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Before the
2012 ERISA Advisory Council on
Current Challenges and Best Practices
Concerning Beneficiary Designations in
Retirement and Life Insurance Plans

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I am an attorney in the Legal department of FMR LLC, the parent company of a group of financial services companies known as Fidelity Investments ("Fidelity"). Fidelity through several of its affiliates provides administrative record keeping, communications, investment management, trustee and custodial services to defined contribution, defined benefit and health and welfare plans as well as Code Section 403(b) and 457(b) programs covering millions of employees and their beneficiaries.

We appreciate the opportunity to provide comments to the ERISA Advisory Council on the current challenges and best practices concerning beneficiary designations in retirement and life insurance plans. My comments have been tailored to respond to the Council's questions and are based upon Fidelity's experiences in providing administrative record keeping services that involve beneficiary designations and the payment of benefits to participants' beneficiaries.

Beneficiary Designations

Generally, all qualified retirement and section 403(b) and 457(b) plans make beneficiary designation forms available to its participants. As one would expect, the availability and the solicitation of beneficiary designations varies from plan to plan and from employer to employer. Plan size, plan type, demographics and forms of distribution all influence beneficiary designation mechanics. If a plan is serviced by a third party, the provisions of the service agreement may impact the administration of beneficiary designations. Most plans provide the beneficiary designation form to an employee when that employee has met the plan's eligibility requirements. As you know, there will be, depending the plan's provisions, certain required provisions in the form, such as spousal consent for a married participant who wishes to designate someone other than his/her spouse as beneficiary, a description of a qualified preretirement survivor annuity if the plan so provides, etc. For those employers who have adopted Fidelity's pre-approved defined contribution plan, Fidelity will provide sample beneficiary forms that a plan sponsor can make available to its employees. It is up to a plan sponsor to determine whether it wants to use those sample forms for its plan and to maintain that information.

Like many service providers, Fidelity does make available to plans an on-line beneficiary service. If a plan sponsor chooses to make Fidelity's on-line beneficiary service available to its employees, those beneficiary designations are maintained on the plan's internet site accessible to plan sponsors and their employees. Approximately, 3,000 of the defined contribution plans that we service, have elected to use this on-line beneficiary service. While there is no prescribed form or format for a beneficiary form in either the Internal Revenue Code or ERISA, a sample beneficiary form that is available to plan sponsors and service providers and which plans could rely upon for compliance would certainly be helpful to a segment of plans. Such a sample that included the requisite elements, i.e. spousal waiver could be used as a guide by a plan to create its own beneficiary designation form.

<u>Plan Provisions</u>

All plans provide that a participant's spouse will be the primary beneficiary, absent a signed waiver, to insure compliance with Code section 417. The majority of plans also impose a 1-year marriage requirement for spousal beneficiaries. If the participant is not married at the time of his/her death, a plan will generally provide that his/her children will be the beneficiary(ies) and if there are no children, the participant's estate.

Plans do not typically address the issue of the status of the designation of a former spouse as a beneficiary when the employee is divorced. This can lead to confusion and delays in distributions upon the death of the employee and in some situations, can result in litigation for plans. A plan provision or regulatory guidance that provides that the designation of a spouse as the beneficiary is automatically revoked upon the employee's divorce may reduce these types of disputes. One large plan serviced by Fidelity experienced a decrease in beneficiary designation disputes when such a plan provision was adopted. The plan incorporated this provision into its QDRO procedures to specify that the designation of the former spouse as the employee's beneficiary is revoked upon divorce. The employee must complete a new beneficiary form after the QDRO is finalized even if the QDRO includes a provision that requires that the former spouse to be maintained as a beneficiary. If the employee does not do so, the employee will be considered to have designated no beneficiary and the plan's default provisions will govern the beneficiary's determination.

Administrative Services

As indicated above, the administrative services provided to plan sponsors regarding beneficiary designations will be governed by the terms of the service agreement. Fidelity as a directed record keeper will make payment to beneficiaries based the data that it has in its records or the data provided by the plan administrator. If there is any uncertainty relating to the identity of a beneficiary(ies), Fidelity will seek guidance from the plan administrator .

