3.
* Sign and date the amendment.

**Are other documents available?**

In addition to the Amendment, we have provided a sample Adopting Resolution (for an employer to evidence adoption of the Amendment, if applicable) and a sample Summary of Material Modifications (SMM) for a defined contribution plan. We have not provided a unanimous written consent or other form to actually adopt the amendment, because this will vary depending on local law and on the structure of the employer.

**Will FIS update this Amendment?**

If and when the IRS finalizes the proposed regulation, or if other developments warrant it, Relius may update the amendment as needed.

**AMENDMENT RELATED TO FORFEITURES**

**ARTICLE 1**

**PREAMBLE**

1.1 **Adoption and effective date of Amendment**. The Employer hereby adopts this Amendment to the Plan identified below. Each Article specifies the effective date of its provisions. Also see Section 1.5.

1.2 **Superseding of inconsistent provisions**. This Amendment supersedes the provisions of the Plan to the extent those provisions are inconsistent with the provisions of this Amendment. Except as otherwise provided in this Amendment, terms defined in the Plan will have the same meaning in this Amendment.

1.3 **Numbering.** Except as otherwise provided in this Amendment, any “Section” reference in this Amendment refers only to this Amendment and is not a reference to the Plan. The Article and Section numbering in this Amendment is solely for purposes of this Amendment, and does not relate to the Plan article, section, or other numbering designations.

1.4 **Intention; Construction**. The purpose of this amendment is to amend the Plan in accordance with Prop. Treas. Reg. §1.401-7. The provisions of this Amendment, and any policies and procedures issued or modified pursuant to this amendment, shall be interpreted and applied to be consistent with IRS guidance issued in connection therewith (including subsequent final regulations), whether such guidance is issued before or after the date of this amendment. The Plan Administrator may, but is not required to, reduce such policies or procedures to writing.

1.5 **Effect of subsequent restatement or amendment of Plan.** If the Employer restates the Plan, then this Amendment shall remain in effect after such restatement unless the provisions in this Amendment are restated or otherwise become obsolete (e.g., if the Plan is restated onto a plan document which incorporates these provisions). It is anticipated that the Cycle 4 amendment for defined contribution plans is such a restatement.

1.6 **Adoption by Document Provider**. The Document Provider hereby adopts this Amendment on behalf of all of the Document Provider's Plans adopted by its adopting employers. The “Document Provider” means the Sponsor of a Prototype Plan or Volume Submitter Practitioner of a Volume Submitter Plan as defined in Rev. Proc. 2013-22 or 2015-36, or the Provider of a Pre-approved Plan, as defined in Rev. Proc. 2023-37. References to the “Document Provider’s Plans” or to “pre-approved plans” refer to the Prototype Plans, Volume Submitter Plans, and/or Pre-approved Plans sponsored by the Document Provider for use by adopting employers, as the case may be, except as limited in Section 1.6(a).

(a) [ ] This Amendment will apply to all of the Document Provider’s Plans except the following: *(Optional. List plan types, such as Defined Benefit Plans or IDP-Formatted Plans, which the Document Provider does not wish to amend)*: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**ARTICLE 2**

**IDENTIFICATION; ELECTIONS**

**Instructions: The Document Provider should complete any applicable elections it wishes at Sections 1.6 and 2.3.** If the Employer is satisfied with those choices, the Employer does not need to execute this Amendment. Otherwise, the Employer must complete the information at Section 2.1 and may complete one or more additional elections to indicate the Employer’s preferences.

2.1 **Identifying information.**

 A. Name of Employer: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 B. Name of Plan: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 C. Type of Plan (*select one; optional*)

 (1) [ ] Qualified Defined Contribution Plan

 (2) [ ] Defined Benefit Plan (including a cash balance plan)

 (3) [ ] 403(b) Plan

2.2 **Effective Date**. Unless otherwise elected below, this amendment is effective as of the first day of the first Plan Year beginning in 2024.

(a) [ ] This amendment is effective as of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

2.3 **Discretion on use of forfeitures.** Select one of the following:

(a) [ ] Section 3.2(c), (d), and (e) do not apply.

(b) [ ] Section 3.2(c) applies to prohibit forfeitures from being used to reduce employer contributions.

(c) [ ] Section 3.2(d) applies to require that forfeitures first be used to reduce employer contributions.

(d) [ ] Section 3.2(e) applies to grant the Employer discretion to choose between forfeiture use options. (This option is **not** recommended for the FIS IDP-formatted Preapproved Plan.)

