

QDROs

The Division of Retirement Benefits Through Qualified Domestic Relations Orders



**U.S. Department of Labor
Employee Benefits Security Administration**

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QDROs

**The Division of Retirement
Benefits Through Qualified
Domestic Relations Orders**

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Introduction

More than 62 million private wage and salary workers are currently covered by employer-provided retirement plans in the United States. For many of these Americans, retirement savings represent one of their most significant assets. For this reason, whether and how to divide a participant's interest in a retirement plan are often important considerations in separation, divorce, and other domestic relations proceedings. While the division of marital property generally is governed by state domestic relations law, any assignments of retirement interests must also comply with Federal law, namely the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). Under ERISA and the Code, retirement interests may be assigned only if the judgment, decree, or order creating or recognizing a spouse's, former spouse's, child's, or other dependent's interest in an individual's retirement benefits constitutes a "qualified domestic relations order" or "QDRO."

This booklet was prepared by the Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor to provide general guidance about QDROs¹ to employers, retirement plan administrators, participants, beneficiaries, employee benefit professionals, and domestic relations specialists. The views expressed in this booklet represent the views of the Department of Labor.

This publication provides general information about the qualified domestic relations orders (QDROs) under the provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986. More information about QDROs submitted to the Pension Benefit Guaranty Corporation after a retirement plan terminates and PBGC becomes the trustee is available from the **Pension Benefit Guaranty Corporation**.

Chapter 1 provides a general overview of the QDRO provisions and the basic rules governing the content of QDROs.

Chapter 2 focuses on the duties of retirement plan administrators in making QDRO determinations and in administering retirement plans for which related QDROs have been issued.

¹The Department of Labor has jurisdiction to interpret the QDRO provisions set forth in section 206(d)(3) of ERISA and section 414(p) of the Code (except to the extent provided in section 401(n) of the Code) and the provisions governing fiduciary duties owed with respect to domestic relations orders and QDROs. This booklet was developed in consultation with the Department of the Treasury and the Internal Revenue Service.

Chapter 3 focuses on issues to be considered in drafting a QDRO. This chapter also discusses the provisions of section 205 of ERISA, which are substantially parallel to the provisions contained in sections 401(a)(11) and 417 of the Code to the extent these sections apply to QDROs. The provisions of section 205 require that retirement plans provide the spouses of retirement plan participants with certain rights to survivor benefits, which are relevant to the provisions governing QDROs. Sample QDRO language developed by the Department of the Treasury and the Internal Revenue Service, in consultation with the Department of Labor, is provided in Appendix C.

It is the hope of EBSA that the information furnished in this booklet will promote better understanding of the rights and obligations of those involved in domestic relations proceedings and those responsible for administering retirement plans.² A better understanding of these provisions of law should reduce the costs and burdens associated with QDRO determinations for both retirement plans and the affected individuals.

The Department recognizes that this booklet does not answer every question that may arise in the development and administration of QDROs. In this regard, the Department is willing to consider addressing specific issues through its advisory opinion process (*but see* Question 1-15 regarding advisory opinion requests on whether a domestic relations order is a QDRO). The ERISA Advisory Opinion Procedure governing this process is set forth in Appendix B of this booklet.

² As used in this booklet, the term “retirement plan” refers to plans defined in section 3(2) of ERISA and means generally any plan established or maintained by an employer or an employee organization (or both) that provides retirement income to employees or results in the deferral of income by employees for periods extending to the termination of covered employment or beyond.

Chapter 1

Qualified Domestic Relations Orders: An Overview

This chapter includes a general overview of the provisions of Federal law governing the assignment of retirement benefits in a domestic relations proceeding and the requirements that apply in determining whether a domestic relations order is a qualified domestic relations order (QDRO). The following areas are addressed:

- ❑ Who can be an “alternate payee”?
- ❑ What information must be included in a domestic relations order in order for it to be “qualified”?
- ❑ Who determines whether a domestic relations order is a QDRO?

In general, ERISA and the Code do not permit a participant to assign or alienate the participant’s interest in a retirement plan to another person. These “anti-assignment and alienation” rules are intended to ensure that a participant’s retirement benefits are actually available to provide financial support during the participant’s retirement years. A limited exception to the anti-assignment and alienation rules is provided for assignments of retirement benefits through qualified domestic relations orders (QDROs).

Under the QDRO exception, a domestic relations order may assign some or all of a participant’s retirement benefits to a spouse, former spouse, child, or other dependent to satisfy family support or marital property obligations if and only if the order is a “qualified domestic relations order.” ERISA requires that each retirement plan pay benefits in accordance with the applicable requirements of any “qualified domestic relations order” that has been submitted to the plan administrator. The plan administrator’s determinations on whether a domestic relations order is a QDRO, therefore, have significant implications for both the parties to a domestic relations proceeding and the plan. The following questions and answers are intended to provide an overview of the Federal requirements a domestic relations order must satisfy to be considered a QDRO.

Q 1-1: What is a Qualified Domestic Relations Order?

A “qualified domestic relations order” (QDRO) is:

- a domestic relations order
- that creates or recognizes the existence of an “alternate payee’s” right to receive, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a retirement plan, and
- that includes certain information and meets certain other requirements. *See Questions 1-5 and 1-6.*

Question 1-4 explains who may be an “alternate payee.”

[ERISA § 206(d)(3)(B)(i); IRC § 414(p)(1)(A)]

Q 1-2: What is a “domestic relations order”?

To be recognized as a QDRO, an order must be a “domestic relations order.” A domestic relations order is:

- a judgment, decree, or order (including the approval of a property settlement)
- that is made pursuant to state domestic relations law (including community property law) and
- that relates to the provision of child support, alimony payments, or marital property rights for the benefit of a spouse, former spouse, child, or other dependent of a participant.

A state authority, generally a court, must actually issue a judgment, order, or decree or otherwise formally approve a property settlement agreement before it can be a “domestic relations order” under ERISA. The mere fact that a property settlement is agreed to and signed by the parties will not, in and of itself, cause the agreement to be a domestic relations order.

There is no requirement that both parties to a marital proceeding sign or otherwise endorse or approve an order. It is also not necessary that the retirement plan be brought into state court or made a party to a domestic relations proceeding for an order issued in that proceeding to be a “domestic relations order” or a “qualified domestic relations order.” Indeed, because state law is generally preempted to the extent that it relates to retirement plans, the Department takes the position that retirement plans cannot be joined as a party in a domestic relations proceeding pursuant to state law. Moreover, retirement plans are neither permitted nor required to follow the terms of domestic relations orders purporting to assign retirement benefits unless they are QDROs.

[ERISA §§ 206(d)(3)(B)(ii), 514(a), 514(b)(7); IRC § 414(p)(1)(B)]

Q 1-3: Must a “domestic relations order” be issued by a state court?

No. A domestic relations order may be issued by any state agency or instrumentality with the authority to issue judgments, decrees, or orders, or to approve property settlement agreements, pursuant to state domestic relations law (including community property law).

[ERISA § 206(d)(3)(B)(ii); IRC § 414(p)(1)(B); Advisory Opinion 2001-06A (Appendix A)]

Q 1-4: Who can be an “alternate payee”?

A domestic relations order can be a QDRO only if it creates or recognizes the existence of an alternate payee’s right to receive, or assigns to an alternate payee the right to receive, all or a part of a participant’s benefits. For purposes of the QDRO provisions, an alternate payee cannot be

anyone other than a spouse, former spouse, child, or other dependent of a participant.

[ERISA § 206(d)(3)(K), IRC § 414(p)(8)]

Q 1-5: What information must a domestic relations order contain to qualify as a QDRO under ERISA?

QDROs must contain the following information:

- the name and last known mailing address of the participant and each alternate payee;
- the name of each plan to which the order applies;
- the dollar amount or percentage (or the method of determining the amount or percentage) of the benefit to be paid to the alternate payee; and
- the number of payments or time period to which the order applies.

[ERISA § 206(d)(3)(C)(i)-(iv); IRC § 414(p)(2)(A)-(D)]

Q 1-6: Are there other requirements that a domestic relations order must meet to be a QDRO?

Yes. There are certain provisions that a QDRO must not contain:

- The order must not require a plan to provide an alternate payee or participant with any type or form of benefit, or any option, not otherwise provided under the plan;
- The order must not require a plan to provide for increased benefits (determined on the basis of actuarial value);
- The order must not require a plan to pay benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a QDRO; and

- The order must not require a plan to pay benefits to an alternate payee in the form of a qualified joint and survivor annuity for the lives of the alternate payee and his or her subsequent spouse.

[ERISA §§ 206(d)(3)(D)(i)-(iii), 206(d)(3)(E)(i)(III);
IRC §§ 414(p)(3)(A)-(C), 414(p)(4)(A)(iii)]

Q 1-7: May a QDRO be part of the divorce decree or property settlement?

Yes. There is nothing in ERISA or the Code that requires that a QDRO (that is, the provisions that create or recognize an alternate payee’s interest in a participant’s retirement benefits) be issued as a separate judgment, decree, or order. Accordingly, a QDRO may be included as part of a divorce decree or court-approved property settlement, or issued as a separate order, without affecting its “qualified” status. The order must satisfy the requirements described above to be a QDRO.

[See generally ERISA § 206(d)(3)(B); IRC § 414(p)(1)]

Q 1-8: Must a domestic relations order be issued as part of a divorce proceeding to be a QDRO?

No. A domestic relations order that provides for child support or recognizes marital property rights may be a QDRO, without regard to the existence of a divorce proceeding. Such an order, however, must be issued pursuant to state domestic relations law and create or recognize the rights of an individual who is an “alternate payee” (spouse, former spouse, child, or other dependent of a participant).

An order issued in a probate proceeding begun after the death of the participant that purports to recognize an interest with respect to retirement benefits arising solely under state community property law, but that doesn’t relate to the dissolution of a marriage or recognition of support obligations, is not a QDRO because the proceeding does not relate to a legal separation, marital dissolution, or family support obligation.

[ERISA § 206(d)(3)(B); IRC § 414(p)(1); Advisory Opinion 90-46A (Appendix A); *see Egelhoff v. Egelhoff*, 121 S.Ct. 1322, 149L. Ed. 2d 264 (2001); *see Boggs v. Boggs*, 520 U.S. 833, 117 S.Ct. 1754 (1997)]

Q 1-9: Will a domestic relations order fail to be a QDRO solely because of the timing of issuance?

No, not if it otherwise meets the QDRO requirements under ERISA. A domestic relations order issued after the participant's death, divorce, or annuity starting date, or subsequent to an existing QDRO, will not fail to be treated as a QDRO solely because of the timing of issuance. For example, a subsequent domestic relations order between the same parties which revises an earlier QDRO does not fail to be a QDRO solely because it was issued after the first QDRO. Likewise, a subsequent domestic relations order between different parties which directs a portion of the participant's previously unallocated benefits to a second alternate payee, does not fail to be a QDRO solely because of the existence of a previous QDRO. Further, a domestic relations order requiring a portion of a participant's annuity benefit payments be paid to an alternate payee does not fail to be a QDRO solely because the domestic relations order was issued after the annuity starting date.

[29 C.F.R. 2530.206; *see* section 1001 of the Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780 (Aug. 17, 2006)]

Q 1-10 : May a QDRO provide for payment to the guardian of an alternate payee?

Yes. If an alternate payee is a minor or is legally incompetent, the order can require payment to someone with legal responsibility for the alternate payee (such as a guardian or a party acting *in loco parentis* in the case of a child, or a trustee as agent for the alternate payee).

[*See* Staff of the Joint Committee on Taxation, Explanation of Technical Corrections to the Tax Reform Act of 1984 and Other Recent Tax Legislation, 100th Cong., 1st Sess. (Comm. Print 1987) at 222.]

Q 1-11: Can a QDRO cover more than one plan?

Yes. A QDRO can assign rights to retirement benefits under more than one retirement plan of the same or different employers as long as each plan and the assignment of benefit rights under each plan are clearly specified.

[ERISA § 206(d)(3)(C)(iv); IRC § 414(p)(2)(D)]

Q 1-12: Must all QDROs have the same provisions?

No. Although every QDRO must contain certain provisions, such as the names and addresses of the participant and alternate payee(s) and the name of the plan(s), the specific content of the rest of the QDRO will depend, as explained in more detail in Chapter 3, on the type of retirement plan, the nature of the participant's retirement benefits, the purposes behind issuing the order, and the intent of the drafting parties.

Q 1-13: Who determines whether an order is a QDRO?

Under Federal law, the administrator of the retirement plan that provides the benefits affected by an order is the individual (or entity) initially responsible for determining whether a domestic relations order is a QDRO. Plan administrators have specific responsibilities and duties with respect to determining whether a domestic relations order is a QDRO. Plan administrators, as plan fiduciaries, are required to discharge their duties prudently and solely in the interest of plan participants and beneficiaries. Among other things, plans must establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions pursuant to qualified orders. Administrators are required to follow the plan's procedures for making QDRO determinations. Administrators also are required to furnish notice to participants and alternate payees of the receipt of a domestic relations order and to furnish a copy of the plan's procedures for determining the qualified status of such orders. *See* Chapter 2 for a detailed discussion of the duties and responsibilities of plan administrators in making QDRO determinations.

It is the view of the Department of Labor that a state court (or other state agency or instrumentality with the authority to issue domestic relations orders) does not have jurisdiction to determine whether an issued domestic relations order constitutes a “qualified domestic relations order.” In the view of the Department, jurisdiction to challenge a plan administrator’s decision about the qualified status of an order lies exclusively in Federal court.

[ERISA §§ 206(d)(3)(G)(i) and (ii), 404(a), 502(a)(3), 502(e), 514; IRC § 414(p)(6)(A)(ii)]

Q 1-14: Who is the “administrator” of the plan?

The “administrator” of an employee benefit plan is the individual or entity specifically designated in the plan documents as the administrator. If the plan documents do not designate an administrator, the administrator is the employer maintaining the plan, or, in the case of a plan maintained by more than one employer, the association, committee, joint board of trustees, or similar group representing the parties maintaining the plan. The name, address, and phone number of the plan administrator is required to be included in the plan’s summary plan description. The summary plan description is a document that the administrator is required to furnish to each participant and to each beneficiary receiving benefits. It summarizes the rights and benefits of participants and beneficiaries and the obligations of the plan.

[ERISA §§ 3(16), 102(b), 29 CFR § 2520.102-3(f); IRC § 414(g), Treas. Reg. § 1.414(g)-1]

Q 1-15: Will the Department of Labor issue advisory opinions on whether a domestic relations order is a QDRO?

No. A determination of whether an order is a QDRO necessarily requires an interpretation of the specific provisions of the plan or plans to which the order applies and the application of those provisions to specific facts, including a determination of the participant's actual retirement benefits under the plan(s). The Department will not issue opinions on such inherently factual matters.

[See ERISA Procedure 76-1, 41 Fed. Reg. 36281 (1976)
(Appendix B)]

Chapter 2

Administration of QDRO: Determining Qualified Status and Paying Benefits

This chapter describes the duties of a plan administrator in determining the qualified status of domestic relations orders and administering distributions under QDROs. The following areas are addressed:

- ❑ What are the plan administrator’s responsibilities in furnishing information to a participant and alternate payee?
- ❑ What measures must a plan administrator take to protect the plan participant’s benefits upon receipt of a domestic relations order?
- ❑ What procedures must a plan administrator follow in determining whether a domestic relations order is a QDRO?

ERISA imposes a number of responsibilities on the plan administrator relating to the handling of domestic relations orders. As a plan fiduciary, the administrator is required to discharge these responsibilities prudently and solely in the interest of the plan’s participants and beneficiaries. It is the view of the Department that the prudent discharge of a fiduciary’s responsibilities with respect to the handling of domestic relations orders, like other areas of plan administration, requires plan administrators to take steps to avoid unnecessary and excessive administrative burdens and costs to the plan. The Department believes that the adoption of procedures and policies designed to facilitate, rather than impede, the timely processing and perfection of domestic relations orders generally will serve to minimize plan burdens and costs attendant to QDRO determinations.

The following questions and answers are intended to provide guidance on the discharge of an administrator’s obligations under the QDRO and fiduciary responsibility provisions of ERISA.

Q 2-1: What information is an administrator required to provide a prospective alternate payee before the administrator receives a domestic relations order?

Congress conditioned an alternate payee's right to an assignment of a participant's retirement benefit on the prospective alternate payee's obtaining a domestic relations order that satisfies specific informational and other requirements. It is the view of the Department that Congress therefore intended prospective alternate payees -- spouses, former spouses, children, and other dependents of a participant who are involved in a domestic relations proceeding -- to have access to plan and participant benefit information sufficient to prepare a QDRO. Such information might include the summary plan description, relevant plan documents, and a statement of the participant's benefit entitlements.

The Department believes that Congress did not intend to require prospective alternate payees to submit a domestic relations order to the plan as a prerequisite to establishing the prospective alternate payee's rights to information in connection with a domestic relations proceeding. However, it is the view of the Department that a plan administrator may condition disclosure of such information on a prospective alternate payee's providing information sufficient to reasonably establish that the disclosure request is being made in connection with a domestic relations proceeding.

It is the Department's understanding that many domestic relations orders fail initially to qualify when submitted to the plan because they fail to take into account the plan's provisions or the participant's actual benefit entitlements. Affording prospective alternate payees access to plan and participant information in a timely manner will, in the view of the Department, help drafters avoid making such obvious errors in preparing orders and, thereby, facilitate plan administration. *See* Question 2-5.

[ERISA §§ 206(d)(3)(A) - (C), 404(a); IRC § 414(p)(1) - (3)]

Q 2-2: What are the duties of a plan administrator upon receipt of a domestic relations order by the plan?

Upon receipt of a domestic relations order, the plan administrator is required to promptly notify the affected participant and each alternate payee named in the order of the receipt of the order and to provide a copy of the plan's procedures for determining whether a domestic relations order is a QDRO. Notification should be sent to the address included in the domestic relations order.

The administrator is required to determine whether the order is a QDRO within a reasonable period of time after receipt of a domestic relations order and to promptly notify the participant and each alternate payee of such determination. *See* Question 2-10.

[ERISA § 206(d)(3)(G)(i); IRC § 414(p)(6)(A)]

Q 2-3: Is a plan required to have procedures for determining whether a domestic relations order is qualified?

Yes. Every retirement plan is required to establish written procedures for determining whether domestic relations orders are QDROs and for administering distributions under QDROs.

[ERISA § 206(d)(3)(G)(ii); IRC § 414(p)(6)(B)]

Q 2-4: What requirements must a plan's QDRO procedures meet?

The QDRO procedures must:

- be in writing;
- be reasonable;

- provide that each person specified in a domestic relations order received by the plan as entitled to payment of benefits under the plan will be notified (at the address specified in the domestic relations order) of the plan's procedures for making QDRO determinations upon receipt of a domestic relations order, and
- permit an alternate payee to designate a representative for receipt of copies of notices and plan information that are sent to the alternate payee with respect to a domestic relations order.

[ERISA § 206(d)(3)(G)(ii); IRC § 414(p)(6)]

Q 2-5: Are there *other* matters that should be addressed in a plan's QDRO procedures?

Yes. It is the view of the Department of Labor that a plan's QDRO procedures should be designed to ensure that QDRO determinations are made in a timely, efficient, and cost-effective manner, consistent with the administrator's fiduciary duties under ERISA. The Department believes that unnecessary administrative burdens and costs attendant to QDRO determinations and administration can be avoided with clear explanations of the plan's determination process, including:

- An explanation of the information about the plan and benefits that is available to assist prospective alternate payees in preparing QDROs, such as summary plan descriptions, plan documents, individual benefit and account statements, and any model QDROs developed for use by the plan (*see* Questions 2-1, 2-7);
- A description of any time limits set by the plan administrator for making determinations;
- A description of the steps the administrator will take to protect and preserve retirement assets or benefits upon receipt of a domestic relations order (for example, a description of when and under what

circumstances plan assets will be segregated or benefit payments will be delayed or suspended) (*See* Questions 2-12, 2-13) and

- A description of the process provided under the plan for obtaining a review of the administrator’s determination as to whether an order is a QDRO.

It is the view of the Department that the plan administrator’s adoption and use of clear QDRO procedures, coupled with the administrator’s provision of information about the plan and benefits upon request, will significantly reduce the difficulty and expense of obtaining and administering QDROs by minimizing confusion and uncertainty about the process.

[ERISA §§ 206(d)(3)(G), 206(d)(3)(H), 404(a); IRC §§ 414(p)(6), 414(p)(7)]

Q 2-6: May a plan administrator charge a participant or alternate payee for determining the qualified status of a domestic relations order?

The Department has taken the position that in the context of a defined contribution plan, an administrator may assess reasonable expenses attributable to a QDRO determination against the individual account of the participant who is a party to the domestic relations order. The documents of the plan should be reviewed to determine how plan expenses are allocated.

[ERISA § 404(a); see Field Assistance Bulletin 2003-3 (see Appendix A)]

Q 2-7: May plan administrators provide parties with a model form or forms to assist in the preparation of a QDRO?

Yes. Although they are not required to do so, plan administrators may develop and make available “model” QDRO forms to assist in the

preparation of a QDRO. Such model forms may make it easier for the parties to prepare a QDRO and reduce the time and expenses associated with a plan administrator's determination of the qualified status of an order. Examples of sample language that may be included in such forms are provided in Appendix C.

Plan administrators are required to honor any domestic relations order that satisfies the requirements to be a QDRO. In the view of the Department, therefore, a plan may not condition its determinations of QDRO status on the use of any particular form.