For those plans that either have made Fidelity's on-line beneficiary service available to its employees or who have contracted with Fidelity to maintain its beneficiary designation forms, employees can check their beneficiary designation(s) either through the plan's internet site or by calling a Fidelity toll-free number. Fidelity does not have access to data how frequently plan sponsors re-solicit or remind employees regarding beneficiary designations. Plans to which Fidelity provides services do not typically use our services to re-solicit these designations. During the process of transitioning a plan to Fidelity services, Fidelity suggests that the plan re-solicit participants to provide updated beneficiary designations. Fidelity also recommends that plan sponsors provide annual reminders to employees to update beneficiary designations to reflect changes in life events.

Beneficiaries

Upon the death of a participant, Fidelity usually receives notice from the plan administrator who updates the employee's status through the plan's internet portal. In some situations, Fidelity may be notified by a relative of the participant, often the participant's beneficiary. Upon confirmation of the employee's status either through the plan administrator or by receipt of a certified death certificate, Fidelity will send a notification to the last known address of beneficiary(ies) that is/are listed in Fidelity's records or has been provided by the plan administrator. The beneficiary(ies) is directed to contact Fidelity for more information on the plan benefit. The form of the distribution will be based upon the plan's distribution options, the status of the beneficiary, i.e. spousal, non-spousal, etc. If a beneficiary cannot be located, Fidelity will take direction from the plan administrator on any additional steps to be taken to locate the beneficiary, such as having a third-party search firm look for a different address. If a different address is discovered, a notification will be sent to that address informing the beneficiary of the available benefit. If no new address is found and if the beneficiary still cannot be located, the sponsor will direct Fidelity regarding the disposition of the assets. Whether those assets are forfeited will depend upon the plan's provisions and whether the sponsor treats the beneficiary as "lost". Only assets held in non-ERISA plans would be escheated in accordance with state escheatment laws.

As indicated above, one of most common reasons for disputes over the disposition of benefits upon the death of a participant involves situations where a divorced participant re-marries without updating his/her beneficiary designation. In those situations, the participant may have designated children from the first marriage as his/her beneficiaries or may have failed to revoke his/her prior designation of his/her former spouse. Under the plan, the participant's spouse would automatically be the participant's beneficiary absent a waiver. In some of those situations, if an amicable settlement cannot be reached, a plan will often file an interpleader to resolve the issue. It does appear that the costs of that filing are usually borne by the plan sponsor and are not paid by the plan or deducted from the plan benefit.

Another issue that plan sponsors will wrestle with is the applicability of “slayer” statutes to ERISA plans. While the Internal Revenue Service has indicated in several Private Letter Rulings (“PLR”) (8905058, 9008079 and 9530003) that the application of a state slayer statute will not adversely affect a plan’s qualified status, there has been no comparable guidance under ERISA. The IRS rationale is that these slayer statutes come within the implied exceptions to Code section 401(a)(13)’s anti-assignment, anti-alienation provisions. Although Private Letter Rulings cannot be relied upon except by the taxpayer requesting the ruling, they do indicate the IRS thinking on a particular topic. While there has been no consensus among the courts on whether ERISA would preempt such state laws, it has been Fidelity’s experience in these situations that plan sponsors will give deference to a state’s slayer statute or in rare situations, file an interpleader.

Spousal Waivers/Post-Death QDROs

Plans that provide that a participant may waive the qualified pre-retirement survivor annuity (QPSA) prior to the participant attaining age 35 will re-solicit participant’s beneficiary designation prior to the end of the plan year in which the participant would attain age 35. For plans that do not include this option, the plan provides that a married participant is not able to designate a beneficiary other than his/her spouse until the participant attains age 35. For those plans, the QPSA notice is provided to the participant in the year in which he/she attains age 35 or if later, the year in which he/she begins participation in the plan.