**ARTICLE 3**

**SUBSTANTIVE PROVISIONS**

3.1 **Defined Benefit Plans.** If the Plan is a Defined Benefit Plan, then forfeitures may not be applied to increase the benefits any employee would otherwise receive under the plan at any time prior to the termination of the Plan or the complete discontinuance of Employer contributions thereunder. However, the effect of forfeitures may be anticipated in determining the costs under the Plan. See Code §§430(h)(1), 431(c)(3), and 433(c)(3), as applicable, regarding the use of reasonable actuarial assumptions in determining the amount of contributions required to be made under a plan to which one of those sections applies.

3.2 **Defined contribution plans.** If the Plan is Qualified Defined Contribution Plan or a 403(b) plan, then the following provisions apply.

(a) **Timing.** The Plan Administrator will allocate or apply forfeitures (including the Earnings thereon) in accordance with Plan terms no later than twelve months after the last day of the Plan Year in which the forfeiture occurs. If forfeitures are to be used to pay Plan expenses, the Plan Administrator, consistent with this election, may apply forfeitures to pay Plan expenses which the Plan incurs in the forfeiture allocation Plan Year, but which the Plan Administrator pays within a reasonable time after the end of the forfeiture allocation Plan Year. If the Plan Administrator has applied all available forfeiture application methods permitted under the Plan, and unallocated forfeitures remain, the Plan Administrator will allocate the remaining forfeitures to pay Plan expenses, as an additional discretionary nonelective or matching contribution, as the Employer directs, or, in the absence of Employer direction, as the Plan Administrator operationally determines.

(b) **Transition Rule.** Forfeitures which occurred prior to the first Plan Year beginning in 2024 will be deemed to have satisfied the requirements of this Section if they are applied or otherwise allocated under this Section as though they had occurred in the first Plan Year beginning in 2024.

(c) **Application of Forfeitures.** This paragraph applies only if specified in Election 2.3(b). Forfeitures may not be used to reduce Employer contributions.

(d) **Reduce Contributions First.** This paragraph applies only if specified in Election 2.3(c). Forfeitures shall first be used to reduce Employer contributions. Any remaining forfeitures will be used as directed by the Plan, as amended by paragraph 3.2(a).

(e) **Employer Discretion.** This paragraph applies only if specified in Election 2.3(d). If the Plan provides for more than one method of applying forfeitures, unless the Plan designates a specific ordering method, then the Plan Administrator may allocate the forfeitures by applying one or more methods permitted under the Plan in any order as the Employer directs, or, in the absence of Employer direction, the Plan Administrator operationally determines, until the forfeitures are fully applied in conformance with this Section.

Document Provider Name:

By:

 *(Authorized signer for Document Provider)*

The Document Provider executed this Amendment this day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_.

Complete the information below if the Employer is signing the Amendment.

By:

 *(Authorized signer for Employer)*

The Employer executed this Amendment this day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_.

**CERTIFICATE OF ADOPTING RESOLUTION**

The undersigned authorized representative of (the Employer) hereby certifies that the following resolution was duly adopted by Employer on , and that such resolution has not been modified or rescinded as of the date hereof:

RESOLVED, the Amendment Related to Forfeitures (the Amendment) is hereby approved and adopted and that an authorized representative of the Employer is hereby authorized and directed to execute and deliver to the Plan Administrator the Amendment and to take any and all actions as it may deem necessary to effectuate this resolution.

The undersigned further certifies that attached hereto is a copy of the Amendment approved and adopted in the foregoing resolution.

Date:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Signed:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 [print name/title]

**SUMMARY PLAN DESCRIPTION**

**MATERIAL MODIFICATIONS – FORFEITURE AMENDMENT**

This is a Summary of Material Modifications regarding the \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ ("Plan"). This is merely a summary of important changes to the Plan and information contained in the Summary Plan Description ("SPD") previously provided to you. It supplements and amends that SPD so you should retain a copy of this document with your copy of the SPD. If you have any questions, contact the Administrator. If there is any discrepancy between the terms of the Plan, as modified, and this Summary of Material Modifications, the provisions of the Plan will control.

The Plan has been amended to require that forfeitures be applied no later than the end of the Plan Year in which the forfeitures arise. Previously unused forfeitures can be applied in the 2025 Plan Year. The amendment is effective as of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

*[Include if Election 2.3(b) is selected.]* Under the amendment, forfeitures cannot be used to reduce Employer contributions.

*[Include if Election 2.3(c) is selected.]* Under the amendment, forfeitures will first be used to reduce Employer contributions.

*[Include if Election 2.3(d) is selected.]* Under the amendment, the Employer, acting as the grantor of the Plan and its Trust, has discretion to direct how the Plan will apply forfeitures.