Q 2-8: In determining the qualified status of a domestic relations order, is the administrator required to determine the validity of the order under state domestic relations law?

No. A plan administrator is generally not required to determine whether the issuing court or agency had jurisdiction to issue an order, whether state law is correctly applied in the order, whether service was properly made on the parties, or whether an individual identified in an order as an alternate payee is in fact a spouse, former spouse, child, or other dependent of the participant under state law.

[See Advisory Opinion 99-13A (Appendix A); Advisory Opinion 92-17A (Appendix A)]

Q 2-9: Is a plan administrator required to reject a domestic relations order as defective if the order fails to specify factual identifying information that is easily obtainable by the plan administrator?

No. In many cases, an order that is submitted to a plan may clearly describe the identity and rights of the parties, but may be incomplete only with respect to factual identifying information within the plan administrator's knowledge or easily obtained through a simple communication with the alternate payee or the participant. For example, an order may misstate the plan's name or the names of participants or alternate payees, and the plan administrator can clearly determine the correct names, or an order

may omit the addresses of participants or alternate payees, and the plan administrator's records include this information. In such a case, the plan administrator should supplement the order with the appropriate identifying information, rather than rejecting the order as not qualified.

[ERISA §§ 206(d)(3)(C), 206(d)(3)(I); IRC § 414(p)(2);
see S. Rep. 575, 98th Cong., 2d Sess. at 20]

Q 2-10: How long may the plan administrator take to determine whether a domestic relations order is a QDRO?

Plan administrators must determine whether a domestic relations order is a QDRO within a reasonable period of time after receiving the order. What is a reasonable period will depend on the specific circumstances. For example, a domestic relations order that is clear and complete when submitted should require less time to review than an order that is incomplete or unclear. *See* Question 2-12.

Plans are required to adopt reasonable procedures for determining the qualified status of domestic relations orders. Compliance with such procedures should ensure that determinations of the qualified status of an order take place within a reasonable period of time. Procedures that unduly inhibit or hamper the QDRO determination process will not be considered reasonable procedures. *See* Question 2-4.

[ERISA § 206(d)(3)(G)(i)(II); IRC § 414(p)(6)(A)(ii)]

Q 2-11: What must the plan administrator do during the determination process to protect against wrongly paying retirement benefits to the participant that would be paid to the alternate payee if the domestic relations order had been determined to be a QDRO?

During any period in which the issue of whether a domestic relations order is a QDRO is being determined (by a plan administrator, by a court

of competent jurisdiction, or otherwise), ERISA requires that the plan administrator separately account for the amounts that would be payable to an alternate payee under the terms of the order during such period if the order had been determined to be qualified. These amounts are referred to as “segregated amounts.” During the period in which the status of a domestic relations order is being determined, the plan administrator must take steps to ensure that amounts that would have been payable to the alternate payee, if the order were a QDRO, are not distributed to the participant or any other person.

The plan administrator’s duty to separately account for and to preserve the segregated amounts is limited in time. ERISA provides that the plan administrator must preserve the segregated amounts for not longer than the end of an “18-month period.” This “18-month period” does not begin until the first date (after the plan receives the order) that the order would require payment to the alternate payee.

It is the view of the Department that, in order to ensure the availability of a full 18-month protection period, the 18 months cannot begin before the plan receives a domestic relations order. Rather, the “18-month period” will begin on the first date on which a payment would be required to be made under an order *following receipt by the plan*. See Questions 2-12 and 2-13, which discuss how benefits should be treated when determinations on qualified status are made either before or after the beginning of the “18-month period.”

[ERISA §§ 206(d)(3)(H), 404(a); IRC § 414(p)(7)]

Q 2-12: What are an administrator’s duties with respect to a domestic relations order received by the plan before the beginning of the “18-month period”?

As explained in Question 2-10, a plan administrator must determine whether a domestic relations order is a QDRO within a reasonable period following receipt. In the view of the Department, the “18-month

period” during which a plan administrator must preserve the “segregated amounts” (*see* Question 2-11) is not the measure of the reasonable period for determining the qualified status of an order and in most cases would be an unreasonably long period of time to take to review an order.

It is further the view of the Department that, during the determination period, the administrator, as a plan fiduciary, may not permit distributions to the participant or any other person of any amounts that would be payable to the alternate payee if the domestic relations order were determined to be a QDRO. If the domestic relations order is determined to be a QDRO before the first date on which benefits are payable to the alternate payee, the plan administrator has a continuing duty to account for and to protect the alternate payee’s interest in the plan to the same extent that the plan administrator is obliged to account for and to protect the interests of the plan’s participants. The plan administrator also has a fiduciary duty to pay out benefits in accordance with the terms of the QDRO.

The Department understands that orders that are initially rejected by the plan administrator as not qualified are frequently revised and resubmitted within a short period of time. The Department also recognizes that in some instances plan administrators who reject an order may receive requests from participants for immediate distribution of benefits under circumstances that suggest that the rejected order is being revised and will shortly be resubmitted to the plan. In such circumstances, the plan administrator may be subject to conflicting claims for either paying the benefit or failing to pay the benefit. The Department suggests that plan administrators may wish to consider the establishment of a process for providing preliminary or interim review of orders, and postponing final determinations for limited periods, to permit parties to correct defects within the 18-month segregation period. Such a process would reduce the likelihood of conflicting claims.

[ERISA §§ 206(d)(3)(H), 404(a)]

Q 2-13: What are an administrator’s duties with respect to a domestic relations order received on or after the date on which benefits would be payable to an alternate payee under the order?

Upon receipt of a domestic relations order, the administrator must separately account for and preserve the amounts that would be payable to an alternate payee until a determination is made with respect to the status of the order. *See* Questions 2-11, 2-12. If, within the “18-month period” -- beginning with the date (after receipt of the order by the plan) on which the first payment would be required to be made to an alternate payee under the order -- the plan administrator determines that the order is a QDRO, the plan administrator must pay the segregated amounts to the alternate payee in accordance with the terms of the QDRO. If, however, the plan administrator determines within the “18-month period” that the order is not a QDRO, or if the status of the order is not resolved by the end of the “18-month period,” the plan administrator must pay out the segregated amounts to the person or persons who would have been entitled to such amounts if there had been no order. If the order is later determined to be a QDRO, the order will apply only prospectively; that is, the alternate payee will be entitled only to amounts payable under the order after the subsequent determination. *See* Question 2-12.

[ERISA §§ 206(d)(3)(H), 404(a); IRC § 414(p)(7); *but see* H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-858 (describing 1986 amendments to the Retirement Equity Act of 1984, including clarification of the procedures to be followed during the 18-month segregation period for QDRO determinations)]

Q 2-14: What kind of notice is required to be provided by a plan administrator following a QDRO determination?

The plan administrator is required to notify the participant and each alternate payee of the administrator’s determination as to whether the order constitutes a QDRO. This notice should be in writing and furnished promptly following a determination.

In the case of a determination that an order is not qualified, the notice should include the reasons for the rejection. It is the view of the Department that, in most instances where there has been a reasonable good faith effort to prepare a qualified domestic relations order, the parties will attempt to correct any deficiencies in the order and resubmit a corrected order for the plan administrator to review. The Department believes that, where a reasonable good faith effort has been made to draft a QDRO, prudent plan administration requires the plan administrator to furnish to the parties the information, advice, and guidance that is reasonably required to understand the reasons for a rejection, either as part of the notification process or otherwise, if such information, advice, and guidance could serve to reduce multiple submissions of deficient orders and therefore the burdens and costs to plans attendant on review of such orders.

The notice of the plan administrator's determination should be written in a manner that can be understood by the parties. Multiple submissions and unnecessary expenses may be avoided by clearly communicating in the rejection notice:

- the reasons why the order is not a QDRO;
- references to the plan provisions on which the plan administrator's determination is based;
- an explanation of any time limits that apply to rights available to the parties under the plan (such as the duration of any protective actions the plan administrator will take); and
- a description of any additional material, information, or modifications necessary for the order to be a QDRO and an explanation of why such material, information, or modifications are necessary.

[ERISA §§ 206(d)(3)(G)(i)(II), 206(d)(3)(I); IRC § 414(p)(6)(A)(ii)]

Q 2-15: What effect does an order that a plan administrator has determined to be a QDRO have on the administration of the plan?

The plan administrator must act in accordance with the provisions of the QDRO as if it were a part of the plan. In particular, if, under a plan, a participant has the right to elect the form in which benefits will be paid, and the QDRO gives the alternate payee that right, the plan administrator must permit the alternate payee to exercise that right under the circumstances and in accordance with the terms that would apply to the participant, as if the alternate payee were the participant.

[ERISA §§ 206(d)(3)(A), 206(d)(3)(E)(i)(III); IRC §§ 401(a)(13)(B), 414(p)(4)(A)(iii)]

Q 2-16: What disclosure rights does an alternate payee have under a QDRO?

ERISA provides that a person who is an alternate payee under a QDRO generally shall be considered a beneficiary under the plan for purposes of ERISA. Accordingly, the alternate payee must be furnished, upon written request, copies of a variety of documents, including the latest summary plan description, the latest annual report, any final annual report, and the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated. The administrator may impose a reasonable charge to cover the cost of furnishing such copies. It is the view of the Department that, at such time as benefit payments to the alternate payee commence under the QDRO, the alternate payee must be treated as a “beneficiary receiving benefits under the plan” and automatically furnished the summary plan description, summaries of material plan changes, and the plan’s summary annual report.

[ERISA §§ 104, 105, 206(d)(3)(J), 404(a); 29 CFR § 2520.104b-1 *et seq.*]

Q 2-17: What happens to the rights created by a QDRO if the plan to which the QDRO applies is amended, merged into another plan, or is maintained by a successor employer?

The rights of an alternate payee under a QDRO are protected in the event of plan amendments, a plan merger, or a change in the sponsor of the plan to the same extent that rights of participants or beneficiaries are protected with respect to benefits accrued as of the date of the event.

[ERISA §§ 204(g), 206(d)(3)(A), 403(c)(1); IRC §§ 401(a)(13)(B), 411(d)(6); *see* Staff of the Joint Committee on Taxation, Explanation of Technical Corrections to the Tax Reform Act of 1984 and Other Recent Tax Legislation, 100th Cong., 1st Sess. (Comm. Print 1987) at 224]

Q 2-18: What happens to the rights created by a QDRO if a plan is terminated?

In the view of the Department, the rights granted by a QDRO must be taken into account in the termination of a plan as if the terms of the QDRO were part of the plan. To the extent that the QDRO grants the alternate payee part of the participant's benefits, the plan administrator, in terminating the plan, must provide the alternate payee with the notification, consent, payment, or other rights that it would have provided to the participant with respect to that portion of the participant's benefits.

[ERISA §§ 206(d)(3)(A), 403(d)]

Q 2-19: What happens to the rights created by a QDRO if a defined benefit plan is terminated and the Pension Benefit Guaranty Corporation becomes trustee of the plan?

The Pension Benefit Guaranty Corporation (PBGC) is a Federal agency that insures pension benefits in most private-sector defined benefit pension

plans. It is important to note that not all plans are insured by PBGC and not all plans that terminate become trustee by PBGC. For example, defined contribution plans (including 401(k) plans) are generally not covered by PBGC's insurance. In addition, most defined benefit plans that terminate have sufficient assets to pay all benefits. PBGC does not trustee these plans. *See* Question 3-4 for a discussion of these basic types of retirement plans.

When an insured plan terminates without enough money to pay all guaranteed benefits, PBGC becomes trustee of the terminating plan and pays the plan benefits subject to certain limits. For instance, PBGC does not pay certain death and supplemental benefits. In addition, benefit amounts and the forms of benefit PBGC pays are limited. PBGC has special rules that apply these guarantee limitations to QDROs. *See* PBGC's booklet, **Qualified Domestic Relations Orders & PBGC**.

For information about a specific domestic relations order or QDRO affecting a plan trustee by PBGC, write to PBGC QDRO Coordinator, P.O. Box 151750, Alexandria, VA 22315-1750. For information about terminated pension plans that PBGC has trustee, benefit information with respect to a participant in a PBGC-trustee plan, or to request a copy of PBGC's booklet, call PBGC's Customer Contact Center at 1-800-400-PBGC (7242). The booklet is also available on the **Internet**.

Chapter 3

Drafting QDROs

This chapter provides guidance for the process of drafting domestic relations orders that qualify as QDROs. The following areas are addressed:

- ❑ What are the most common and useful ways of dividing retirement benefits?
- ❑ What are survivor benefits, and why are they important?
- ❑ When can an alternate payee receive the benefits assigned by a QDRO?
- ❑ In what form will the alternate payee receive the assigned benefits?

Although domestic relations orders that involve retirement plans are issued under and governed by state law, Federal law (ERISA and the Code) and the terms of the relevant retirement plan determine whether these orders can be QDROs. This chapter discusses how to draft orders that will qualify as QDROs while accomplishing the purposes for which the retirement benefits are being divided.

This chapter also discusses the most common methods of dividing retirement benefits under the two separate types of retirement plans: defined benefit plans and defined contribution plans. The following questions and answers emphasize the importance of understanding the nature of a participant's retirement benefits and of making decisions about the assignment of any survivor benefits payable under the retirement plan.

Q 3-1: What is the best way to divide a participant's retirement benefits in a QDRO?

There is no single “best” way to divide retirement benefits in a QDRO. What will be “best” in a specific case will depend on many factors, including the type of retirement plan, the nature of the participant’s retirement benefits, and why the parties are seeking to divide those benefits.

In deciding how to divide a participant’s retirement benefits in a QDRO, it is also important to consider two aspects of a participant’s retirement benefits: the benefit payable under the plan directly to the participant for retirement purposes (referred to here as the “retirement benefit”), and any benefit that is payable under the plan on behalf of the participant to someone else after the participant dies (referred to here as the “survivor benefit”). These two aspects of a participant’s retirement benefits are discussed separately in this booklet only in order to emphasize the importance of considering how best to divide retirement benefits.

The following four questions and answers introduce the basic concepts that should inform decisions about drafting QDROs. Question 3-2 explains the scope of assignment permitted by the QDRO provisions; Questions 3-3 and 3-4 relate primarily to the retirement benefit; Question 3-5 describes survivor benefits. Later questions present more specific information about how to draft QDROs.

Q 3-2: How much can be given to an alternate payee through a QDRO?

A QDRO can give an alternate payee any part or all of the retirement benefits payable with respect to a participant under a retirement plan. However, the QDRO cannot require the plan to provide increased benefits (determined on the basis of actuarial value); nor can a QDRO require a plan to provide a type or form of benefit, or any option, not otherwise provided under the plan (with one exception, described in Questions 3-9 and 3-10, for an alternate payee’s right to receive payment at the participant’s “earliest retirement age”). The QDRO also cannot require the payment of benefits to an alternate payee that are required to be paid to another alternate payee under another QDRO already recognized by the plan.

[ERISA §§ 206(d)(3)(B)(i)(I), 206(d)(3)(D), 206(d)(3)(E); IRC §§ 414(p)(1)(A)(i), 414(p)(3), 414(p)(4); Advisory Opinion 2000-09A (see Appendix A)]

Q 3-3: Why are the reasons for dividing the retirement benefits important?

Generally, QDROs are used either to provide support payments (temporary or permanent) to the alternate payee (who may be the spouse, former spouse or a child or other dependent of the participant) or to divide marital property in the course of dissolving a marriage. These differing goals often result in different choices in drafting a QDRO. This answer describes two common different approaches in drafting QDROs for these two different purposes.

One approach that is used in some orders is to “split” the actual benefit payments made with respect to a participant under the plan to give the alternate payee part of each payment. This approach to dividing retirement benefits is often called the “shared payment” approach. Under this

approach, the alternate payee will not receive any payments unless the participant receives a payment or is already in pay status. This approach is often used when a support order is being drafted after a participant has already begun to receive a stream of payments from the plan (such as a life annuity).

An order providing for shared payments, like any other QDRO, must specify the amount or percentage of the participant's benefit payments that is assigned to the alternate payee (or the manner in which such amount or percentage is to be determined). It must also specify the number of payments or period to which it applies. This is particularly important in the shared payment QDRO, which must specify when the alternate payee's right to share the payments begins and ends. For example, when a state authority seeks to provide support to a child of a participant, an order might require payments to the alternate payee to begin as soon as possible after the order is determined to be a QDRO and to continue until the alternate payee reaches maturity. Alternatively, when support is being provided to a former spouse, the order might state that payments to the alternate payee will end when the former spouse remarries. If payments are to end upon the occurrence of an event, notice and reasonable substantiation that the event has occurred must be provided for the plan to be able to comply with the terms of the QDRO.

Orders that seek to divide a retirement benefit as part of the marital property upon divorce or legal separation often take a different approach to dividing the retirement benefit. These orders usually divide the participant's retirement benefit (rather than just the payments) into two separate portions with the intent of giving the alternate payee a separate right to receive a portion of the retirement benefit to be paid at a time and in a form different from that chosen by the participant. This approach to dividing a retirement benefit is often called the "separate interest" approach.

An order that provides for a separate interest for the alternate payee must specify the amount or percentage of the participant's retirement benefit to be assigned to the alternate payee (or the manner in which such amount or percentage is to be determined). The order must also specify the number of payments or period to which it applies, and such orders often satisfy this requirement simply by giving the alternate payee the right that the participant would have had under the plan to elect the form of benefit payment and the time at which the separate interest will be paid. Such an order would satisfy the requirements to be a QDRO.

Federal law does not require the use of either approach for any specific domestic relations purpose, and it is up to the drafters of any order to determine how best to achieve the purposes for which retirement benefits are being divided. Further, the shared payment approach and the separate interest approach can each be used for either defined benefit or defined contribution plans. *See* Question 3-4 for a discussion of the two basic types of retirement plans. However, it is important in drafting any order to understand and follow the terms of the plan. An order that would require a plan to provide increased benefits (determined on an actuarial basis) or to provide a type or form of benefit, or an option, not otherwise available under the plan cannot be a QDRO. *See* Questions 3-4, 3-6, and 3-7 for further information on dividing retirement benefits under defined benefit and defined contribution plans.

In addition to determining whether or how to divide the retirement benefit, it is important to consider whether or not to give the alternate payee a right to survivor benefits or any other benefits payable under the plan. *See* Question 3-5 for a discussion of survivor benefits.

[ERISA § 206(d)(3)(C)(ii) - (iv); IRC § 414(p)(2)(B) - (D)]

Q 3-4: In deciding how to divide the participant's retirement benefits, why is understanding the type of retirement plan important?

Understanding the type of retirement plan is important because the order cannot be a QDRO unless its assignment of rights or division of retirement benefits complies with the terms of the plan. Parties drafting a QDRO should read the plan's summary plan description and other plan documents to understand what retirement benefits are provided under the plan.

Retirement plans may be divided generally into two types: defined benefit plans and defined contribution plans.

A defined benefit plan promises to pay each participant a specific benefit at retirement. This basic retirement benefit is usually based on a formula that takes into account factors like the number of years a participant works for the employer and the participant's salary. The basic retirement benefit is generally provided in the form of periodic payments for the participant's life beginning at what the plan calls "normal retirement age." This stream of periodic payments is generally known as an "annuity." A participant's basic retirement benefit under a defined benefit plan may increase over time, either before or after the participant begins receiving benefits, due to a variety of circumstances, such as increases in salary or the crediting of additional years of service with the employer (which are taken into account under the plan's benefit formula), or through amendment to the plan's provisions, including some amendments to provide cost of living adjustments.

Defined benefit plans may promise to pay benefits at various times, under certain circumstances, or in alternative forms. Benefits paid at those times or in those forms may have a greater actuarial value than the basic retirement benefit payable by the plan at the participant's normal retirement age. When one form of benefit has a greater actuarial value than another

form, the difference in value is often called a “subsidy.” See Appendix C for further discussion of the benefits provided under defined benefit plans.

A defined contribution plan, by contrast, is a type of retirement plan that provides for an individual account for each participant. The participant’s benefits are based solely on the amount contributed to the participant’s account and any income, expenses, gains or losses, and any forfeitures of accounts of other participants that may be allocated to such participant’s account. Examples of defined contribution plans include profit sharing plans (like 401(k) plans), employee stock ownership plans (ESOPs), and money purchase plans. A participant’s basic retirement benefit in a defined contribution plan is the amount in his or her account at any given time. This is generally known as the participant’s “account balance.” Defined contribution plans commonly provide for retirement benefits to be paid in the form of a lump sum payment of the participant’s entire account balance. Defined contribution plans by their nature do not offer subsidies.

It should be noted, however, that some defined benefit plans provide for lump sum payments, and some defined contribution plans provide for annuities.

[IRS Notice 97-11, 1997-2 IRB 49 (Jan. 13, 1997) (Appendix C)]

Q 3-5: What are “survivor benefits,” and why should a QDRO take them into account?

Federal law requires all retirement plans, whether they are defined benefit plans or defined contribution plans, to provide benefits in a way that includes a survivor benefit for the participant’s spouse. The provisions creating these protections are contained in section 205 of ERISA and sections 401(a)(11) and 417 of the Code. The type of survivor benefit that is required by Federal law depends on the type of retirement plan. Plans also may provide for survivor (or “death”) benefits that are in addition to those required by Federal law. Participants and alternate payees drafting

a QDRO should read the plan's summary plan description and other plan documents to understand the survivor benefits available under the plan.