Although the Pension Protection Act of 2006 clarified that a domestic relations order (DRO) that meets the requirements of ERISA section 206(d)(3) will not fail to be a qualified domestic relations order because of the timing of its issuance, i.e. after the death of a participant, it does not appear that this clarification has led to an increase in these types of QDRO requests. Post-death QDROs remain rare.

State Laws

If an estate is the beneficiary, state small estate probate laws expedite beneficiary distributions. These small estate laws provide that in lieu of having a formal appointment of a personal representative for a deceased participant's estate, the individual(s) otherwise entitled to inherit a participant's property, including the plan benefit, submits an affidavit in which the individual attests to compliance with the state's small estate law. The availability of this process depends upon the participant's domicile at the time of his/her death and the dollar amount of the participant's estate. These laws provide clarity and reliability concerning the proper recipient of an estate's assets, as state laws require the "small estate" affidavit to be signed under the penalties of perjury. The dollar amounts and the information required to be included in the affidavit will vary from state to state.

The question of ERISA preemption of state laws does not arise very frequently regarding the processing of death benefits. Plans to which Fidelity provides services have received claims from certain state agencies demanding payment for certain state services, such as paying for the expenses relating to incarceration or for child support payments. In addition, as mentioned above, the question the applicability of slayer statutes to a beneficiary and the assignment of a benefit as the result of a claim made by a participant's (or beneficiaries) creditor, including a state or local governmental agency, will arise occasionally. However, the anti-assignment, anti-alienation provisions will be cited as a response to these situations. Guidance on the applicability of slayer statutes to ERISA plans would provide plan administrators with some certainty and relief when responding to those situations where the statute may have an impact on a beneficiary.

Miscellaneous Issues

There are some other issues that impact distributions of plan benefits to beneficiaries which were not included in your questions. While the DOL cannot provide relief for these issues, other than possible providing explanations of the subject matter on the EBSA website for plan sponsors, we have nevertheless included them in this discussion. Based upon our experience in processing distributions to beneficiaries, the most common situations that may delay distributions relate to minor beneficiaries, “look-through” trusts and qualified disclaimers. When a minor is named as a beneficiary of a retirement plan benefit, the plan administrator is unable to pay that benefit unless the minor has a legal guardian. The legal guardianship process varies from state to state and may involve a time-consuming process to be established. An alternative that is available for minor beneficiaries would be a transfer to a custodian under the Uniform Transfers to Minors Act (UTMA). While the UTMA may not be appropriate for all situations, it could be helpful in many of these instances.

Under Code section 401(a)(9)’s minimum required distribution (MRD) provisions, only individuals may be named as beneficiaries. There is an exception to this restriction for “look-through” trusts. These trusts must be valid under state law, be irrevocable or become irrevocable upon the death of the participant, and provide for identifiable trust beneficiaries who must be individuals. The regulations require that either a copy of the trust be provided to the plan administrator for its determination of whether the trust satisfies these requirements or a certification provided by the trustee to the plan administrator. The certification must include a list of trust’s beneficiaries, indicate that to the best of the trustee’s knowledge the list of the beneficiaries is complete, that the trust is a look-through trust as outlined in regulation 1.401(a)(9)-4 Q&A-6, that the trustee agrees to provide any amendments to the trust and if so requested, provide a copy of the trust instrument to the plan administrator. The trust or the trustee’s certification must be provided to the plan administrator by the October 31st following the calendar year in which the participant died. As a practical matter, most plans rely upon the trustee’s certification letter as opposed to reviewing the trust instrument to make a determination of the look-through trust status.

Finally, plan sponsors are periodically confronted with a qualified disclaimer under Code section 2518 that permits a beneficiary to waive a plan benefit without being subject to tax on that disclaimed benefit. Plans are generally unfamiliar with this tax provision. The primary requirements for these disclaimers are the timing of the submission, i.e. no later than nine (9) months following the participant's death, providing the document to the proper party, i.e. the plan administrator or the payor of benefits and insuring that the disclaimer does not designate the recipient of the disclaimed benefit.

In closing, I would be pleased to respond to any questions or comments from members of the ERISA Advisory Council.

Thank you,

Thomas J. Hohl