Federal law generally requires that defined benefit plans and certain defined contribution plans pay retirement benefits to participants who were married on the participant's "annuity starting date" (this is the first day of the first period for which an amount is payable to the participant) in a special form called a "qualified joint and survivor annuity" (QJSA) unless the participant elects a different form and the spouse consents to that election. When benefits are paid as a QJSA, the participant receives a periodic payment (usually monthly) during his or her life, and the surviving spouse of the participant receives a periodic payment for the rest of the surviving spouse's life upon the participant's death. *See* Appendix C for a description of the QJSA. Federal law also generally requires that, if a married participant with a non-forfeitable benefit under one of these types of plans dies before his or her "annuity starting date," the plan must pay the surviving spouse of the participant a monthly survivor benefit. This benefit is called a "qualified preretirement survivor annuity" (QPSA). Appendix C also describes the QPSA.

Those defined contribution plans that are not required to pay retirement benefits to married participants in the form of a QJSA or QPSA (like most 401(k) plans) are required by Federal law to pay any balance remaining in the participant's account after the participant dies to the participant's surviving spouse. If the spouse gives written consent, the participant can direct that upon the participant's death any balance remaining in the account will be paid to a beneficiary other than the spouse, for example, the couple's children. Under these defined contribution plans, Federal law does not require a spouse's consent to a participant's decision to withdraw any portion (or all) of his or her account balance during the participant's life.

If a participant and his or her spouse become divorced before the participant's annuity starting date, the divorced spouse loses all right to the survivor benefit protections that Federal law requires be provided to a

participant's spouse. If the divorced participant remarries, the participant's new spouse may acquire a right to the Federally mandated survivor benefits. A QDRO, however, may change that result. To the extent that a QDRO requires that a former spouse be treated as the participant's surviving spouse for all or any part of the survivor benefits payable after the death of the participant, any subsequent spouse of the participant cannot be treated as the participant's surviving spouse. For example, if a QDRO awards all of the survivor benefit rights to a former spouse, and the participant remarries, the participant's new spouse will not receive any survivor benefit upon the participant's death. If such a QDRO requires that a defined benefit plan, or a defined contribution plan subject to the QJSA and QPSA requirements, treat a former spouse of a participant as the participant's surviving spouse, the plan must pay the participant's benefit in the form of a QJSA or QPSA unless the former spouse who was named as surviving spouse in the QDRO consents to the participant's election of a different form of payment.

It should also be noted that some retirement plans provide that a spouse of a participant will not be treated as married unless he or she has been married to the participant for at least a year. If the retirement plan to which the QDRO relates contains such a one-year marriage requirement, then the QDRO cannot treat the alternate payee as a surviving spouse if the marriage lasted for less than one year.

In addition, it is important to note that some retirement plans may provide for survivor benefits in addition to those required by Federal law for the benefit of the surviving spouse. Generally, however, the only way to establish a former spouse's right to survivor benefits such as a QJSA or QPSA is through a QDRO. A QDRO may provide that a part or all of such other survivor benefits shall be paid to an alternate payee rather than to the person who would otherwise be entitled to receive such death benefits under the plan. As discussed above (*see, e.g.,* Question 3-3), a spouse or former spouse can also receive a right to receive (as a separate interest or as shared payments) part of the participant's retirement benefit as well as a survivor's benefit.

[ERISA §§ 205, 206(d)(3)(F); IRC §§ 401(a)(11), 414(p)(5), 417; Advisory Opinion 2000-09A (see Appendix A)]

Q 3-6: How may the participant's retirement benefit be divided if the retirement plan is a defined contribution plan?

An order dividing a retirement benefit under a defined contribution plan may adopt either a “separate interest” approach or a “shared payment” approach (or some combination of these approaches). *See* Question 3-3 for a discussion of these two approaches. Orders that provide the alternate payee with a separate interest, either by assigning to the alternate payee a percentage or a dollar amount of the account balance as of a certain date, often also provide that the separate interest will be held in a separate account under the plan with respect to which the alternate payee is entitled to exercise the rights of a participant. Provided that the order does not assign a right or option to an alternate payee that is not otherwise available under the plan, an order that creates a separate account for the alternate payee may qualify as a QDRO.

Orders that provide for shared payments from a defined contribution plan should clearly establish the amount or percentage of the participant's payments that will be allocated to the alternate payee and the number of payments or period of time during which the allocation to the alternate payee is to be made. A QDRO can specify that any or all payments made to the participant are to be shared between the participant and the alternate payee.

In drafting orders dividing benefits under defined contribution plans, parties should also consider addressing the possibility of contingencies occurring that may affect the account balance (and therefore the alternate payee's share) during the determination period. For example, parties might be well advised to specify the source of the alternate payee's share of a participant's account that is invested in multiple investments because

there may be different methods of determining how to derive the alternate payee's share that would affect the value of that share. The parties should also consider how to allocate any income or losses attributable to the participant's account that may accrue during the determination period. If an order allocates a specific dollar amount rather than a percentage to an alternate payee as a shared payment, the order should address the possibility that the participant's account balance or individual payments might be less than the specified dollar amount when actually paid out.

[ERISA §§ 206(d)(3)(C); IRC § 414(p)(2)]

Q 3-7: How may the participant's retirement benefit be divided if the retirement plan is a defined benefit plan?

As indicated earlier, an order may adopt either the shared payment or the separate interest approach (or a combination of the two) in dividing retirement benefits in a defined benefit plan. *See* Question 3-3 for a discussion of these two approaches.

If shared payments are desired, the order should specify the amount of each shared payment allocated to the alternate payee either by percentage or by dollar amount. If the order describes the alternate payee's share as a dollar amount, care should be taken to establish that the payments to the participant will be sufficient to satisfy the allocation, and the order should indicate what is to happen in the event a payment is insufficient to satisfy the allocation. The order must also describe the number of payments or period of time during which the allocation to the alternate payee is to be made. This is usually done by specifying a beginning date and an ending date (or an event that will cause the allocation to begin and/or end). If an order specifies a triggering event that may occur outside the plan's knowledge, notice of its occurrence must be given to the plan before the plan is required to act in accordance with the order. If the intent is that all

payments made under the plan are to be shared between the participant and the alternate payee, the order may so specify.

As discussed in Appendix C at pages 100-101, a defined benefit plan may provide for subsidies under certain circumstances and may also provide increased benefits or additional benefits either earned through additional service or provided by way of plan amendment. A QDRO that uses the “shared payment” method to give the alternate payee a percentage of each payment may be structured to take into account any such future increases in the benefits paid to the participant. Such a QDRO does not need to address the treatment of future subsidies or other benefit increases, because the alternate payee will automatically receive a share of any subsidy or other benefit increases that are paid to the participant. If the parties do not wish to provide for the sharing of such subsidies or increases, the order should so specify.

If a separate interest is desired for the alternate payee, it is important that the order be based on adequate information from the plan administrator and the plan documents concerning the participant’s retirement benefit and the rights, options, and features provided under the plan. *See* Question 2-1. In particular, the drafters of a QDRO should consider any subsidies or future benefit increases that might be available with respect to the participant’s retirement benefit. The order may specify whether, and to what extent, an alternate payee is to receive such subsidies or future benefit increases. *See* Appendix C at pages 100-101 for a discussion of subsidies and possible future increases in a participant’s benefits in a defined benefit plan.

[ERISA §§ 206(d)(3)(C), 206(d)(3)(D); IRC §§ 414(p)(2), 414(p)(3)]

Q 3-8: May the QDRO specify the form in which the alternate payee's benefits will be paid?

A QDRO that provides for a separate interest may specify the form in which the alternate payee's benefits will be paid subject to the following limitations: (1) the order may not provide the alternate payee with a type or form of payment, or any option, not otherwise provided under the plan; (2) the order may not provide any subsequent spouse of an alternate payee with the survivor benefit rights that Federal law requires be provided to spouses of participants under section 205 of ERISA (*see* Question 3-5); and (3) (for any tax-qualified retirement plan), the payment of the alternate payee's benefits must satisfy the requirements of section 401(a)(9) of the Code respecting the timing and duration of payment of benefits. In determining the form of payment for an alternate payee, an order may substitute the alternate payee's life for the life of the participant to the extent that the form of payment is based on the duration of an individual's life. As discussed in Appendix C at pages 102-103, however, the timing and forms of benefit available to an alternate payee under a tax-qualified plan may be limited by section 401(a)(9) of the Code.

Alternatively, a QDRO may (subject to the limitations described above) give the alternate payee the right that the participant would have had under the plan to elect the form of benefit payment. For example, if a participant would have the right to elect a life annuity, the alternate payee may exercise that right and choose to have the assigned benefit paid over the alternate payee's life. However, the QDRO must permit the plan to determine the amount payable to the alternate payee under any form of payment in a manner that does not require the plan to pay increased benefits (determined on an actuarial basis).

A plan may by its own terms provide alternate payees with additional types or forms of benefit, or options, not otherwise provided to participants, such as a lump-sum payment option, but the plan cannot prevent a QDRO from assigning to an alternate payee any type or form of benefit, or option, provided generally under the plan to the participant.

[ERISA §§ 206(d)(3)(A), 206(d)(3)(D), 206(d)(3)(E)(i)(III); IRC §§ 401(a)(9), 401(a)(13)(B), 414(p)(3), 414(p)(4)(A)(iii)]

Q 3-9: When can the alternate payee get the benefits assigned under a QDRO?

A QDRO that provides for shared payments must specify the date on which the alternate payee will begin to share the participant's payments. Such a date, however, cannot be earlier than the date on which the plan receives the order. With respect to a separate interest, an order may either specify the time (after the order is received by the plan) at which the alternate payee will receive the separate interest or assign to the alternate payee the same right the participant would have had under the plan with regard to the timing of payment. In either case, a QDRO cannot provide that an alternate payee will receive a benefit earlier than the date on which the participant reaches his or her "earliest retirement age," unless the plan permits payments at an earlier date. Question 3-10 describes how to determine this "earliest retirement age," which is often a date earlier than the earliest date on which the participant would be entitled to receive his or her retirement benefit.

The plan itself may contain provisions permitting alternate payees to receive separate interests awarded under a QDRO at an earlier time or under different circumstances than the participant could receive the benefit. For example, a plan may provide that alternate payees may elect to receive a lump sum payment of a separate interest at any time. As discussed in Question 3-8 and in Appendix C at pages 102-103, section 401(a)(9) of the Code may affect when benefits must be paid under tax-qualified retirement plans.

[ERISA §§ 206(d)(3)(C), 206(d)(3)(D), 206(d)(3)(E); IRC §§ 401(a)(9), 414(p)(2), 414(p)(3), 414(p)(4)]

Q 3-10: What is “earliest retirement age,” and why is it important?

For QDROs, Federal law provides a very specific definition of “earliest retirement age,” which is the earliest date as of which a QDRO can order payment to an alternate payee (unless the plan permits payments at an earlier date). The “earliest retirement age” applicable to a QDRO depends on the terms of the retirement plan and the participant’s age. “Earliest retirement age” is the earlier of two dates:

- the date on which the participant is entitled to receive a distribution under the plan, or
- the later of either:
 - the date the participant reaches age 50, or
 - the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service with the employer.

Drafters of QDROs should consult the plan administrator and the plan documents for information on the plan’s “earliest retirement age.” The following examples illustrate the concept of “earliest retirement age.”

Example 1. The retirement plan is a defined contribution plan that permits a participant to make withdrawals only when he or she reaches age 59½ or terminates from service. The “earliest retirement age” for a QDRO under this plan: is the earlier of (1) when the participant actually terminates employment or reaches age 59½, or (2) the later of the date the participant reaches age 50 or the date the participant could receive the account balance if the participant terminated employment. Since the participant could terminate employment at any time and thereby be able to receive the account balance under the plan’s terms, the later of the two dates described

above is “age 50.” The “earliest retirement age” formula for this plan can be simplified to read the earlier of: (1) actually reaching age 59½ or terminating employment or (2) age 50. Since age 50 is earlier than age 59½, the “earliest retirement age” for this plan will be the earlier of age 50 or the date the participant actually terminates from service.

Example 2. The retirement plan is a defined benefit plan that permits retirement benefits to be paid beginning when the participant reaches age 65 and terminates employment. It does not permit earlier payments. The “earliest retirement age” for this plan is: the earlier of (1) the date on which the participant actually reaches age 65 and terminates employment, or (2) the later of age 50 or the date on which the participant reaches age 65 (whether he or she terminates employment or not). Because age 65 is later than age 50, the second part of the formula can be simplified to read “age 65” so that the formula reads as follows: the “earliest retirement age” is the earlier of (1) the date on which the participant reaches age 65 and actually terminates or (2) the date the participant reaches age 65. Under this plan, therefore, the “earliest retirement age” will be the date on which the participant reaches age 65.

[ERISA § 206(d)(3)(E); IRC § 414(p)(4)]

Appendix A

Department of Labor Interpretations

December 4, 1990

Ms. Ellen O. Pfaff
Lane Powell Moss & Miller
3800 Rainier Bank Tower
Seattle, Washington 98101-2647

AO 90-46A
ERISA SEC. 514, 206(d)

Dear Ms. Pfaff:

This responds to your request for an advisory opinion, on behalf of the trustee of the Bruce A. Nordstrom Self-Employed Retirement Plan (Plan), concerning the application of sections 514 and 206(d) of the Employee Retirement Income Security Act of 1974 (ERISA) with respect to the court order described below.¹ Your submission contains the following facts and representations.

The Plan is a tax-qualified retirement plan² under which benefits are payable upon the participant's retirement or death. The Plan provides that benefits may not be assigned or alienated except in the case of a "qualified domestic relations order." Bruce A. Nordstrom is a Plan participant whose benefit account is not in pay status.

Bruce Nordstrom's wife, Frances W. Nordstrom, died October 5, 1984. Her will was admitted to probate in the superior court for the State of Washington at King County (the Court). Subsequently, the estate of Frances Nordstrom (the Estate) filed a petition asking the Court to require the Plan to divide and segregate that portion of Bruce Nordstrom's benefits which represents the interest of the Estate. You indicate the request was made on the grounds that, inter alia, Frances Nordstrom owned at her death an undivided one-half community interest in Bruce Nordstrom's accrued benefits pursuant to the community property law of the State of Washington and that a court order for such division and segregation of benefits could issue in accordance with section 206(d)(3) of ERISA. The Court granted the petition and entered an order styled "Qualified Domestic Relations Order and Order Dividing Retirement Plan Benefits" (the Court Order).

You request the views of the Department of Labor concerning whether the community property law of the State of Washington is preempted by section 514 of ERISA and whether the Court Order falls within the scope of section 206(d)(3) of ERISA. Section 514(a) of ERISA generally preempts all state laws insofar as they relate to employee benefit plans covered by title I of ERISA. Therefore, a state community property law that considers the pension earned by a married spouse to be community property is preempted under this provision, unless some exception applies.

¹For convenience, this letter refers to the provisions of section 206(d) of ERISA rather than to the corresponding provisions in sections 401(a)(13)(B) and 414(p) of the Internal Revenue Code, to which your request refers.

²You indicated in a telephone conversation with a representative of this Office that the plan has a number of participants and is covered by title I of ERISA.

Section 514(b) of ERISA specifies certain exceptions from the broad preemptive effect of section 514(a). Of those exceptions, only that provided by section 514(b)(7) has relevance to community property laws. Section 514(b)(7) states that preemption under section 514(a) does not apply to “qualified domestic relations orders” within the meaning of ERISA section 206(d)(3)(B)(i).

Section 206(d)(1) of ERISA generally requires pension plans covered by title I of ERISA to provide that plan benefits may not be assigned or alienated. Section 206(d)(3)(A) of ERISA states that section 206(d)(1) applies to an assignment or alienation of benefits pursuant to a “domestic relations order,” unless the order is determined to be a “qualified domestic relations order” (QDRO). Section 206(d)(3)(A) further provides that pension plans must provide for payment of benefits in accordance with the applicable requirements of any QDRO.

Section 206(d)(3)(B) of ERISA defines the terms “qualified domestic relations order” and “domestic relations order” for purposes of section 206(d)(3) as follows:

For purposes of [section 206(d)(3)] —

(i) the term “qualified domestic relations order” means a domestic relations order —

(I) which creates or recognizes the existence of an alternate payee’s right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term “domestic relations order” means any judgment, decree, or order (including approval of a property settlement agreement) which —

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law) (emphasis added)

The term “alternate payee” is defined by ERISA section 206(d)(3)(K) to mean “any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic

relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.”

Sections 514(b)(7) and 206(d)(3) of ERISA were enacted as part of the Retirement Equity Act of 1984 (REA), which aimed primarily at assuring greater and more equitable opportunity for women working as employees or homemakers to receive private pension income. The legislative history of the QDRO provisions of REA contains numerous statements indicating that Congress was focusing on the division of pension benefits in marital dissolution or dependent support situations. For example, Congressman William Clay described the QDRO provisions during a House floor debate on the legislation as follows:

Finally, women may be denied their rights to pension benefits by the dissolution of a marriage by divorce, regardless of how many years she served as an economic partner to a man covered by a pension plan. Even in cases in which the State domestic relations court is willing to consider the pension an asset of the marriage and award the ex-wife a share of it, her rights have been thwarted. Pension plans have refused to honor those court orders claiming that they required an impermissible assignment of benefits and were preempted by ERISA.

H.R. 4280 makes it clear that honoring a legitimate State court order awarding an ex-spouse some or all of a worker’s pension does not violate the antiassignment clause of ERISA. In addition, the legislation creates an exception from ERISA’s broad preemption of State laws for qualified domestic relations orders.³

Moreover, the report of the Senate Committee on Finance made specific mention of state community property laws in observing that “[s]everal cases have arisen in which courts have been required to determine whether the ERISA preemption and spendthrift provisions apply to family support obligations (e.g. alimony, separate maintenance, and child support obligations).”⁴ The report noted “[t]here is a divergence of opinion among the courts as to whether ERISA preempts State community property laws insofar as they relate to the rights of a married couple to benefits under a pension, etc, plan,”⁵ and cited two cases in which application of state community property law to pension benefits was at issue in the context of marital dissolution proceedings.⁶

³130 Cong. Rec. 13327 (1984).

⁴S. Rep. No 575, 98th Cong., 2d Sess. 18 (1984).

⁵Id. 19.

⁶The cases cited were *Stone v. Stone*, 632 F. 2d 740 (9th Cir. 1980) and *Francis v. United Technology Corp.*, 458 F. Supp. 84 (N.D. Cal. 1978).

It thus appears Congress generally intended that the QDRO provisions of ERISA would have application in those court proceedings conducted primarily to resolve domestic relations issues. With respect to ERISA section 206(d)(3)(B)(ii)(II), it is the view of the Department of Labor that Congress intended the QDRO provisions to encompass state community property laws only insofar as such laws would ordinarily be recognized by courts in determining alimony, property settlement and similar orders issued in domestic relations proceedings. We find no indication Congress contemplated that the QDRO provisions would serve as a mechanism in which a non-participant spouse's interest derived only from state property law could be enforced against a pension plan.

In the case at hand, the Court Order was issued in a probate proceeding and would recognize an interest in pension benefits of the surviving spouse solely on the basis of the state community property law. Consistent with the views discussed above, it is the opinion of the Department of Labor that the Court Order is not a "domestic relations order" within the meaning of section 206(d)(3)(B)(ii) of ERISA and, therefore, does not constitute a QDRO for purposes of sections 206(d)(3) and 514(b)(7) of ERISA. Accordingly, it is the opinion of the Department of Labor that the Court Order is unenforceable against the Plan.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Section 10 of the procedure explains the effect of advisory opinions.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations



August 21, 1992

Ms. Ann E. Neydon
Sachs, Kadushin, O'Hare
Helveston & Waldman, P.C.
1000 Farmer
Detroit, Michigan 48226

92-17A
ERISA SEC. 206(d)(3)

Dear Ms. Neydon:

The Internal Revenue Service has referred to us your request for an advisory opinion on behalf of the Cement Masons' Pension Trust Fund (the Plan) concerning the application of the "qualified domestic relations order" (QDRO) exception to the anti-assignment and alienation rules contained in section 206(d)(3) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), and sections 401(a)(13)(B) and 414(p) of the Internal Revenue Code of 1986 (the Code), to an order from the Circuit Court for the County of Wayne, Michigan. Your submission contains the following facts and representations.

The Plan is qualified under section 401(a) of the Code. The Plan has received a proposed Qualified Domestic Relations Order (the Order) in connection with a domestic relations proceeding in the Circuit Court for the County of Wayne in the State of Michigan. The Order states that X is a Plan participant whose benefit account is not in pay status. As a result of such proceeding, a property division was entered into between X and Y. The property division was executed prior to, and is referenced in, the Order.

According to the terms of the Order, which you enclosed with your letter, the Court approved the property division prior to granting an annulment ab initio of the marriage between the parties. You represent that, at the time of the property division and before the annulment, the parties had been married for 38 years and the marriage had produced six children. Under the Order, and pursuant to the terms of the property division, Y is designated as the "alternate payee" assigned 50% of the participant's accrued benefit as of the date of the Order. The Order further designates Y as the surviving spouse of X. You indicate that Michigan domestic relations law provides for the division of property and the entry of such an order upon the annulment of a marriage.¹

You request an opinion as to whether a state court correctly ruled that a party to an annulled marriage (1) is a "former spouse" of a participant for purposes of the definition of "alternate payee" in section 206(d)(3)(K) of ERISA, and (2) is designated as a "surviving spouse" pursuant to section 206(d)(3)(F) of ERISA for purposes of the joint and survivor and pre-retirement annuity provisions. In essence, you are requesting an opinion on whether the plan administrator is required to review such rulings as part of the process of determining whether a domestic relations order is qualified under section 206(d)(3) of ERISA.

¹ Section 552.19 of the Michigan statute states that "upon the annulment of a marriage, a divorce from the bonds of matrimony or a judgment of separate maintenance, the court may make a further judgment for restoring to either party the whole, or such parts as it shall deem just and reasonable, of the real and personal estate that shall have come to either party by reason of the marriage, or for awarding to either party the value thereof, to be paid by either party in money." (MCLA 552.19)

Under the Retirement Equity Act of 1984, as amended (REA), the Secretary of Labor has authority to issue regulations interpreting the QDRO provisions in section 206(d)(3) of ERISA, as well as the parallel provisions in sections 401(a)(13)(B) and 414(p) of the Code. To date, the Department has not issued regulations interpreting these provisions. Because your inquiry presents issues on which the answer seems to be clear from the application of these statutory provisions to the facts described, the Department has determined, in accordance with section 5.03 of ERISA Procedure 76-1, 41 Fed. Reg. 36281 (Aug. 27, 1976), that it is appropriate to issue an advisory opinion in this case. For convenience, references to Code sections that parallel provisions of Title I of ERISA are omitted from the following discussion, but may be assumed to be incorporated by reference when the parallel section in Title I of ERISA is cited.

Section 206(d)(1) of ERISA generally requires pension plans covered by Title I to provide that plan benefits may not be assigned or alienated. Section 206(d)(3)(A) of ERISA states that section 206(d)(1) applies to an assignment or alienation of benefits pursuant to a “domestic relations order,” unless the order is determined to be a QDRO. Section 206(d)(3)(A) further provides that pension plans must provide for payment of benefits in accordance with the applicable requirements of any QDRO.

Section 206(d)(3)(B) of ERISA defines the terms “qualified domestic relations order” and “domestic relations order” as follows:

(B) For purposes of [section 206(d)(3)]--

(i) the term “qualified domestic relations order” means a domestic relations order--

(I) which creates or recognizes the existence of an alternate payee’s right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under the plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term “domestic relations order” means any judgement, decree, or order (including approval of a property settlement agreement) which--

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a state domestic relations law.

Section 206(d)(3)(C) requires that in order for a domestic relations order to be qualified such order must clearly specify (i) the name and the last known mailing address (if any) of the

participant and the name and mailing address of each alternate payee covered by the order; (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined; (iii) the number of payments or period to which such order applies; and (iv) each plan to which the order applies.

Section 206(d)(3)(D) specifies that a domestic relations order is qualified only if such order does not require (i) the plan to provide any type of benefit, or any option, not otherwise provided by the plan; (ii) the plan to provide increased benefits (determined on the basis of actuarial value); and (iii) the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

The term "alternate payee" is defined by section 206(d)(3)(K) to mean "any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant."

Section 206(d)(3)(F) of ERISA provides, with respect to the joint and survivor and pre-retirement annuity provisions, that, to the extent provided in any qualified domestic relations order:

- (i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 205 (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and
- (ii) if married for at least 1 year, the surviving spouse shall be treated as meeting the requirements of section 205(f).

Section 206(d)(3)(G) of ERISA requires the plan administrator to determine the qualified status of domestic relations orders received by the plan, and to administer distributions under such qualified orders, pursuant to reasonable procedures established by the plan. Upon receipt of the order, the plan administrator must promptly notify the participant and each alternate payee named in the order of its receipt by the plan and of the plan's procedures for determining the order's qualified status.

Based on the foregoing, when a pension plan receives an order requiring that all or a part of the benefits payable with respect to a participant be distributed to an alternate payee, the plan administrator must determine that the judgment, decree or order is a "domestic relations order" within the meaning of section 206(d)(3)(B)(ii) of ERISA -- i.e., that it relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of the participant, and that it is made pursuant to a State domestic relations law by a State authority with jurisdiction over such matters. Additionally, the plan administrator must determine that the order is qualified under the requirements of section 206(d)(3)(B)(i) of ERISA. It is the view of the Department that the plan administrator

is not required by section 206(d)(3) or any other provision of Title I to review the correctness of a determination by a competent State authority that an individual is a “spouse,” “former spouse,” “child,” “other dependent” or “surviving spouse” of the participant under state domestic relations law.²

With respect to your submission, you have represented that the Order assigns to former spouse Y, as “alternate payee,” 50% of participant X’s accrued benefit under the Plan, and designates Y as the “surviving spouse” of X. Further, you indicate that Michigan domestic relations law provides for such a division of property upon the annulment of a marriage. Accordingly, it is the view of the Department that, to the extent the Order was executed by a court of competent jurisdiction pursuant to Michigan domestic relations law, neither the determination under the Order that Y is a “former spouse,” and thus meets the requirements to be an “alternate payee” for purposes of section 206(d)(3)(B) of ERISA, nor the determination that Y is a “surviving spouse” for purposes of section 206(d)(3)(F) of ERISA, are required to be reviewed by the plan administrator. The Department expresses no view regarding the qualified status of the domestic relations order in this case.³

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations

² While the question of whether an order is a qualified domestic relations order under 206(d)(3) of ERISA is a federal question, determinations regarding an individual’s status as a “spouse,” “former spouse,” “child,” “other dependent” or “surviving spouse” for purposes of a QDRO are questions of state law.

³ As indicated in sections 5.01 and 5.04 of ERISA Procedure 76-1, the Department ordinarily will not issue opinions on matters which are inherently factual in nature, or on the form or effect in operation of particular plan provisions. Accordingly, the Department will not issue advisory opinions as to whether any particular domestic relations order constitutes a QDRO, or whether a specific plan procedure for determining the qualified status of domestic relations orders satisfies the requirements of ERISA section 206(d)(3)(G)(ii).

September 29, 1999

Brian G. Belisle
Oppenheimer Wolff & Donnelly LLP
Plaza VII
45 South Seventh Street
Suite 3400
Minneapolis, Minnesota 55402-1609

1999-13A
ERISA SEC. 206(d)(3)

Dear Mr. Belisle:

This is in response to your request on behalf of the UAL Corporation (UAL) and United Air Lines, Inc. (United) for an advisory opinion. Specifically, you ask how a plan administrator should treat domestic relations orders the plan administrator has reason to believe are “sham” or “questionable” in nature.¹(1)

UAL is a holding company. Its major wholly-owned subsidiary is United. You represent that employees of United participate in three pension plans — an employee stock ownership plan (the ESOP); a 401(k) plan that is a profit sharing plan qualified under section 401(a) of the Code (the 401(k) Plan); and a defined benefit pension plan. The ESOP is a combination leveraged ESOP and non-leveraged stock bonus plan that is qualified under section 401(a) of the Code. Substantially all of the assets in the ESOP are invested in UAL stock.

You represent that the named plan administrator of the ESOP is UAL. UAL has assigned many of its administrative duties under the ESOP, including the duty to establish procedures for determining whether a domestic relations order constitutes a “qualified domestic relations order” (QDRO), to an ESOP Committee consisting of employees of United. The ESOP Committee has delegated to United’s Pension Programs Department (Pension Programs) the responsibility of reviewing and determining whether a domestic relations order received by the ESOP Committee is a QDRO within the meaning of section 206(d)(3) of ERISA. Appeals of QDRO determinations are made to the ESOP Committee.

You further represent that the ESOP permits an alternate payee to request the immediate lump sum distribution of any benefits under the plan that are assigned pursuant to the terms of any domestic relations order that the ESOP Committee determines is a QDRO. The ESOP otherwise permits lump sum distributions only following a participant’s termination of employment (including by way of the participant’s death).

¹You do not ask and we do not opine as to whether any of the individual domestic relations orders at issue is “qualified” pursuant to section 206(d)(3) of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and section 414(p) of the Internal Revenue Code (Code).

The named plan administrator of the 401(k) Plan is United. United has delegated the authority to control and manage the administration of the 401(k) Plan, including the duty to establish procedures for determining whether a domestic relations order constitutes a QDRO, to a Pension and Welfare Plans Administration Committee (PAWPAC) consisting of employees of United. PAWPAC in turn has delegated to Pension Programs the responsibility for reviewing and determining whether a domestic relations order applying to the 401(k) Plan is a QDRO. Appeals of a QDRO determination are made to PAWPAC. As with the ESOP, the 401(k) Plan permits the immediate distribution of benefits under the plan that are assigned pursuant to the terms of a QDRO. Although an alternate payee may thus receive an immediate lump sum distribution from the 401(k) Plan, participants or beneficiaries are entitled to distributions from the 401(k) plan only following termination of employment (including by way of the participant's death) or upon financial hardship.

You represent that Pension Programs currently has under review 16 domestic relations orders concerning benefits under the ESOP and the 401(k) Plan that Pension Programs believes may be "questionable" or "sham" in nature.²

You detail the grounds for Pension Programs' suspicions as to the nature of these domestic relations orders as follows. Pension Programs received within a very short period of time five domestic relations orders from the same lawyer (two of the orders were mailed in the same envelope). Each order related to participants working in United's maintenance facility located in Indianapolis, Indiana. Each of the five orders identically provided for an assignment of 100 percent of the participant's benefit in the ESOP and the 401(k) Plan to an alternate payee. Each order made no provision for any assignment of these participants' benefits in United's defined benefit pension plan. In each of the orders, the alternate payee and participant were shown as having the same address. Despite its suspicions, Pension Programs determined that each of the five orders was qualified because they satisfied the requirements of section 206(d)(3) of ERISA. In Pension Programs' view, these orders differed from other domestic relations orders processed by Pension Programs in that they dealt only with the ESOP and the 401(k) Plan; they provided for assignment of 100 percent of the participant's benefit; and they showed the participant and alternate payee as having the same address.

After its determination that these five domestic relations orders were QDROs, Pension Programs received and reviewed 16 other orders that had unusual characteristics similar to those of the original five orders. These 16 orders similarly provided for a 100 percent assignment of benefits payable under the ESOP and/or the 401(k) Plan, made no mention of the defined benefit pension plan, and specified in most cases that the alternate payee and participant shared the same address. You represent that Pension Programs performed additional investigation in its review

²Pension Programs processes between approximately 200 and 300 domestic relations orders per year for all of its qualified retirement plans.

of these 16 domestic relations orders to determine whether they were qualified.³ While these orders were pending review with Pension Programs, two participants from the Indiana facility called at different times to determine the status of the review of their orders. You indicate that, during those conversations, each participant asserted that his order was not one of the “fraudulent QDROs.” You represent that these statements led Pension Programs to heighten its scrutiny of the 16 orders assigning 100 percent of the participant’s right to the ESOP and 401(k) benefits.

You further represent that, after beginning its investigation of the 16 domestic relations orders in question, Pension Programs learned of a pamphlet entitled “Retirement Liberation Handbook” that was being distributed by at least one United employee in the Indianapolis, Indiana area.⁴ The pamphlet advocated, as a method of acquiring a distribution of pension plan benefits before reaching retirement age, that participants and their spouses obtain a divorce for the sole purpose of securing a court order assigning pension plan benefits and then remarry. Such a sham divorce, according to the Liberation Handbook, would enable the participant to obtain direct control over the investment of the participant’s pension benefit. The Liberation Handbook also suggested that single employees could go through a sham marriage and subsequent divorce, by paying an individual a percentage of the anticipated pension distribution as compensation for acting as spouse, or could instead quit employment in order to obtain a similar early distribution and later get rehired. The Handbook described in some detail how distributions from pension plans are handled for tax purposes and discussed various options for distributions and investments of the distributions.

After reviewing the Liberation Handbook, Pension Programs determined that all of the 16 orders in question, as well as the original five orders it had previously deemed qualified, had significant similarities to the specific format promoted by the Liberation Handbook. For example, two of the initial five orders requested that distribution be made to an inappropriate account named in the Liberation Handbook.

In addition, all of the orders identified by Pension Programs as questionable relate to the ESOP and 401(k) benefits of employees who, at the time of the order, resided in the Indianapolis area and were in related work groups, and all had a number of common characteristics not typically seen in Pension Programs’ review of domestic relations orders. Included in these were rapid remarriage and continued use by the putative alternate payee of United’s no-cost travel for spouses.

³You represent that United pays all expenses related to the administration of domestic relations orders and QDROs, including all of the investigative efforts relating to any questionable QDROs and all legal expenses. You state that no plan assets of either the ESOP or the 401(k) Plan have been used directly or indirectly to pay for the expenses of investigating the QDROs at issue here.

⁴The Liberation Handbook apparently first appeared in the classified section of a local advertising exchange.

You represent that Pension Programs engaged local counsel in Indiana to determine whether and to what extent the questionable domestic relations orders might be valid under Indiana law. Indiana counsel opined that, if the orders had been obtained as promoted by the Liberation Handbook, (i) the participant and alternate payee would have committed perjury; (ii) the parties would be in contempt of court; (iii) the order would have been fraudulently obtained; and (iv) if the foregoing could be established to the satisfaction of a judge, the order likely would be vacated by the court.

You have asked for an advisory opinion as to whether, and if so when, a plan administrator may investigate or question a domestic relations order submitted for review to determine whether it is a valid “domestic relations order” under State law for purposes of section 206(d)(3)(B) of ERISA.

Section 206(d)(1) of ERISA generally requires pension plans covered by Title I of ERISA to provide that plan benefits may not be assigned or alienated. Section 206(d)(3)(A) of ERISA states that section 206(d)(1) applies to an assignment or alienation of benefits pursuant to a “domestic relations order” unless the order is determined to be a “qualified domestic relations order” (QDRO). Section 206(d)(3)(A) further provides that pension plans must provide for payment of benefits in accordance with the applicable requirements of any QDRO.

Section 206(d)(3)(B) of ERISA defines the terms “qualified domestic relations order” and “domestic relations order” for purposes of section 206(d)(3) as follows:

- (B) For purposes of [section 206(d)(3)] —
 - (i) the term “qualified domestic relations order” means a domestic relations order —
 - (I) which creates or recognizes the existence of an alternate payee’s right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
 - (II) with respect to which the requirements of subparagraphs (C) and (D) are met, and
 - (ii) the term “domestic relations order” means any judgment, decree, or order (including approval of a property settlement agreement) which —
 - (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

- (II) is made pursuant to a State domestic relations law (including a community property law).

Section 206(d)(3)(C) requires that in order for a domestic relations order to be qualified such order must clearly specify (i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order; (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined; (iii) the number of payments or period to which such order applies; and (iv) each plan to which the order applies.

Section 206(d)(3)(D) specifies that a domestic relations order is qualified only if such order does not require (i) the plan to provide any type of benefit, or any option, not otherwise provided by the plan; (ii) the plan to provide increased benefits (determined on the basis of actuarial value); and (iii) the payment of benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

Section 206(d)(3)(G) of ERISA requires the plan administrator to determine the qualified status of domestic relations orders received by the plan and to administer distributions under such qualified orders, pursuant to reasonable procedures established by the plan. In administering QDROs, plan administrators must follow the plan's reasonable procedures, as required under section 206(d)(3)(G), and must assure that the plan pays only reasonable expenses of administering the plan, as required by sections 403(c)(1) and 404(a)(1)(A) of ERISA. In this regard, plan fiduciaries must take appropriate steps to ensure that plan procedures are designed to be cost effective and to minimize expenses associated with the administration of domestic relations orders. See Advisory Opinion 94-32A (Aug. 4, 1994).

When a pension plan receives an order requiring that all or a part of the benefits payable with respect to a participant be paid to an alternate payee, the plan administrator must determine that the judgment, decree or order is a "domestic relations order" within the meaning of section 206(d)(3)(B)(ii) of ERISA — i.e., that it relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of the participant and that it is made pursuant to State domestic relations law by a State authority with jurisdiction over such matters. Additionally, the plan administrator must determine that the order is qualified under the requirements of section 206(d)(3) of ERISA. It is the view of the Department that the plan administrator is not required by section 206(d)(3) or any other provision of Title I to review the correctness of a determination by a competent State authority pursuant to State domestic relations law that the parties are entitled to a judgment of divorce. See Advisory Opinion 92-17A (Aug. 21, 1992). Nevertheless, a plan administrator who has received a document purporting to be a domestic relations order must carry out his or her responsibilities under section 206(d)(3) in a manner consistent with the general fiduciary duties in part 4 of title I of ERISA.

For example, if the plan administrator has received evidence calling into question the validity of an order relating to marital property rights under State domestic relations law, the plan administrator is not free to ignore that information. Information indicating that an order was fraudulently obtained calls into question whether the order was issued pursuant to State domestic relations law, and therefore whether the order is a “domestic relations order” under section 206(d)(3)(C). When made aware of such evidence, the administrator must take reasonable steps to determine its credibility. If the administrator determines that the evidence is credible, the administrator must decide how best to resolve the question of the validity of the order without inappropriately spending plan assets or inappropriately involving the plan in the State domestic relations proceeding. The appropriate course of action will depend on the actual facts and circumstances of the particular case and may vary depending on the fiduciary’s exercise of discretion. However, in these circumstances, we note that appropriate action could include relaying the evidence of invalidity to the State court or agency that issued the order and informing the court or agency that its resolution of the matter may affect the administrator’s determination of whether the order is a QDRO under ERISA.⁵(5) The plan administrator’s ultimate treatment of the order could then be guided by the State court or agency’s response as to the validity of the order under State law. If, however, the administrator is unable to obtain a response from the court or agency within a reasonable time, the administrator may not independently determine that the order is not valid under State law and therefore is not a “domestic relations order” under section 206(d)(3)(C), but should rather proceed with the determination of whether the order is a QDRO.

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 Fed. Reg. 36281 (1976). Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,

Susan G. Lahne
Acting Chief, Division of
Fiduciary Interpretation
Office of Regulations
and Interpretations

⁵Appropriate action could take other forms, depending on the circumstances and the fiduciary’s assessment of the relative costs and benefits, including actual intervention in or initiation of legal proceedings in State court.

July 12, 2000

Gail Inman-Campbell
Walker, Campbell & Campbell
Suite 201 Security Plaza
P.O. Box 1940
Harrison, Arkansas 72602-1940

2000-09A
ERISA Sec. 206(d)(3)

Dear Ms. Inman-Campbell:

This is in response to your request for an advisory opinion under section 206(d)(3) of ERISA. You raise questions regarding the proper treatment of a domestic relations order that assigns to an alternate payee a “company-paid survivor benefit.” The terms of the affected pension plan makes this company-paid survivor benefit payable only to a beneficiary designated by the participant from within a limited class of individuals (either the participant’s surviving spouse, the participant’s minor child or children, or the participant’s parent or parents). According to your representations, the survivor benefit in question is not the qualified joint and survivor annuity (QJSA) benefit that is mandated by section 205 of ERISA, but is provided by the plan in addition to the QJSA benefit. Specifically, you ask whether an order requiring the company-paid survivor benefit to be paid to the participant’s former spouse, who had been named by the participant as the designated beneficiary under the plan prior to the divorce and as of the date of the participant’s retirement, could constitute a “qualified domestic relations order” (QDRO) within the meaning of section 206 (d)(3) of ERISA.

You represent the applicable facts to be as follows. The plan participant was married when he retired from employment. In connection with his retirement, the participant and his then-wife¹ executed the necessary forms to entitle him to begin to receive his retirement benefits under the employer’s defined benefit pension plan (the Plan).² You further state that the participant elected, with his wife’s consent, to decline to receive his benefits under the Plan in the form of a qualified joint and survivor annuity (QJSA) and elected instead to receive a single life annuity. The consent form executed by the participant’s wife stated:

I, [the participant’s spouse], hereby acknowledge that I have read the notification on the reverse side regarding post-retirement survivor benefits under the [Plan] and consent to waive my right to receive such benefits as the participant’s spouse under the Retirement Equity Act. I also understand that my spouse has authority to specify a beneficiary without my knowledge or consent and that I will not receive any benefit under the Plan unless specified as a beneficiary by my spouse.

¹Although the participant and his wife were married at the time he retired, they subsequently divorced. For the sake of clarity, and because the change in status is relevant to the analysis, this opinion refers to the participant’s former spouse variously (depending on the relevant time period) as either the participant’s wife or the participant’s former wife.

²The Department does not interpret the terms of individual pension plans and has relied, in reaching the conclusions expressed herein, on your representations as to the terms of the Plan and the manner in which those terms are interpreted by the Plan administrator. The Department takes no position regarding the correctness of the representations.

You represent that, in addition to providing the QJSA form of benefit, the Plan provides a company-paid survivor benefit (described below), to which the participant had earned a vested right. This company-paid survivor benefit provides monthly payments to “the surviving spouse of an active employee, the spouse at retirement of a former employee, or a survivor or survivors specified by [the participant] in such a manner as the Board of Benefits and Pensions may prescribe.” Plan, Section VI.A (1). You state that the Plan generally limits the categories of survivors whom the participant may designate to receive the company-paid survivor benefit to the following: (1) the employee’s spouse (with payments to minor children following the spouse’s death); (2) the employee’s minor children; or (3) a parent or stepparent of the employee.

In connection with his retirement, the participant designated his wife, together with their then-minor child, as the beneficiaries for the company-paid survivor benefit. That designation has remained in effect unchanged since it was executed. The participant began receiving monthly annuity benefits under the Plan at his retirement and has continued receiving such benefits since that time.

A state court some time later issued a divorce decree dissolving the marriage of the participant and his wife. Thereafter, a Nunc Pro Tunc Supplemental Divorce Decree, (the domestic relations order),³ described a division of the participant’s benefits under the Plan. The domestic relations order assigned to the former wife, as alternate payee, a certain portion of the participant’s life annuity payments. The domestic relations order further provided that the former wife “shall be treated as a surviving spouse, as she was the Participant’s spouse at his retirement, and that [she] shall receive the employer paid survivor benefits as stated under [the plan].”

After the domestic relations order was submitted to the Plan, the Plan Administrator rejected the domestic relations order as not qualified with respect to the provision of survivor benefits, stating:

The order attempts to force the Plan to provide a type or form of benefit not otherwise available under the Plan. As explained in previous determination reports, there are no survivor benefits available for any alternate payee. There are no survivor benefits available for [the participant’s ex-wife]. The court cannot award the Company-paid survivor benefit to [the participant’s ex-wife] because she is not a Plan-qualified beneficiary. The court cannot award a non-existent benefit to an alternate payee.

* * * * *

At his retirement, [the participant] designated his spouse, [the participant’s former wife], as the beneficiary for the Company-paid survivor benefit. Pursuant to the terms of the Plan, the Company-paid survivor benefit can be paid only to a Plan-qualified beneficiary — spouse, minor children, parent, or stepparent, not a former spouse. At

³An earlier order that had purported to assign the right of a surviving spouse to receive survivor benefits in the form of the qualified joint and survivor annuity (QJSA) under section 205 of ERISA (section 401(a)(11) of the Internal Revenue Code) to the participant’s former wife was rejected by the Plan as not qualified because the former wife had validly consented to the waiver of those rights. You represent that the former wife does not dispute that she properly waived her right under federal law to receive survivor benefits in the form of a QJSA.

the time of his retirement, [the participant] designated his spouse and a minor child to receive the Company-paid survivor benefit. During the remaining 10+ years that the parties remained married, [the participant] controlled the beneficiary designation for the Company-paid survivor benefit. At any time during the remainder of the marriage, [the participant] could change the beneficiary to any other Plan-qualified beneficiary or to no one without [the participant's former wife's] consent.

(Emphasis original).

You ask whether the Plan is correct in concluding that, in ordering the company-paid survivor benefit to be paid to the participant's former wife, the domestic relations order would require the Plan to provide a "type or form of benefit, or [an] option not otherwise provided" under the Plan, which is not permitted under section 206(d)(3)(D)(i) of ERISA. As explained below, it is the view of the Department that the Plan erred in reaching this conclusion.

Section 206(d)(1) of ERISA generally requires pension plans covered by Title I of ERISA to provide that plan benefits may not be assigned or alienated. Section 206(d)(3)(A) of ERISA states that section 206(d)(1) applies to an assignment or alienation of benefits pursuant to a "domestic relations order," unless the order is determined to be a "qualified domestic relations order." Section 206(d)(3)(A) further provides that pension plans must provide for payment of benefits in accordance with the applicable requirements of any QDRO.

Section 206(d)(3)(B) of ERISA defines the terms "qualified domestic relations order" and "domestic relations order" for purposes of section 206(d)(3) as follows:

- (B) For purposes of [section 206(d)(3)] —
 - (i) the term "qualified domestic relations order" means a domestic relations order —
 - (I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
 - (II) with respect to which the requirements of subparagraphs (C) and (D) are met, and
 - (ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which —
 - (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

- (II) is made pursuant to a State domestic relations law (including a community property law).

Section 206(d)(3)(D) specifies that a domestic relations order is qualified only if such order does not require (i) the plan to provide any type of benefit, or any option, not otherwise provided by the plan; (ii) the plan to provide increased benefits (determined on the basis of actuarial value); and (iii) the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

Section 206(d)(3)(F) of ERISA provides, with respect to the joint and survivor and pre-retirement annuity provisions in ERISA, that, “[t]o the extent provided in any qualified domestic relations order”:

- (i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 205 (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and
- (ii) if married for at least 1 year, the surviving spouse shall be treated as meeting the requirements of section 205(f).

It is our view that section 206(d)(3)(F) does not, in itself, limit the scope of the survivor benefits that may be assigned to an alternate payee pursuant to section 206(d)(3)(B). Rather, the general scope of permissible assignment is defined by section 206(d)(3)(B) itself, as limited by sections 206(d)(3)(C) and 206(d)(3)(D).⁴ Section 206(d)(3)(B) provides broadly for the possibility of assigning not merely “benefits payable to a participant,” but “all or a portion of the benefits payable with respect to a participant under a plan.” In using this particular language, Congress made clear that the QDRO provisions are intended to enable State courts or agencies to assign any and all benefits payable under a plan that a participant had earned through employment.

Further, any assignment effected by a QDRO necessarily has the effect of requiring the substitution of an alternate payee for the individual (participant or beneficiary) who would otherwise be entitled to receive the benefit under the terms of the plan in question. The Plan’s conclusion that such a substitution would require the Plan to provide a “type or form of benefit, or any option, not otherwise provided” under the Plan, in violation of section 206(d)(3)(D), thus, proves too much. Such an argument would invalidate any assignment of benefits pursuant to a domestic relations order.

⁴Section 206(d)(3)(F) provides an additional right that may be assigned to an alternate payee: the right to be treated as if the divorce had not occurred with respect to the survivor rights created by section 205 of ERISA. The section 205 rights include, but extend beyond, the right to receive the survivor portion of the joint and survivor annuity form of benefit payment that must be provided as the normal form of payment under a plan subject to section 205. Section 206(d)(3)(E) further permits alternate payees to be afforded the right to receive benefit payments as of a participant’s “earliest retirement age,” rather than when the participant is entitled to receive benefit payments.

In this case, the alternate payee was the individual actually designated by the participant as his beneficiary to receive the company-paid survivor benefit. At his retirement, and until their subsequent divorce, the alternate payee was also within the class of individuals expressly entitled under the terms of the Plan to be named as beneficiary. The order did no more than preserve the alternate payee's status as a spouse with respect to the company-paid survivor benefit when the divorce would otherwise have altered that status. The assignment effected by the order, thus, would not require the Plan to provide a type or form of benefit, or an option not otherwise provided under the Plan. It is the view of the Department that, under the circumstances of this case as you have described them, the plan administrator erred in concluding that an order that named a participant's former spouse as beneficiary for the company-paid survivor benefit would violate the limitations imposed by section 206(d)(3)(D) and therefore could not constitute a QDRO.⁵

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 Fed. Reg. 36281 (1976). Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,

Louis Campagna
Chief, Division of
Fiduciary Interpretations
Office of Regulations
and Interpretations

⁵A domestic relations order, nonetheless, could not be deemed to be qualified if it assigned benefits that have already been paid or have been validly waived under a plan. For example, if an alternate payee has validly waived QJSA rights, as the participant's former wife apparently did when the participant retired, a subsequently issued domestic relations order could not require a plan to provide QJSA rights to the alternate payee.

June 1, 2001

Lee Sapienza
Chief, Bureau of Policy and Planning
Division of Child Support Enforcement
Office of Temporary and Disability Assistance
40 North Pearl Street
Albany, NY 12243-0001

2001-06A
ERISA Sec. 206(d)(3)

Dear Mr. Sapienza:

This is in response to your request for guidance regarding the qualified domestic relations order (QDRO) provisions of the Employee Retirement Income Security Act of 1974, as amended (ERISA).¹(1) In particular, you ask whether an income withholding notice issued by the New York State Office of Temporary and Disability Assistance, Division of Child Support Enforcement (DCSE), or a county child support enforcement agency operating under DCSE guidelines, is a judgment, decree, or order within the meaning of section 206(d)(3)(B)(ii) of ERISA.

DCSE is a state agency that administers the programs under Part D of Title IV of the Social Security Act (Title IV-D), generally known as the Child Support Enforcement (CSE), or IV-D, program, for the State of New York. The Federal Office of Child Support Enforcement (OCSE), Department of Health and Human Services, has the responsibility to establish standards for state IV-D agencies, and manages the distribution of federal funding to the state IV-D agencies.

Section 466(a) of the Social Security Act (the act) requires that, as a condition for receiving federal funding under Title IV-D, states have procedures to effectuate withholding from the income of obligors amounts payable as child support in cases that are subject to enforcement by the state. Section 466(b) of the act prescribes procedures that the states must provide for with respect to such income withholding. That section also defines income for purposes of the withholding requirements to include periodic payments due to an individual pursuant to a pension or retirement program. You represent that state IV-D agencies, including DCSE, routinely issue income withholding notices pursuant to federal and state law to enforce child support orders against obligor parents. The child support orders are made pursuant to state family or domestic relations law. The income withholding notices may seek to enforce the child support obligation from various sources of income, including benefits due to a participant in a pension plan.

You represent that notices issued by DCSE and county child support enforcement agencies are frequently determined not to be QDROs by plan administrators. You represent that these plan administrators contend that an income withholding notice is not a judgment, decree, or order, and

¹References to the Internal Revenue Code sections that parallel the provisions of section 206(d)(3) of ERISA (the QDRO provisions) are omitted from the following, but may be assumed to be incorporated by reference when the parallel provision of section 206(d)(3) is cited.

therefore not a domestic relations order as defined in section 206(d)(3)(B)(ii) of ERISA. As a result, when a pension plan rejects an income withholding notice, DCSE or the county child support enforcement agency must obtain a court order requiring the plan to withhold the necessary child support payments, which order then generally will be accepted as a QDRO by plan administrators.

Section 206(d)(1) of ERISA generally requires that benefits provided under a pension plan may not be assigned or alienated. Section 206(d)(3)(A) of ERISA provides that the anti-assignment and alienation provisions of section 206(d)(1) apply to the assignment or alienation of benefits pursuant to a domestic relations order, unless the order is determined to be a qualified domestic relations order. Section 206(d)(3)(A) further provides that pension plans must provide for the payment of benefits in accordance with the applicable requirements of any QDRO.

Section 206(d)(3)(B) of ERISA defines the term qualified domestic relations order for purposes of section 206(d)(3) as a domestic relations order which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and which meets the requirements of section 206(d)(3)(C) and (D).²(2)

The term domestic relations order is defined in section 206(d)(3)(B)(ii) as any judgment, decree, or order (including approval of a property settlement agreement) which relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and is made pursuant to a state domestic relations law (including a community property law).

The term alternate payee is defined by ERISA section 206(d)(3)(K) to mean any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

²Section 206(d)(3)(C) provides that in order for a domestic relations order to be qualified, the order must clearly specify (i) the name and last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order; (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined; (iii) the number of payments or period to which such order applies; and (iv) each plan to which the order applies.

Section 206(d)(3)(D) specifies that a domestic relations order is not qualified if it requires: (i) the plan to provide any type of benefit, or any option, not otherwise provided by the plan; (ii) the plan to provide increased benefits (determined on the basis of actuarial value); or (iii) the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order. Section 206(d)(3)(E) provides that an order may not provide that an alternate payee receive a benefit earlier than the date on which the participant reaches his or her earliest retirement age, unless the plan permits payments at an earlier date. Earliest retirement age is defined as the earlier of: (1) The date on which the participant is entitled to receive a distribution under the plan, or (2) the later of (a) the date the participant reaches age 50 or (b) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service with the employer.

Section 206(d)(3)(G) of ERISA requires the plan administrator to determine whether a domestic relations order received by the plan is qualified, and to administer distributions under such qualified orders, pursuant to reasonable procedures established by the plan.

When a pension plan receives an order requiring that all or part of the benefits payable with respect to a participant be distributed to an alternate payee, the plan administrator must determine that the judgment, decree, or order is a domestic relations order within the meaning of section 206(d)(3)(B)(ii) of ERISA - i.e., that it relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of the participant, and that it is made pursuant to a state domestic relations law by a state authority with jurisdiction over such matters. Additionally, the plan administrator must determine that the order is qualified under the requirements of section 206(d)(3)(B)(i) of ERISA.

It is the view of the department that an income withholding notice issued by DCSE or county child support enforcement agencies (as described in your submission) as part of the state's IV-D program, is a domestic relations order as defined in section 206(d)(3)(B)(ii) of ERISA. The notice relates to the provision of child support to a child of a participant in a pension plan, enforces a child support order that is made pursuant to state family or domestic relations law, and is made by DCSE or a county child support enforcement agency, which have jurisdiction over child support matters. We note in particular that section 206(d)(3)(B)(ii) does not specify that in order for a judgment, decree, or order to be a domestic relations order for the purposes of section 206(d)(3) that it must be issued by a court.

While a withholding notice issued by DCSE may constitute a domestic relations order for purposes of section 206(d)(3) of ERISA, the administrator of a pension plan that receives such a notice is still obligated to determine whether the notice is a qualified domestic relations order as defined in section 206(d)(3)(B). Whether any notice issued by the state, including the Order/Notice To Withhold Income For Child Support (the form developed by OCSE that state IV-D agencies are required to use to enforce child support obligations), satisfies the requirements of section 206(d)(3)(C) and (D) is an inherently factual question on which the department is unable to opine.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Louis Campagna
Chief, Division of Fiduciary
Interpretations
Office of Regulations
and Interpretations

June 7, 2002

Alsee McDaniel, Director
Division of Child Support Enforcement
Department of Human Services
750 North State Street
Jackson, MS 39202

2002-03A
ERISA Sec. 206(d)

Dear Mr. McDaniel:

This is in response to your request for an advisory opinion concerning the application of section 206(d) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), with respect to the Mississippi Department of Human Services, Division of Child Support Enforcement (DCSE). Your submission contains the following facts and representations.

DCSE is a state agency that administers the programs under Part D of Title IV of the Social Security Act (Title IV-D), generally known as the Child Support Enforcement (CSE), or IV-D, program, for the State of Mississippi. The Federal Office of Child Support Enforcement (OCSE), Department of Health and Human Services, has the responsibility to establish standards for state IV-D agencies, and manages the distribution of Federal funding to the IV-D agencies.

Like other IV-D agencies, DCSE collects child support both for custodial parents who are receiving economic assistance from the state and for those who are not receiving such assistance, but have applied for the agency's services in collecting support payments. DCSE distributes the support payments that it collects on behalf of the custodial parent as follows. If the custodial parent has a public assistance arrearage¹ and is no longer receiving public assistance, DCSE transmits all child support payments it receives to the custodial parent as current child support payments plus any existing child support arrearage before any of the payment is applied to the public assistance arrearage. If the custodial parent has a public assistance arrearage and is currently receiving public assistance, DCSE applies the payments it receives first to the public assistance arrearage and transmits any remaining funds to the custodial parent as current child support payments. If the custodial parent is not receiving public assistance and has no public assistance arrearage, then DCSE transmits the entire payment to the custodial parent. In all cases, DCSE receives the child support payments, deposits them in its own account, and distributes a check representing the child support payment (minus any public assistance arrearages, if applicable) to the custodial parent.

Section 206(d)(1) of ERISA generally requires pension plans subject to Title I to provide that plan benefits may not be assigned or alienated. Section 206(d)(3)(A) provides an exception to the general rule

¹Pursuant to the IV-D program, State laws provide that a custodial parent who receives public assistance from a State is deemed to assign to the State any right or claim to child support payments that the non-custodial parent is obligated to make, but has not made, to the extent of the owed child support payments plus the State's costs incurred in collecting such support payments. These public assistance payments are considered public assistance arrearages that are owed to the State IV-D agency. In such situations, the public assistance is, essentially, an advance by the State of the child support obligations of the non-custodial parent to the extent of nonpayment, and the retention by the State of all or a portion of the support payments subsequently secured from the non-custodial parent is reimbursement of such advances.

for the creation, assignment or recognition of a right to any benefit payable with respect to a participant pursuant to a qualified domestic relations order (QDRO). Section 206(d)(3)(A) further requires that pension plans must provide for the payment of benefits in accordance with the applicable terms of any QDRO. Section 206(d)(3) describes the conditions that a domestic relations order must satisfy in order to be a QDRO, as well as additional rules regarding a plan administrator's determination of whether a domestic relations order is a QDRO, how benefits are to be administered pursuant to a QDRO, and definitions of certain terms used in section 206(d)(3).

Among other things, section 206(d)(3)(B) provides that a domestic relations order that creates or recognizes an alternate payee's right to, or assigns to the alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and complies with the requirements of section 206(d)(3)(C) and (D) is a QDRO. A domestic relations order is defined as any judgment, decree, or order that relates to, among other things, the provision of child support to a child of a participant. Alternate payee is defined in section 206(d)(3)(K) to mean any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

You ask whether, under the circumstances described above, DCSE may be considered an alternate payee within the meaning of section 206(d)(3)(K) of ERISA, or, in the alternative, whether a domestic relations order that requires a pension plan to make payments to DCSE on behalf of any alternate payee named in the order may be a QDRO.

You argue that in cases in which the custodial parent received public assistance due, at least in part, to the non-custodial parent's nonpayment of ordered child support prior to the issuance of a QDRO, permitting the IV-D agency to be an alternate payee assures that such amounts are returned to state and federal governments when child support payments are made pursuant to the QDRO. In addition, you maintain that public policy favors allowing IV-D agencies to be alternate payees so that reliable records of all child support payments can be kept.

Section 206(d)(3)(K) of ERISA defines the classes of persons who may be alternate payees for purposes of the QDRO provisions. This provision is part of an exception to ERISA's general rule that benefits due to a participant from a pension may not be assigned or alienated, and thus is to be read narrowly. In the opinion of the Department, an alternate payee cannot be anyone other than one of the persons identified in section 206(d)(3)(K), i.e., a spouse, former spouse, child, or other dependent of a participant in a pension plan. Therefore, DCSE cannot be an alternate payee.

However, the Department recognizes that circumstances may arise that will necessitate another person's acting on behalf of an alternate payee, such as if an alternate payee is a minor or is legally incompetent. In such cases, a domestic relations order that requires that the plan make payment to someone with legal responsibility for the alternate payee, such as a guardian or party acting in loco parentis in the case of such child, or a trustee as agent for the alternate payee, may still be a QDRO.² You state that, while DCSE's relationship to a child does not rise to the level of a court-appointed guardian

²See, Staff of the Joint Committee on Taxation, Explanation of Technical Corrections to the Tax Reform Act of 1984 and Other Recent Tax Legislation, 100th Cong., 1st Sess. (Comm. Print 1987) at 222.

ad litem or to the fiduciary level of a trustee, DCSE is charged, by federal and state law, to act in the best interests of each child for which it is acting. DCSE is obligated by law to establish a non-custodial parent's child support obligation, to secure and collect child support payments from any person who is legally liable for such support, and to disburse support payments to the custodial parent. DCSE is authorized to use any method available under state law to establish and enforce a parent's support obligations. You therefore contend that DCSE has essentially the same level of responsibility as a guardian or trustee with respect to child support payments, since it is legally obligated to act on the child's behalf, and any child support received goes to the custodial parent on behalf of the child.

It appears that DCSE, in the circumstances you describe, acts as an agent for the child on whose behalf it is acting. The agency receives funds from a pension plan in which the obligor is a participant, and forwards all of those funds to the alternate payee, or the alternate payee's custodial parent, except for the reimbursement to DCSE of public assistance arrearages," which, as noted above, represent advances by the state to the custodial parent of unpaid support obligations. Under these circumstances, it is the opinion of the Department that the fact that a domestic relations order names DCSE as the party to whom payments are to be made on behalf of an alternate payee, would not constitute grounds on which a plan administrator could find the order not to be qualified.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (41 Fed. Reg. 36281, August 27, 1976). Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 relating to the effect of advisory opinions.

Sincerely,

Louis Campagna
Chief, Division of Fiduciary
Interpretations
Office of Regulations
and Interpretations

cc: Darrell Baughn

February 17, 2004

Terry-Lynne Lastovich
Dorsey & Whitney LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498

2004-02A
ERISA Sec. 206(d)(3)

Dear Ms. Lastovich:

This is in response to your request on behalf of Northwest Airlines, Inc. Retirement Plan for Pilot Employees (the Plan) for an advisory opinion under section 206(d) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether a domestic relations order that changes a prior assignment of benefits to an alternate payee to reduce the amount assigned to the alternate payee may be a “qualified domestic relations order” (QDRO) within the meaning of section 206(d)(3) of ERISA.

You represent that this question arises out of a divorce and property settlement involving a now-retired employee of Northwest Airlines, Inc. (the participant) and his former spouse (the alternate payee). The participant has earned a vested pension benefit under the Plan, which is a defined benefit pension plan. Northwest Airlines, Inc. (Northwest) sponsors and is the administrator of the Plan.

In 1997, while the participant was still actively employed, the Plan received a domestic relations order, dated April 3, 1997, that assigned to the alternate payee a percentage of the participant’s pension benefits (the 1997 Order). The 1997 Order was issued by the District Court of the First Judicial District, Family Court Division, County of Dakota, State of Minnesota. In accordance with its procedures, the Plan reviewed the order, determined it to be a QDRO, and so informed both the participant and the alternate payee on August 27, 1997.

In November 2000, while the participant was still actively employed, the participant notified the Plan that both he and the alternate payee desired to modify the assignment reflected in the QDRO to reduce the portion of the participant’s benefits that would be paid in the future to the alternate payee. The participant sought the Plan’s advice on how to make such a change. The Plan advised the alternate payee and the participant that it would not consider an order that purported to reduce the assignment already made under a previously recognized QDRO to be permissible.

Nonetheless, on June 6, 2002, the participant submitted to the Plan a second domestic relations order, dated June 4, 2002 (the 2002 Order). The 2002 Order was also issued by the District Court of the First Judicial District, Family Division, County of Dakota, State of Minnesota. This order stated that the parties to the divorce were “in agreement” that the QDRO provisions of the 1997 Order should be altered and therefore ordered that those 1997 QDRO provisions were “deleted.” The 2002 Order set forth new provisions for a different (and smaller) assignment to the alternate payee.

During the course of its review of the 2002 Order, the Plan expressed its doubts as to whether such a reduction in the amount assigned could be effected by a QDRO and requested both participant and alternate payee to provide “a written explanation of why this amended order should or should not

be reviewed as a qualified domestic relations order.” These parties declined to offer argument on this issue and continued to assert that the 2002 Order expressed their consensus on how the participant’s benefits should be divided between them.

In September 2002, before the Plan had issued a determination on the qualified status of the 2002 Order, the participant retired, and Northwest began paying benefits to both the participant and the alternate payee under the terms of the 1997 Order.

On November 15, 2002, the Plan sent a letter to the participant, setting forth its “decision” that the 2002 Order was not qualified, based upon its view that a subsequent order cannot reduce the benefits awarded to an alternate payee under a previous domestic relations order recognized by the Plan as a QDRO. This letter set forth the following additional determinations: (1) the 2002 Order is “provisionally” determined not to be a QDRO; (2) the 1997 Order continues in full force and effect; (3) the Plan has requested an advisory opinion from the Department of Labor (the Department) on whether an order that “takes away” benefits previously assigned to an alternate payee can be a QDRO; and (4) pending issuance of the advisory opinion, the Plan will continue to pay out benefits in accordance with the 1997 Order. The letter further advised the participant that, if the Department opined that the 2002 Order cannot be a QDRO, the Plan’s determination would become “final.” The letter further stated that if the Department opined that the 2002 Order could be a QDRO “even though it ‘takes away’ a benefit previously awarded” to the alternate payee, it would then seek reimbursement of any “overpayments” made to the alternate payee based on the 1997 Order. If the alternate payee did not return the “overpayments” the Plan would withhold future payments to the alternate payee until the “overpayments” were recovered.

This request for an advisory opinion ensued. In the context of these facts, you seek guidance on whether the 2002 Order, which purported to reduce the amount of the participant’s benefits that are assigned to the alternate payee, could qualify as a QDRO within the meaning of section 206(d)(3) of ERISA.

Under section 206(d)(3) of ERISA, the plan administrator is the party to whom an initial determination of the qualified status of an order is entrusted. The Department generally does not provide advisory opinions addressing this question because making such a determination necessarily requires an interpretation of the specific provisions of a plan and application of those provisions to specific facts, including the nature and amount of a participant’s pension benefits. Nonetheless, the Department believes it is appropriate to provide guidance under section 206(d)(3) on the narrow issue you have presented of whether a subsequent domestic relations order that alters or modifies a qualified domestic relations order involving the same participant and alternate payee may itself be qualified and therefore supercede the previous order. In providing this guidance, however, the Department takes no position on whether any particular order described in this letter is or is not a “qualified domestic relations order” within the meaning of section 206(d)(3) of ERISA.

Section 206(d)(1) of ERISA generally requires pension plans covered by Title I of ERISA to provide that plan benefits may not be assigned or alienated. Section 206(d)(3)(A) of ERISA states that section 206(d)(1) applies to any assignment or alienation of benefits made pursuant to a “domestic relations order,” unless the order is determined to be a “qualified domestic relations order.” Section 206(d)(3)

(A) further provides that pension plans must provide for the payment of benefits in accordance with the applicable requirements of any order that is determined to be a “qualified domestic relations order.” The grounds on which the plan administrator must judge the status of an order that purports to assign benefits are set forth in the specific subparagraphs of section 206(d)(3).

Subparagraph (B) of section 206(d)(3) of ERISA defines the terms “qualified domestic relations order” and “domestic relations order” for purposes of section 206(d)(3) as follows:

(B) For purposes of [section 206(d)(3)] —

(i) the term “qualified domestic relations order” means a domestic relations order —

(I) which creates or recognizes the existence of an alternate payee’s right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term “domestic relations order” means any judgment, decree, or order (including approval of a property settlement agreement) which —

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

Subparagraphs (C) and (D) of section 206(d)(3) of ERISA contain both positive and negative requirements for qualification of a domestic relations order. Subparagraph (C) specifies that, in order for a domestic relations order to be qualified, such order must clearly specify (i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order; (ii) the amount or percentage of the participant’s benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined; (iii) the number of payments or period to which such order applies; and (iv) each plan to which the order applies.

Subparagraph (D) provides that an order cannot be qualified if it either (i) requires the plan to provide any type of benefit, or any option, not otherwise provided by the plan; (ii) requires the plan to provide increased benefits (determined on the basis of actuarial value); or (iii) requires the plan to pay benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

A plan administrator may determine that an order is not qualified only on the basis of the requirements set forth in section 206(d)(3) of ERISA. In our view, nothing in section 206(d)(3) suggests that a State court (or other appropriate State agency or instrumentality) may not alter or modify a

previous domestic relations order involving the same participant and alternate payee, as long as the new domestic relations order itself meets the statutory requirements. Indeed, the purpose of section 206(d)(3) is to permit the division of marital property on divorce in accordance with the directions of the State authority with jurisdiction to achieve the appropriate disposition of property upon the dissolution of a marriage. Where a State authority reasserts jurisdiction over a marital dissolution and issues an order changing a previously established property allocation, it would appear contrary to this purpose to create additional requirements, beyond what is specified in section 206(d)(3) of ERISA, that would thwart the exercise of that authority. Accordingly, provided that a domestic relations order otherwise meets the requirements of section 206(d)(3) of ERISA, a plan administrator may not fail to qualify the domestic relations order merely because the order changes a prior assignment to the same alternate payee.¹ Thus, it is the Department's view that a plan administrator may determine, consistent with the requirements of section 206(d)(3), that a domestic relations order is qualified even if it would supersede or amend a pre-existing QDRO assigning the same participant's benefits to the same alternate payee.

The plan administrator in this case has made apparent its intention to seek repayments from, or to withhold future payments to, the alternate payee of amounts paid out in accordance with the 1997 Order. We do not believe that, under these facts, the plan administrator would have the authority to do so. As a general matter, a plan administrator making QDRO determinations has fiduciary duties applicable to the determination process. The administrator has a duty under section 206(d)(3)(G) of ERISA to determine whether a domestic relations order is a QDRO within a reasonable time after receipt and to promptly notify the participant and each alternate payee of the determination. The administrator has a duty under section 404(a)(1) of ERISA to act prudently and solely in the interests of the plan's participants and beneficiaries, and to follow the plan's QDRO procedures unless they conflict with the provisions of ERISA.

Because, in this case, the plan administrator had previously determined the 1997 Order to be a QDRO, the plan was required to make benefit payments in accordance with the 1997 Order. The plan administrator took no steps to preserve the amounts that would be affected by the 2002 Order during its consideration of that order's qualified status, but continued to make the payments required by the 1997 Order. Subparagraph (I) of section 206(d)(3) of ERISA provides that, if a plan fiduciary, acting in accordance with its fiduciary duties, treats a domestic relations order as being qualified, and pays out benefits in accordance with its determination and the 18-month segregation rules of subparagraph (H), the plan's obligations to the participant and any alternate payee are discharged with respect to such payments.² Accordingly, under these circumstances it is appropriate to treat the 2002 Order as prospective only. There does not appear to be grounds on which the plan could seek repayment from the alternate payee of the benefits paid out in accordance with the 1997 Order.³

¹Section 206(d)(3)(D)(iii), which provides that a domestic relations order may be qualified only if it does not require the payment of benefits to an alternate payee that are required to be paid to another alternate payee under a pre-existing QDRO, does not apply here, where there is only one alternate payee.

²Although § 206(d)(3)(H) requires an administrator to segregate amounts that would be payable to an alternate payee under an order for 18 months pending determination of the order's qualified status, that section does not require segregation of amounts that would be transferred from the alternate payee (per a previously recognized QDRO) to the participant. Nonetheless, the administrator may have been able, under these facts, to arrange a voluntary escrow of the amounts in question, since both the participant and the alternate payee apparently sought the change in assignment.

³Nothing in this letter is intended to alter or have any effect on the federal tax consequences under the Internal Revenue Code (the Code) to the participant and alternative payee of distributions under either the 1997 Order or the 2002 Order.

This letter constitutes an advisory opinion under ERISA Procedure 76-1, 41 Fed. Reg. 36281 (1976). Accordingly, this letter is issued subject to the provisions of that procedure, including section 10 thereof, relating to the effect of advisory opinions.

Sincerely,
Louis Campagna
Chief, Division of Fiduciary
Interpretations
Office of Regulations
and Interpretations

Field Assistance Bulletin 2003-3

May 19, 2003

Memorandum for: Virginia C. Smith
Director of Enforcement, Regional Directors

From: Robert J. Doyle
Director of Regulations and Interpretations

Subject: Allocation of Expenses in a Defined Contribution Plan

Issue

What rules apply to how expenses are allocated among plan participants in a defined contribution pension plan?

Background

A number of questions have been raised in the course of investigations and otherwise concerning the propriety of certain expense allocation practices in defined contribution plans. This memorandum is intended to respond to the various requests for guidance from the National and Regional Offices on these issues.¹

The two principal issues raised with respect to the allocation of plan expenses in defined contribution plans involve the extent to which plan expenses are required to be allocated on a pro rata, rather than per capita, basis and the extent to which plan expenses may properly be charged to an individual participant, rather than plan participants as a whole. For purposes of discussing these issues, we assume first that the expenses at issue are proper plan expenses² 2) and second that, with respect to the plan as a whole, the amount of the expenses at issue are reasonable with respect to the services to which they relate.

Analysis

ERISA contains no provisions specifically addressing how plan expenses may be allocated among participants and beneficiaries. The Act and implementing regulations, however, do address certain instances in which a plan may impose charges on particular participants and beneficiaries. For example, section 104(b)(4) provides that the plan administrator may impose a reasonable charge to cover the cost of furnishing copies of plan documents and instruments upon request of a participant or beneficiary.³ Also, section 602 permits group health plans, subject to certain conditions, to require the payment of 102% of the applicable premium for any period of continuation coverage elected by

¹The views set forth herein relate solely to the application of Title I of ERISA. We express no view as to whether any particular allocation of expenses might violate the Internal Revenue Code or any other Federal statute.

²See Advisory Opinion No. 2001-01A and related hypotheticals for discussion of the principles applicable to distinguishing settlor from plan expenses.

³See § 29 CFR 2520.104b-30. See also § 2520.104-4(b)(2)(ii).

an eligible participant or beneficiary. Further, the Department's regulations under sections 404(c) and 408(b)(1) provide that reasonable expenses associated with a participant's exercise of an option under the plan to direct investments or to take a participant loan may be separately charged to the account of the individual participant.⁴ By contrast, regulations may limit the ability of a plan to charge a particular participant or beneficiary by requiring that information be furnished free of charge upon request of a participant or beneficiary.⁵

Section 404(a)(1) generally provides, in relevant part, that fiduciaries shall discharge their duties with respect to a plan "solely in the interest of the participants and beneficiaries," prudently (404(a)(1)(B)), and "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] . . ." (404(a)(1)(D)). Plan fiduciaries, therefore, would be required to implement allocation of expense provisions set forth in the plan, unless such provisions otherwise violate Title I.

Accordingly, plan sponsors and fiduciaries have considerable discretion in determining, as a matter of plan design or a matter of plan administration, how plan expenses will be allocated among participants and beneficiaries.

Allocating Expenses Among All Participants - Pro rata v. Per capita

In analyzing formulas for allocating expenses among all plan participants, the starting point is a review of the instruments governing the plan. Inasmuch as ERISA does not specifically address the allocation of expenses in defined contribution plans, a plan sponsor, as noted above, has considerable discretion in determining the method of expense allocation. Where the method of allocating expenses is determined by the plan sponsor (i.e., set forth in the plan documents), fiduciaries, consistent with section 404(a)(1)(D), will be required to follow the prescribed method of allocation. The fiduciary's obligation in this regard does not change merely because the allocation method favors a class (or classes) of participants. When set forth in plan documents, the method of allocating expenses, in effect, becomes part of defining the benefit entitlements under the plan.⁶

When the plan documents are silent or ambiguous on this issue, fiduciaries must select the method or methods for allocating plan expenses. A plan fiduciary must be prudent in the selection of the method of allocation. Prudence in such instances would, at a minimum, require a process by which the fiduciary weighs the competing interests of various classes of the plan's participants and the effects of various allocation methods on those interests. In addition to a deliberative process, a fiduciary's decision must satisfy the "solely in the interest of participants" standard. In this regard, a method of allocating expenses would not fail to be "solely in the interest of participants" merely because the selected method disfavors one class of participants, provided that a rational basis exists for the selected method.⁷ On the other hand, if a method of allocation has no reasonable relationship to the services

⁴See § 2550.404c-1(b)(2)(ii)(A) and 54 FR 30520, 30522 (July 20, 1989)(preamble to 29 CFR § 2550.408b-1).

⁵See §§ 2520.104-46(b)(1)(i)(C), 2520.104b-1(c)(1)(iii) and (iv), 2520.104b-30.

⁶If a plan is intended to be a tax qualified plan, the fiduciary would have a duty to assure that the allocation method does not negatively affect the tax qualified status of the plan.

⁷In reviewing the propriety of such fiduciary actions, the judicial standard is whether the fiduciary acted in an arbitrary or capricious manner. In meeting this standard, the fiduciary has a duty of impartiality to all the plan's participants and may appropriately balance the interests of different classes of participants in evaluating a proposed method of expense allocation. See *Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996); Restatement

furnished or available to an individual account, a case might be made that the fiduciary breached his fiduciary duties to act prudently and “solely in the interest of participants” in selecting the allocation method. Further, in the case where the fiduciary is also a plan participant, the selection of the method of allocation may raise issues under the prohibited transaction provisions of section 406 of ERISA where the benefit to the fiduciary is more than merely incidental.⁸ For example, if in anticipation of the plan fiduciary’s own divorce, the fiduciary who is also a plan participant decides to change the allocation of expenses related to a determination of whether a domestic relations order constitutes a “qualified” order from the account incurring the expense to the plan as a whole, such change in allocation by the fiduciary could constitute an act of self-dealing under section 406 of ERISA.

While a pro rata method of allocating expenses among individual accounts (i.e., allocations made on the basis of assets in the individual account) would appear in most cases to be an equitable method of allocation of expenses among participants, it is not the only permissible method. A per capita method of allocating expenses among individual accounts (i.e., expenses charged equally to each account, without regard to assets in the individual account) may also provide a reasonable method of allocating certain fixed administrative expenses of the plan, such as recordkeeping, legal, auditing, annual reporting, claims processing and similar administrative expenses. On the other hand, where fees or charges to the plan are determined on the basis of account balances, such as investment management fees, a per capita method of allocating such expenses among all participants would appear arbitrary. With regard to services which provide investment advice to individual participants, a fiduciary may be able to justify the allocation of such expenses on either a pro rata or per capita basis and without regard to actual utilization of the services by particular individual accounts. Investment advice services might also be charged on a utilization basis, as discussed below, whereby the expense will be allocated to an individual account solely on the basis of a participant’s utilization of the service.

Allocating Expenses to an Individual v. General Plan Expense

In contrast to the preceding discussion, which focused on methods of allocating plan expenses among all participants, the following discussion focuses on the extent to which an expense may be allocated (or charged) solely to a particular participant’s individual account, rather than allocated among the accounts of all participants (e.g., on a pro rata or per capita basis). The Department provided some guidance on this issue in Advisory Opinion No. 94-32A. In analyzing the extent to which a plan may charge a participant (or alternate payee) for a determination as to whether a domestic relations order constitutes a “qualified” order, the Department concluded in AO 94-32A that imposing the costs of a QDRO determination solely on the participant (or alternate payee) seeking the QDRO, rather than the plan as a whole, would violate ERISA.

Since the issuance of AO 94-32A, the Department has had an opportunity to review the Act and the opinion in the context of a broader array of plan expense allocation issues raised in the course of investigations. On the basis of this review, the Department has determined that neither the analyses or conclusions set forth in that opinion are legally compelled by the language of the statute. Except for the few instances in which ERISA specifically addresses the imposition of expenses on individual participants, the statute places few constraints on how expenses are allocated among plan participants.

(Second) of Trusts §183.

⁸See Advisory Opinion No. 2000-10A.

In this regard, the same principles applicable to determining the method of allocating expenses among all participants, as discussed above, apply to determining the permissibility of allocating specific expenses to the account of an individual participant, rather than the plan as a whole (i.e., among all participants).⁹

Examples of Specific Plan Expenses

Hardship Withdrawals. Some plans may provide for the allocation of administrative expenses attendant to hardship withdrawal distributions to the participant who seeks the withdrawal. ERISA does not specifically preclude the allocation of reasonable expenses attendant to hardship withdrawals to the account of the participant or beneficiary seeking the withdrawal.

Calculation of Benefits Payable under Different Plan Distribution Options. Some defined contribution plans may charge participants for a calculation of the benefits payable under the different distribution options available under the plan (e.g., joint and survivor annuity, lump sum, single life annuity, etc.). ERISA does not specifically preclude the allocation of reasonable expenses attendant to the calculation of benefits payable under different distribution options available under the plan to the account of the participant or beneficiary seeking the information.

Benefit Distributions. Some plans provide for the imposition of benefit distribution charges on the participant to whom the distribution is being made. These charges may be assessed for benefit distributions paid on a periodic basis (e.g., monthly check writing expenses). ERISA does not specifically preclude the allocation of reasonable expenses attendant to the distribution of benefits to the account of the participant or beneficiary seeking the distribution.

Accounts of Separated Vested Participants. Some plans, with respect to which the plan sponsor generally pays the administrative expenses of the plan, provide for the assessment of administrative expenses against participants who have separated from employment. In general, it is permissible to charge the reasonable expenses of administering a plan to the individual accounts of the plan's participants and beneficiaries. Nothing in Title I of ERISA limits the ability of a plan sponsor to pay only certain plan expenses or only expenses on behalf of certain plan participants. In the latter case, such payments by a plan sponsor on behalf of certain plan participants are equivalent to the plan sponsor providing an increased benefit to those employees on whose behalf the expenses are paid. Therefore, plans may charge vested separated participant accounts the account's share (e.g., pro rata or per capita) of reasonable plan expenses, without regard to whether the accounts of active participants are charged such expenses and without regard to whether the vested separated participant was afforded the option of withdrawing the funds from his or her account or the option to roll the funds over to another plan or individual retirement account.

⁹The views expressed herein supersede the views expressed in AO 94-32A.

Qualified Domestic Relations Orders (QDROs) and Qualified Medical Child Support Order (QMCSOs) Determinations. ERISA does not, in our view, preclude the allocation of reasonable expenses attendant to QDRO or QMCSO determinations to the account of the participant or beneficiary seeking the determination.¹⁰

It should be noted that, pursuant to 29 CFR § 2520.102-3(l), plans are required to include in the Summary Plan Description a summary of any provisions that may result in the imposition of a fee or charge on a participant or beneficiary, or the individual account thereof, the payment of which is a condition to the receipt of benefits under the plan. In addition, § 2520.102-3(l) provides that Summary Plan Descriptions must include a statement identifying the circumstances that may result in the “. . . offset, [or] reduction . . . of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits . . .” These requirements are intended to ensure that participants and beneficiaries are apprised of fees and charges that may affect their benefit entitlements.

Questions concerning the information contained in this Bulletin may be directed to the Division of Fiduciary Interpretations, Office of Regulations and Interpretations, (202)693-8510.

¹⁰See footnote 9.

Appendix B

ERISA Advisory Opinion Procedure

The following first appeared in the Federal Register, Volume 41, No. 168, pg. 36281. August 27, 1976

ERISA Procedure 76-1 For ERISA Advisory Opinions

It is the practice of the Department of Labor to answer inquiries of individuals or organizations affected, directly or indirectly, by the Employee Retirement Income Security Act of 1974 (Pub. L. 93-406, hereinafter the Act) as to their status under the Act and as to the effect of certain acts and transactions. The answers to such inquiries are categorized as information letters and advisory opinions. This ERISA procedure describes the general procedures of the Department in issuing information letters and advisory opinions under the Act, and is designed to promote efficient handling of inquiries and to facilitate prompt responses.

Section 7 of this procedure is reserved and will set forth the procedures to be followed to obtain an advisory opinion relating to prohibited transactions and common definitions, such as whether a person is a party in interest and a disqualified person. In general, this section will incorporate a revenue procedure to be published by the Internal Revenue Service.

SEC 1. *Purpose.* The purpose of this ERISA Procedure is to describe the general procedures of the Department of Labor in issuing information letters and advisory opinions to individuals and organizations under the Employee Retirement Income Security Act of 1974 (Pub. L. 93-406), hereinafter referred to as the Act. This ERISA Procedure also informs individuals and organizations, and their authorized representatives, where they may direct requests for information letters and advisory opinions, and outlines procedures to be followed in order to promote efficient handling of their inquiries.

SEC 2. *General Practice.* It is the practice of the Department to answer inquiries of individuals and organizations, whenever appropriate, and in the interest of sound administration of the Act, as to their status under the Act and as to the effects of their acts or transactions. One of the functions of the Department is to issue information letters and advisory opinions in such matters.

SEC 3. *Definitions.* .01 An information letter is a written statement issued either by the Pension and Welfare Benefit Programs (Office of Employee Benefits Security), U.S. Department of Labor, Washington, D.C. or a Regional Office or an Area Office of the Labor-Management Services Administration, U.S. Department of Labor, that does no more than call attention to a well-established interpretation or principle of the Act, without applying it to a specific factual situation. An information letter may be issued to any individual or organization when the nature of the request from the individual or the organization suggests

that it is seeking general information, or where the request does not meet all the requirements of section 6 or section 7 of this procedure, and it is believed that such general information will assist the individual or organization.

.02 An advisory opinion is a written statement issued to an individual or organization, or to the authorized representative of such individual or organization, by the Administrator of Pension and Welfare Benefit Programs or his delegate, that interprets and applies the Act to a specific factual situation. Advisory opinions are issued only by the Administrator of Pension and Welfare Benefit Programs or his delegate.

.03 Individuals and organizations are those persons described in section 4 of this procedure.

SEC 4. *Individuals and Organizations Who May Request Advisory Opinions or Information Letters.* .01 Any individual or organization affected directly or indirectly, by the Act may request an information letter or an advisory opinion from the Department.

.02 A request by or for an individual or organization must be signed by the individual or organization, or by the authorized representative of such individual or organization. See section 7.03 of this procedure.

SEC 5. *Discretionary Authority to Render Advisory Opinions.* .01 The Department will issue advisory opinions involving the interpretation of the application of one or more sections of the Act, regulations promulgated under the Act, interpretive bulletins, or exemptions issued by the Department to a specific factual situation. Generally, advisory opinions will be issued by the Department only with respect to prospective transactions (i.e., a transaction which will be entered into). Moreover, there are certain areas where, because of the inherently factual nature of the problem involved, or because the subject of the request for opinion is under investigation for a violation of the Act, the Department ordinarily will not issue advisory opinions. Generally, an advisory opinion will not be issued on alternative courses of proposed transactions, or on hypothetical situations, or where all parties involved are not sufficiently identified and described, or where material facts or details of the transaction are omitted.

.02 The Department ordinarily will not issue advisory opinions relating to the following sections of the Act:

.02(a) Section 3(18), relating to whether certain consideration constitutes adequate consideration;

.02(b) Section 3(26), relating to whether the valuation of any asset is at current value;

- .02(c) Section 3(27), relating to whether the valuation of any asset is at present value;
- .02(d) Section 102(a)(1), relating to whether a summary plan description is written in a manner calculated to be understood by the average participant;
- .02(e) Section 103(a)(3)(A), relating to whether the financial statements and schedules required to be included in the Annual Report are presented fairly in conformity with generally accepted accounting principles applied on a consistent basis;
- .02(f) Section 103(b)(1), relating to whether a matter must be included in a financial statement in order to fully and fairly present the financial statement of the plan;
- .02(g) Section 202 (other than section 202(a)(3) and (b)(1)) relating to minimum participation standards;
- .02(h) Section 203 (other than sections 202(a)(3)(B), (b)(1) (flush language), (b)(2), (b)(3) (A));
- .02(i) Section 204 of the Act (other than sections 204(b)(1)(B), (b)(1)(A), (C), (D), (E)), relating to benefit accrual requirements;
- .02(j) Section 205(e), relating to the period during which a participant may elect in writing not to receive a joint and survivor annuity;
- .02(k) Section 208, relating to mergers and consolidation of plans or transfer of plan assets;
- .02(l) Section 209(a)(1), relating to whether the report required by section 209(a)(1) is sufficient to inform the employee of his accrued benefits under the plan, etc.;
- .02(m) Sections 302 through 305, relating to minimum funding standards;
- .02(n) Section 403(c)(1), relating to the purposes for which plan assets must be held;
- .02(o) Section 404(a), relating to fiduciary duties as applied to particular conduct; and,
- .02(p) Section 407(a)(2) and (3) and (c)(1), relating to fair market value, as applied to whether the value of any particular security or real property constitutes fair market value.

This list is not all inclusive and the Department may decline to issue advisory opinions relating to other sections of the Act whenever warranted by the facts and circumstances of a particular case. The Department may, when it is deemed appropriate and in the best interest of sound administration of the Act, issue information letters calling attention to established principles under the Act, even though the request that was submitted was for an advisory opinion.

.03 Pending the adoption of regulations (either temporary or final) involving the interpretation of the application of a provision of the Act, consideration will be given to the issuance of advisory opinions relating to such provisions of the Act only under the following conditions:

.03(a) If an inquiry presents an issue on which the answer seems to be clear from the application of the provisions of the Act to the facts described, the advisory opinion will be issued in accordance with the procedures contained herein.

.03(b) If an inquiry presents an issue on which the answer seems reasonably certain but not entirely free from doubt, an advisory opinion will be issued only if it is established to the satisfaction of the Department, that a business emergency requires an advisory opinion or that unusual hardship to the plan or its participants and beneficiaries will result from failure to obtain an advisory opinion. In any case in which the individual or organization believes that a business emergency exists or that an unusual hardship to the plan or its participants and beneficiaries will result from the failure to obtain an advisory opinion, the individual or organization should submit with the request a separate letter setting forth the facts necessary for the Department to make a determination in this regard. In this connection, the Department will not deem a business emergency to result from circumstances within the control of the individual or organization such as, for example, scheduling within an inordinately short time the closing date of a transaction or a meeting of the Board of Directors or the shareholders of a corporation.

.03(c) If an inquiry presents an issue that cannot be reasonably resolved prior to the issuance of a regulation, an advisory opinion will not be issued.

.04 The Department ordinarily will not issue advisory opinions on the form or effect in operation of a plan, fund, or program (or a particular provision or provisions thereof) subject to Title I of the Act. For example, the Department will not issue an advisory opinion on whether a plan satisfies the requirements of Parts 2 and 3 of Title I of the Act.

SEC 6. *Instructions To Individuals and Organizations Requesting Advisory Opinions From the Department.* .01 If an advisory opinion is desired, a request should be submitted to:

U.S. Department of Labor
Employee Benefits Security Administration
Office of Regulations and Interpretations
200 Constitution Avenue, NW, Suite N-5655
Washington, DC 20210

.02 A request for an advisory opinion must contain the following information:

.02(a) The name and type of plan or plans (e.g., pension, profit-sharing, or welfare plan); the Employer Identification Number (EIN); the Plan Number (PN) used by the plan in reporting to the Department of Labor on Form EBS-1 or a copy of the first two pages of the most recent Form EBS-1 filed with the Department.

.02(b) A detailed description of the act or acts or transaction or transactions with respect to which an advisory opinion is requested. Where the request pertains to only one step of a larger integrated act or transaction, the facts, circumstances, etc., must be submitted with respect to the entire transaction. In addition, a copy of all documents submitted must be included in the individual's or organization's statement and not merely incorporated by reference, and must be accompanied by an analysis of their bearing on the issue or issues, specifying the pertinent provisions.

.02(c) A discussion of the issue or issues presented by the act or acts or transaction or transactions which should be addressed in the advisory opinion.

.02(d) If the individual or organization is requesting a particular advisory opinion, the requesting party must furnish an explanation of the grounds for the request, together with a statement of relevant supporting authority. Even though the individual or organization is urging no particular determination with regard to a proposed or prospective act or acts or transaction or transactions, the party requesting the ruling must state such party's views as to the results of the proposed act or acts or transaction or transactions and furnish a statement of relevant authority to support such views.

.03 A request for an advisory opinion by or for an individual or organization must be signed by the individual or organization or by the individual's or organization's authorized representative. If the request is signed by a representative of an individual or organization, or the representative may appear before the Department in connection

with the request, the request must include a statement that the representative is authorized to represent the individual or organization.

.04 A request for an advisory opinion that does not comply with all the provisions of this procedure will be acknowledged, and the requirements that have not been met will be noted. Alternatively, at the discretion of the Department, the Department will issue an information letter to the individual or organization.

.05 If the individual or organization or the authorized representative, desires a conference in the event the Department contemplates issuing an adverse advisory opinion, such desire should be stated in writing when filing the request or soon thereafter in order that the Department may evaluate whether in the sole discretion of the Department, a conference should be arranged and at what stage of the consideration a conference would be most helpful.

.06 It is the practice of the Department to process requests for information letters and advisory opinions in regular order and as expeditiously as possible. Compliance with a request for consideration of a particular matter ahead of its regular order, or by a specified time, tends to delay the disposition of other matters. Requests for processing ahead of the regular order, made in writing (submitted with the request or subsequent thereto) and showing clear need for such treatment, will be given consideration as the particular circumstances warrant. However, no assurance can be given that any letter will be processed by the time requested. The Department will not consider a need for expedited handling to arise if the request shows such need has resulted from circumstances within the control of the person making the request.

.07 An individual or organization, or the authorized representative desiring to obtain information relating to the status of his or her request for an advisory opinion may do so by contacting the Office of Regulatory Standards and Exceptions, Pension and Welfare Benefit Programs, U.S. Department of Labor, Washington, D.C.

SEC. 7. Instructions to Individuals and Organizations Requesting Advisory Opinions Relating to Prohibited Transactions and Common Definitions. .01 [Reserved]

.02 [Reserved]

.03 [Reserved]

SEC. 8. Conferences at Department of Labor. If a conference has been requested and the Department determines that a conference is necessary or appropriate, the individual or

organization or the authorized representative will be notified of the time and place of the conference. A conference will normally be scheduled only when the Department in its sole discretion deems it will be necessary or appropriate in deciding the case. If conferences are being arranged with respect to more than one request for an opinion letter involving the same individual or organization, they will be so scheduled as to cause the least inconvenience to the individual or organization.

SEC. 9. *Withdrawal of Requests.* The individual or organization's request for an advisory opinion may be withdrawn at any time prior to receipt of notice that the Department intends to issue an adverse opinion, or the issuance of an opinion. Even though a request is withdrawn, all correspondence and exhibits will be retained by the Department and will not be returned to the individual or organization.

SEC. 10. *Effect of Advisory Opinion.* An advisory opinion is an opinion of the Department as to the application of one or more sections of the Act, regulations promulgated under the Act, interpretive bulletins, or exemptions. The opinion assumes that all material facts and representations set forth in the request are accurate, and applies only to the situation described therein. Only the parties described in the request for opinion may rely on the opinion, and they may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and the situation conforms to the situation described in the request for opinion.

SEC. 11. *Effect of Information Letters.* An information letter issued by the Department is informational only and is not binding on the Department with respect to any particular factual situation.

SEC. 12. *Public Inspection.* .01 Advisory opinions shall be open to public inspection at the Public Disclosure Room, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20216.

.02 Background files (including the request for an advisory opinion, correspondence between the Department and the individual or organization requesting the advisory opinion) shall be available upon written request. Background files may be destroyed after three years from the date of issuance.

.03 Advisory opinions will be modified to delete references to proprietary information prior to disclosure. Any information considered to be proprietary should be so specified in a separate letter at the time of request. Other than proprietary information, all materials contained in the public files shall be available for inspection pursuant to section 12.02.

.04 The cost of search, copying and deletion of any references to proprietary information will be borne by the person requesting the advisory opinion or the background file.

SEC. 13. *Effective Date.* This advisory opinion procedure consists of rules of agency procedure and practice, and is therefore excepted under 5 U.S.C. 552(b)(3)(A) of the Administrative Procedure Act from the ordinary notice and comment provisions for agency rulemaking. Accordingly, the procedure is effective August 27, 1976, the date of its publication in the Federal Register.

Signed at Washington, DC, this 24th day of August 1976

James D. Hutchinson
Administrator of Pension and Welfare Benefit Programs
U.S. Department of Labor

[FR Doc. 76-25168 Filed 8-26-76;8:45 am]

Appendix C

IRS Sample Language for a Qualified Domestic Relations Order

Appendix C - IRS Sample Language for a QDRO

The following document, which contains sample language for inclusion in a form for a QDRO and discussion of the sample language, was issued by the Department of the Treasury and the Internal Revenue Service in compliance with Congressional directives contained in the Small Business Job Protection Act of 1986, section 1457(a)(2). It appeared in Internal Revenue Bulletin 1997-2 at p. 49 (Jan. 13, 1997). This document was developed in consultation with the Department of Labor and is reprinted here for the convenience of the reader.

Part III - Administrative, Procedural and Miscellaneous Sample Language for a Qualified Domestic Relations Order Notice 97-11

Purpose

This Notice provides information intended to assist domestic relations attorneys, plan participants, spouses and former spouses of participants, and plan administrators in drafting and reviewing a qualified domestic relations order (“QDRO”). The Notice provides sample language that may be included in a QDRO relating to a plan that is qualified under § 401(a) or § 403(a) of the Internal Revenue Code of 1986 (“qualified plan” or “plan”) and that is subject to § 401(a)(13). The Notice also discusses a number of issues that should be considered in drafting a QDRO. A QDRO is a domestic relations order that provides for payment of benefits from a qualified plan to a spouse, former spouse, child or other dependent of a plan participant and that meets certain requirements.

Statutory QDRO Requirements

Section 401(a)(13)(A) of the Code provides that benefits under a qualified plan may not be assigned or alienated. Section 401(a)(13)(B) establishes an exception to the antialienation rule for assignments made pursuant to domestic relations orders that constitute QDROs within the meaning of § 414(p). A “domestic relations order” is defined in § 414(p)(1)(B) as any judgment, decree, or order (including approval of a property settlement agreement) that: (i) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant (ii) is made pursuant to a State domestic relations law (including a community property law). There is no exception to the § 401(a)(13)(A) antialienation rule for assignments made pursuant to domestic relations orders that are not QDROs.

Section 414(p)(1)(A) provides, in general, that a QDRO is a domestic relations order that creates or recognizes the existence of an alternate payee’s right, or assigns to an alternate payee the right, to receive all or a portion of the benefits payable with respect to a participant under a plan, and that meets the requirements of paragraphs (2) and (3) of § 414(p). Section 414(p)(2) requires that a QDRO clearly specify: (A) the name and last known mailing address (if any) of the participant and of each alternate payee covered by the order, (B) the amount or percentage of the participant’s benefits to be paid by the plan to each alternate payee, or the manner in which that amount or percentage is to be determined, (C) the number of payments or period to which the order applies.

Section 414(p)(3) provides that a QDRO cannot require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan; cannot require a plan to provide increased benefits (determined on the basis of actuarial value); and cannot require the payment of benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a QDRO. Section 414(p)(4)(A)(i) provides that a domestic relations order shall not be treated as failing to meet the requirements of § 414(p)(3)(A) (and thus will not fail to be a QDRO) solely because the order requires payment of benefits to an alternate payee on or after the participant's earliest retirement age, even if the participant has not separated from service at that time. Section 414(p)(4)(B) defines earliest retirement age as the earlier of (i) the date on which the participant is entitled to a distribution under the plan, or (ii) the later of (I) the date the participant attains age 50, or (II) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

Section 414(p)(5) permits a QDRO to provide that the participant's former spouse shall be treated as the participant's surviving spouse for purposes of §§ 401(a)(11) and 417 (relating to the right to receive survivor benefits and requirements concerning consent to distributions), and that any other spouse of the participant shall not be treated as a spouse of the participant for these purposes. An alternate payee is defined under § 414(p)(8) as any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to the participant. Section 414(p)(10) provides that a plan shall not fail to satisfy the requirements of § 401(a), 401(k) or 403(b) solely by reason of payments made to an alternate payee pursuant to a QDRO.

B. Small Business Job Protection Act of 1996

Section 1457(a)(2) of the Small Business Job Protection Act of 1996 ("SBJPA") directs the Secretary of the Treasury ("Secretary") to develop sample language for inclusion in a form for a QDRO described in § 414(p)(1)(A) of the Code and §206(d)(3)(B)(i) of the Employee Retirement Income Security Act of 1974 ("ERISA") that meets the requirements contained in those sections, and the provisions of which focus attention on the need to consider the treatment of any lump sum payment, qualified joint and survivor annuity ("QJSA"), or qualified preretirement survivor annuity ("QPSA"). Accordingly, the Service and Treasury are publishing the discussion and sample QDRO language set forth in the Appendix to this Notice.

Section 1457(a)(1) of the SBJPA directs the Secretary to publish sample language that can be included in a form that is used for a spouse to consent to a participant's waiver of a QJSA or QPSA. This sample language for use in spousal consent forms is contained in Notice 97-10 in this Bulletin.

C. Department of Labor Interpretive Authority

Section 206(d)(3) of ERISA (29 U.S.C. § 1056(d)(3)) contains QDRO provisions that are substantially parallel to those of § 414(p) of the Code. The Department of Labor has jurisdiction to interpret these provisions (except to the extent provided in § 401(n) of the Code) and the provisions governing the fiduciary duties owed with respect to domestic relations orders and QDROs. Section 401(n) gives the Secretary of the Treasury the authority to prescribe rules or regulations necessary to coordinate the requirements of §§ 401(a)(13) and 414(p), and the regulations issued by the Department of Labor thereunder, with other Code provisions. The Department of Labor has reviewed this Notice, including its Appendix, and has advised the Service and Treasury that the discussion and sample language are consistent with the views of the Department of Labor concerning the statutory requirements for QDROs. This Notice, including its Appendix, is not intended by the Service or Treasury to convey interpretations of the statutory requirements applicable to QDROs, but only to provide examples of language that may be (but are not required to be) used in drafting a QDRO that satisfies these requirements.

II. SAMPLE LANGUAGE

The appendix to this notice has two parts. Part I discusses certain issues that should be considered when drafting a QDRO. Part II contains sample language that will assist in drafting a QDRO. Drafters who use the sample language will need to conform it to the terms of the retirement plan to which the QDRO applies, and to specify the amounts assigned and other terms of the QDRO so as to achieve an appropriate division of marital property or level of family support. A domestic relations order is not required to incorporate the sample language in order to satisfy the requirements for a QDRO, and a domestic relations order that incorporates part of the sample language may omit or modify other parts.

The sample language addresses a variety of matters, but is not designed to address all retirement benefit issues that may arise in each domestic relations matter or QDRO. Further, some of the sample language, while helpful in facilitating the administration of a QDRO, is not necessarily required for the order to satisfy the requirements for a QDRO. Alternative formulations would be permissible for use in drafting orders that meet the statutory requirements for a QDRO.

III. OTHER SOURCES OF INFORMATION

The Pension Benefit Guaranty Corporation (“PBGC”) recently published a booklet entitled *Divorce Orders & PBGC*, which discusses the special QDRO rules that apply for plans that have been terminated and are trusted by PBGC, and provides model QDROs for use with those plans.

This publication may be obtained by calling PBGC's Customer Service Center at 1-800-400-PBGC or via the PBGC Web site at <http://www.pbgc.gov>

Additional information on the rights of participants and spouses to plan benefits can be found in a two-booklet set published by the Service, entitled *Looking Out for #2*. These booklets discuss retirement benefit choices under a defined contribution or a defined benefit plan, and may be obtained by calling the Internal Revenue Service at 1-800-TAX-FORM, and asking for Publication 1565 (defined contribution plans) or Publication 1566 (defined benefit plans).

IV COMMENTS

The Service invites the public to comment on the QDRO discussion and sample language included in the Appendix to this Notice, and welcomes suggestions concerning possible additional sample language. Comments may be submitted to the Internal Revenue Service at CC:DOM:CORP:R (Notice 97-11), Room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, D.C. 20044. Alternatively, taxpayers may hand-deliver comments between the hours of 8 a.m. and 5 p.m. to CC:DOM:CORP:R (Notice 97-11), Courier's desk, Internal Revenue Service, 1111 Constitution Ave., N.W., Washington, D.C., or may submit comments electronically via the IRS Web Site at http://www.irs.ustreas.gov/prod/tax_regs/comments.html

DRAFTING INFORMATION

The principal authors of this Notice are Diane S. Bloom of the Employee Plans Division and Susan M. Lennon of the Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations); however, other personnel from the Service and Treasury contributed to its development. For further information regarding this Notice, please contact the Employee Plans Division's taxpayer assistance telephone service at 202.622.6074/6075, between the hours of 1:30 p.m. and 4 p.m. Eastern Time, Monday through Thursday. Alternatively, please call Ms. Bloom at (202) 622-6214 or Ms. Lennon at (202) 622-4606. Questions concerning QDROs may be addressed to ~~Susan G. Lahne of the Pension and Welfare Benefits Administration, Department of Labor, at 202.219.7461.*~~ These telephone numbers are not toll-free.

*The Office of Regulations and Interpretations, Employee Benefits Security Administration, Department of Labor, at (202) 693-8500.

Appendix

Part I of this Appendix discusses certain issues that are relevant in drafting a qualified domestic relations order (“QDRO”). Part II of this Appendix contains sample language that can be used in a QDRO. However, the discussion and sample language do not attempt to address every issue that may arise in drafting a QDRO. Also, some parts of the discussion are not relevant to all situations and some parts of the sample language are not appropriate for all QDROs. In formulating a particular QDRO, it is important that the drafters tailor the QDRO to the needs of the parties and ensure that the QDRO is consistent with the terms of the retirement plan to which the QDRO applies.

PART I. DISCUSSION OF QDRO REQUIREMENTS AND RELATED ISSUES

In order to be recognized as a QDRO, an order must first be a “domestic relations order.” A domestic relations order is any judgment, decree or order (including approval of a property settlement) which (i) relates to the provision of child support, alimony payments or marital property rights to a spouse, former spouse, child or other dependent of the plan participant, and (ii) is made pursuant to a State domestic relations law (including a community property law). A State authority must actually issue an order or formally approve a proposed property settlement before it can be a domestic relations order. A property settlement signed by a participant and the participant’s former spouse or a draft order to which both parties consent is not a domestic relations order until the State authority has adopted it as an order or formally approved it and made it part of the domestic relations proceeding.

The sample language in Part II assumes that the QDRO applies to one qualified plan and one alternate payee. If a QDRO is intended to cover more than one qualified plan or alternate payee, the QDRO should clearly state which qualified plan and which alternate payee each provision is intended to address.

The terms of a qualified plan must be set forth in a written document. The plan must also establish written QDRO procedures to be used by the plan administrator in determining whether a domestic relations order is a QDRO and in administering QDROs. The plan administrator maintains copies of the plan document and the plan’s QDRO procedures. If the plan is required under Federal law to have a summary plan description, or “SPD,” the plan administrator will also have a copy of the SPD. The information in these documents is helpful in drafting a QDRO. The drafter of a QDRO may wish to obtain copies of these documents before drafting a QDRO.

A. IDENTIFICATION OF PARTICIPATING AND ALTERNATE PAYEE

A QDRO must clearly specify the name and last known mailing address (if any) of the participant and of each alternate payee covered by the QDRO. In the event that an alternate payee is a minor or legally incompetent, the QDRO should also include the name and address of the alternate payee’s legal representative. A QDRO can have more than one alternate payee, such as a former spouse and a child.

The “participant” is the individual whose benefits under the plan are being divided by the QDRO. Thee participant’s spouse (or former spouse, child, or other dependent) who receives some or all of the plan’s benefits wwith respect to the participant under the terms of the QDRO is the “alternate payee.”

B. IDENTIFICATION OF RETIREMENT PLAN

A QDRO must clearly identify each plan tot which the QDRO applies. A QDRO can satisfy this requirement by stating the full name of the plan as provided in the plan document.

C. AMOUNT OF BENEFITS TO BE PAID TO ALTERNATE PAYEE

A QDRO must clearly specify the amount or percentatge of the participant’s benefits in the plan that is assigned to each alternate payee, or the manner in which the amount or percentage is to be determined. Many factors should be taken into account in determinig which benefits to assign to an alternate payee and how these benefits are to be assigned. The following discussion highlights some of these factors. Because of the complexity and variety of the factors that should be considered, and the need to tailor the assignments of benefits under a QDRO to the individual circumstances of the parties, specific sample language regarding the assingment of benefits has not been provided in Part II of this Appendix.

1. Types of Benefits

In order to decide how to divide benefits under a QDRO, the drafter first should determine the types of benefits the plan provides. Most benefits provided by qualified plans can be classified as (1) retirement benefits that are paid during the participant’s life and (2) survivor benefits that are paid to beneficiaries after the participant’s death. Generally, a QDRO can assign all or a portion of each of these types of benefits to an alternate payee. The drafters of a QDRO should coordinate the assignment of these types of benefits. QDRO drafters should also consider how the benefits divided under the QDRO may be affected, under the plan, by the death of either the participant or the alternate payee.

2. Types of Qualified Plans

Another important factor to consider in the drating of a QDRO is the type of plan to which the QDRO will apply. As discussed below, the type of plan may affect the types of benefits available for assignment, how the parties choose to assign the benefits, and other matters.

There are two basic types of qualified plans to which QDROs apply: defined benefit plans and defined contribution plans.

a. Defined Benefit Plans

A “defined benefit plan” promises to pay each participant a specific benefit at retirement. The basic retirement benefits are usually based on a formula that takes into account factors such as the number of years a participant has worked for the employer and the participant’s salary. The basic retirement benefits are generally expressed in the form of periodic payments for the participant’s life beginning at the plan’s normal retirement age. This stream of periodic payments is generally known as an “annuity.” There are special rules that apply if the participant is married; these rules are discussed in greater detail in section E below. A plan may also provide that these retirement benefits may be paid in other forms, such as a lump sum payment.

b. Defined Contribution Plans

A “defined contribution plan” is a retirement plan that provides for an individual account for each participant. The participant’s benefits are 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 such participant’s account. Examples of defined contribution plans include a profit sharing plan (including a “401(k)” plan), an employee stock ownership plan (an “ESOP”) and a money purchase pension plan. Defined contribution plans commonly permit retirement benefits to be paid in the form of a lump sum payment of the participant’s entire account balance.

3. Approaches to Dividing Retirement Benefits

There are two common approaches to dividing retirement benefits in a QDRO: one awards a separate interest in the retirement benefits to the alternate payee, and the other allows the alternate payee to share in the payment of the retirement benefits. In drafting a QDRO using either of these approaches, consideration should be given to factors such as whether the plan is a defined benefit plan or defined contribution plan, and the purpose of the QDRO (such as whether the QDRO is meant to provide spousal support or child support, or to divide marital property.)

a. Separate Interest Approach

A QDRO that creates a “separate interest” divides the participant’s benefits into two separate parts: one for the participant and one for the alternate payee. Subject to the terms of the plan and as discussed in more detail below, a QDRO may provide that the alternate payee can determine the form in which his or her benefits are paid and when benefit payments commence. If benefits are allocated under the separate interest approach, the drafters of a QDRO should take into account certain issues depending on the type of plan.

(1) Issues Relevant to Defined Benefit Plans

The treatment of subsidies provided by a plan and the treatment of future increases in benefits due to increases in the participant's compensation, additional years of service, or changes in the plan's provisions are among the matters that should be considered when drafting a QDRO that uses the separate interest approach to allocate benefits under a defined benefit plan.

Subsidies. Defined benefit plans may promise to pay benefits at various times and in alternative forms. Benefits paid at certain times or in certain forms may have a greater actuarial value than the basic retirement benefits payable at normal retirement age. When one form of benefit has a greater actuarial value than another form, the difference in value is often called a subsidy. Plans usually provide that a participant must meet specific eligibility requirements, such as working for a minimum number of years for the employer that maintains the plan, in order to receive the subsidy.

For example, a defined benefit plan may offer an "early retirement subsidy" to employees who retire before the plan's normal retirement age but after having worked for a specific number of years for the employer maintaining the plan. In some cases, this subsidized benefit provides payments in the form of an annuity that pays the same annual amount as would be paid if the payments commenced instead at the normal retirement age. The subsidy may be available only for certain forms of benefit.

A QDRO may award to the alternate payee all or part of the participant's basic retirement benefits. A QDRO can also address the disposition of any subsidy to which the participant may become entitled after the QDRO has been entered.

Future Increases in the Participant's Benefits. A participant's basic retirement benefits may increase due to circumstances that occur after a QDRO has been entered, such as increases in salary, crediting of additional years of service, or amendments to the plan's provisions, including amendments to provide cost of living adjustments. The treatment of such benefit increases should be considered when drafting a QDRO using the separate interest approach.

(2) Issues Relevant to Defined Contribution Plans

Investment of the amount assigned to the alternate payee when the account is invested in more than one investment vehicle and division of any future allocation of contributions or forfeitures to the participant's account are among the matters that should be considered when drafting a QDRO that allocates the alternate payee a separate interest under a defined contribution plan.

Investment Choices. The participant's account may be invested in more than one investment fund. If the plan provides for participant-directed investment

of the participant's account, consideration should be given to how the alternate payee's interest will be invested.

Future Allocations. A participant's account balance may later increase due to the allocation of contributions or forfeitures after the QDRO has been entered. A QDRO may provide that the amounts assigned to the alternate payee will include a portion of such future allocations.

b. Shared Payment Approach

A QDRO may use the "shared payment" approach, under which benefit payments from the plan are split between the participant and the alternate payee. The alternate payee receives payments under this approach only when the participant receives payments. A QDRO may provide that the alternate payee will commence receiving benefit payments when the participant begins receiving payments or at a later stated date, and that the alternate payee will cease to share in the benefit payments at a stated date (or upon a stated event, provided that adequate notice is given to the plan). In splitting the benefit payments, the QDRO may award the alternate payee either a percentage or a dollar amount of each of the participant's benefit payments; in either case, the amount awarded cannot exceed the amount of each payment to which the participant is entitled under the plan. If a QDRO awards a percentage of the participant's benefit payments (rather than a dollar amount), then, unless the QDRO provides otherwise, the alternate payee generally will automatically receive a share of any future subsidy or other increase in the participant's benefits.

D. FORM AND COMMENCEMENT OF PAYMENT TO ALTERNATE PAYEE

QDRO drafters should take into account certain issues that may arise in connection with the alternate payee's choice of a form of benefit payments and the date on which payment will commence.

1. Separate Interest Approach

a. Form of Alternate Payee's Benefit Payments

A QDRO either may specify a particular form in which payments are to be made to the alternate payee or may provide that the alternate payee may choose a form of benefit from among the options available to the participant. However, Federal law provides that the alternate payee cannot receive payments in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse.

The choice of the form of benefits should take into account the period over which payments will be made. For example, if the alternate payee elects to

receive a lump sum payment, no further payments will be made by the plan with respect to the alternate payee's interest.

Any decision concerning the form of benefit should take into account the difference, if any, in the actuarial value of different benefit forms available under the plan. For example, as discussed above, a plan might provide an early retirement subsidy that is available only for payment in certain forms.

In addition, the forms of benefit available to the alternate payee may be limited by § 401(a)(9) of the Code, which specifies the date by which benefit payments from a qualified plan must commence and limits the period over which the benefit payments may be made. Section 1.401(a)(9)-1, Q&A H-4, of the Proposed Income Tax Regulations addresses the application of the required minimum distribution rules of § 401(a)(9) to payments to an alternate payee. The proposed regulation limits the period over which benefits may be paid with respect to the alternate payee's interest. For example, the proposed regulation provides that distribution of the alternate payee's separate interest will not satisfy § 401(a)(9)(A)(ii) of the Code if the separate interest is distributed over the joint lives of the alternate payee and a designated (other than the participant).

b. Commencement of Benefit Payments to Alternate Payee

Under the separate interest approach, the alternate payee may begin receiving benefits at a different time than the participant. A QDRO either may specify a time at which payments are to commence to the alternate payee or may provide that the alternate payee can elect a time when benefits will commence in accordance with the terms of the plan. In two circumstances, an alternate payee who is given a separate interest may begin receiving his or her separate benefit before the participant is eligible to begin receiving payments. First, Federal law provides that benefit payments to the alternate payee may begin as soon as the participant attains his or her earliest retirement age. Federal law defines "earliest retirement age" as the earlier of (i) the date on which the participant is entitled to a distribution under the plan, or (ii) the later of (I) the date the participant attains age 50, or (II) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service. Second, the retirement plan may (but is not required to) allow payments to begin to an alternate payee at a date before the earliest retirement date.

2. Shared Payment Approach

As indicated above, under the shared payment approach, benefit payments are split between the participant and the alternate payee. The alternate payee receives payments in the same form as the participant. Further, payments to the alternate payee do not commence before the participant has begun to receive benefits. Payments to the alternate payee can cease at any time stated in the QDRO but do not continue after payments with respect to

the participant cease. As noted above, a QDRO must state the number of payments or the period to which the order applies.

E. SURVIVOR BENEFITS AND TREATMENT OF FORMER SPOUSE AS PARTICIPANT'S SPOUSE

Survivor benefits include both benefits payable to surviving spouses and other benefits that are payable after the participant's death. These benefits can be awarded to an alternate payee. In determining the assignment of survivor benefits, QDRO drafters should take into account that benefits awarded to the alternate payee under a QDRO will not be available to a subsequent spouse of the participant or to another beneficiary. QDRO drafters may consult with the plan administrator for information on the survivor benefits provided under the plan.

A QDRO may provide for treatment of a former spouse of a participant as the participant's spouse with respect to all or a portion of the spousal survivor benefits that must be provided under Federal law. The following discussion explains the spousal survivor benefits that must be offered under a plan, and identifies issues that should be considered in determining whether to treat the alternate payee as the participant's spouse.

Only a spouse or former spouse of the participant can be treated as a spouse under a QDRO. A child or other dependent who is an alternate payee under a QDRO cannot be treated as the spouse of a participant.

Retirement plans generally need not provide the special survivor benefits to the participant's surviving spouse unless the participant is married for at least one year. If the retirement plan to which the QDRO relates contains such a one-year marriage requirement, then the QDRO cannot require that the alternate payee be treated as the participant's spouse if the marriage lasted for less than one year.

1. Qualified Joint and Survivor Annuity

Federal law generally requires that defined benefit plans and certain defined contribution plans pay retirement benefits to participants who were married on the participant's annuity starting date (this is the first day of the first period for which an amount is payable to the participant) in a special form called a qualified joint and survivor annuity, or QJSA. Under a QJSA, retirement payments are made monthly (or at other regular intervals) to the participant for his or her lifetime; after the participant dies, the plan pays the participant's surviving spouse an amount each month (or other regular interval) that is at least one half of the retirement benefit that was paid to the participant. At any time that benefits are permitted to commence under the plan, a QJSA must be offered that commences at the same time and that has an actuarial value that is at least as great as any other form of benefit payable under the plan at the same time. A married participant can choose to receive retirement

benefits in a form other than a QJSA if the participant's spouse agrees in writing to that choice.

2. Qualified Preretirement Survivor Annuity

Federal law generally requires that defined benefit plans and certain defined contribution plans pay a monthly survivor benefit to surviving spouse for the spouse's life when a married participant dies prior to the participant's annuity starting date, to the extent the participant's benefit is nonforfeitable under the terms of the plan at the time of his or her death. This benefit is called a qualified preretirement survivor annuity, or QPSA. As a general rule, an individual loses the right to the QPSA survivor benefits when he or she is divorced from the participant. However, if a former spouse is treated as the participant's surviving spouse under a QDRO, the former spouse is eligible to receive the QPSA unless the former spouse consents to the waiver of the QPSA. If the spouse does not waive the QPSA, the plan allows the spouse to receive the value of the QPSA in a form other than an annuity.

3. Defined Contribution Plans Not Subject to the QJSA or QPSA Requirements

Those defined contribution plans that are not required to pay benefits to married participants in the form of a QJSA or a QPSA are required by Federal law to pay the balance remaining in the participant's account after the participant dies to the participant's surviving spouse. If the spouse gives written consent, the participant can direct that upon his or her death the account will be paid to a beneficiary other than the spouse, for example, the couple's children.

4. Alternate Payee Treated as Spouse

A QDRO may provide that an alternate payee who is a former spouse of the participant will be treated as the participant's spouse for some or all of the benefits payable upon the participant's death, so that the alternate payee will receive benefits provided to a spouse under the plan. To the extent that a former spouse is to be treated under the plan as the participant's spouse pursuant to a QDRO, any subsequent spouse of the participant cannot be treated as the participant's surviving spouse. Thus, QDRO drafters should consider the potential impact of designating a former spouse as the participant's spouse on the disposition of survivor benefits among the former spouse and any subsequent spouse of the participant, as well as the impact on children or any other beneficiaries designated by the participant in accordance with the terms of the plan.

In determining the portion of the participant's benefits for which the alternate payee is treated as the spouse, the drafters should take into account the manner in which benefits are otherwise divided under the QDRO. In particular, consideration should be given to whether the formula for dividing

the participant's benefits for this purpose should be coordinated with the formula otherwise used for dividing the benefits.

Under a defined benefit plan, or a defined contribution plan that is subject to the QJSA and QPSA requirements, to the extent the former spouse is treated as the current spouse, the former spouse must consent to payment of retirement benefits in a form other than a QJSA or to the participant's waiver of the QPSA. For example, in a defined benefit plan, the participant would not be able to elect to receive a lump sum payment of the retirement benefits for which the alternate payee is treated as the participant's spouse unless the alternate payee consents. Similarly, the former spouse's consent might be required for any loan to the participant from the plan that is secured by his or her retirement benefits. In a defined contribution plan that is not subject to the QJSA and QPSA requirements, to the extent the QDRO treats the former spouse as the participant's spouse under the plan, the survivor benefits under the plan must be paid to the former spouse unless he or she consents to have those benefits paid to someone else.

F. TAX TREATMENT OF BENEFIT PAYMENTS MADE PURSUANT TO A QDRO

The Federal income tax treatment of retirement benefits is governed by Federal law, and a QDRO cannot designate who will be liable for the taxes owed when retirement benefits are paid. For a description of the tax consequences of payments to an alternate payee pursuant to a QDRO, see Internal Revenue Service Publication 575, Pension and Annuity Income. A local IRS office can provide this publication, or it may be obtained by calling 1-800-TAX-FORM.

Part II. SAMPLE LANGUAGE FOR INCLUSION IN QDRO

A. SAMPLE LANGUAGE FOR IDENTIFICATION OF PARTICIPANT AND ALTERNATE PAYEE

The "Participant" is [insert name of Participant]. The Participant's address is [insert Participant's address]. The Participant's social security number is [insert Participant's social security number].

The "Alternate Payee" is [insert name of Alternate Payee]. The Alternate Payee's address is [insert Alternate Payee's address]. The Alternate Payee's social security number is [insert Alternate Payee's social security number]. The Alternate Payee is the [describe the Alternate Payee's relationship to Participant] of the Participant.

B. SAMPLE LANGUAGE FOR IDENTIFICATION OF RETIREMENT PLAN

This order applies to benefits under the [insert formal name of retirement plan] ("Plan").

C. AMOUNT OF BENEFITS TO BE PAID TO ALTERNATE PAYEE

Instruction: The QDRO should clearly specify the amount or percentage of benefits assigned to the Alternate Payee or the manner in which the amount or percentage is to be determined, and the number of payments or period to which the Order applies. There are many different forms in which benefits may be paid from a qualified plan. Because of the diversity of factors that should be considered, and the need to tailor the assignment of benefits under a QDRO to meet the needs of the parties involved, specific sample language regarding the assignment of benefits has not been provided. See the discussion in Part I for further information.

D. SAMPLE LANGUAGE FOR FORM AND COMMENCEMENT OF PAYMENT TO ALTERNATE PAYEE

Instruction: Drafters using the separate interest approach may use paragraph 1. Drafters using the shared payment approach may use paragraph 2. Drafters using the separate interest approach for a portion of the benefits allocated to the alternate payee and the shared payment approach for the remainder should modify the sample language to specify the benefits to which each paragraph provided below applies..

1. Separatee Interest Approach

The Alternate Payee may elect to receive payment from the Plan of the benefits assigned to the Alternate Payee under this Order in any form in which such benefits may be paid under the Plan to the Participant (other than in the form of a joint and survivor annuity with respect to the Alternate Payee and his or her subsequent spouse), but only if the form elected complies with the minimum distribution requirements of § 401(a)(9) of the Internal Revenue Code. Payments to the Alternate Payee pursuant to this Order shall commence on any date elected by the Alternate Payee (and such election shall be made in accordance with the terms of the Plan), but not earlier than the Participant's earliest retirement age (or such earlier date as allowed under the terms of the Plan), and not later than the earlier of (A) the date the Participant would be required to commence benefits under the terms of the Plan or (B) the latest date permitted by § 401(a)(9) of the Internal Revenue Code. For purposes of this Order, the eParticipant's earliest retirement age shall be the earlier of (i) the date on which the participant is entitled to a distribution under the Plan, or (ii) the later of (I) the date the Participant attains age 50, or (II) the earliest date on which the Participant could begin receiving benefits under the plan if the Participant separated from service.

2. Shared Payment Approach

The Alternate Payee shall receive payments from the Plan of the benefits assigned to the Alternate Payee under this Order (including payments attributable to the period in which the issue of whether this Order is a qualified domestic relations order is being determined) commencing as soon as practicable after this Order has been determined to be a qualified domestic relations order or, if later, on the date the Participant commences receiving benefit payments from the Plan. Payment to the Alternate Payee shall cease on the earlier of: [insert date or future event, such as the Alternate Payee's remarriage], or the date that payments from the Plan with respect to the Participant cease.

E. SAMPLE LANGUAGE FOR TREATMENT OF FORMER SPOUSE AS PARTICIPANT'S SPOUSE

Instruction: The Alternate Payee may be treated as the Participant's spouse only if the Alternate Payee is the Participant's spouse or former spouse, and not if the Alternate Payee is a child or other dependent of the Participant.

If the Alternate Payee is the Participant's spouse or former spouse, drafters may select sample paragraph 1, sample paragraph 2, or sample paragraph 3. Sample paragraph 1 applies if the Alternate Payee is treated as the Participant spouse for all of the spousal survivor benefits payable with respect to the Participant's benefits under the Plan. Sample paragraph 2 applies if the Alternate Payee is treated as the Participant's spouse for a portion of the spousal survivor benefits payable with respect to the Participant's benefits under the Plan. Sample paragraph 3 applies if the Alternate Payee is not treated as the Participant's spouse for any of the spousal survivor benefits payable with respect to the Participant's benefits under the Plan.

1. Alternate Payee Treated as Spouse For All Spousal Survivor Benefits

The Alternate Payee shall be treated as the Participant's spouse under the Plan for purposes of §§ 401(a)(11) and 417 of the Code.

2. Alternate Payee Treated as Spouse For a Portion of the Spousal Survivor Benefits

The Alternate Payee shall be treated as the Participant's spouse under the Plan for purposes of §§ 401(a)(11) and 417 of the Code with respect to [insert percentage of benefit or a formula, such as a formula describing the benefit earned under the plan during marriage].

3. Alternate Payee not Treated as Spouse

The Alternate Payee shall not be treated as the Participant's spouse under the Plan.



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