Advisory Council on Employee Welfare and Pension Benefit Plans

Report to the Honorable Hilda L. Solis,
United States Secretary of Labor

Current Challenges and Best Practices Concerning Beneficiary Designations in Retirement and Life Insurance Plans

December 2012

NOTICE

This report was produced by the Advisory Council on Employee Welfare and Pension Benefit Plans, usually referred to as the ERISA Advisory Council (the "Council"). The Council was established under Section 512 of ERISA to advise the Secretary of Labor. This report examines Current Challenges and Best Practices Concerning Beneficiary Designations in Retirement and Life Insurance Plans. The contents of this report do not represent the position of the Department of Labor (DOL).

ABSTRACT

The 2012 ERISA Advisory Council studied current challenges and best practices concerning beneficiary designations in retirement and life insurance plans. The Council examined the issues surrounding attempts to pay the correct plan beneficiaries in a timely manner and to improve plan design and administrative practices to ensure that the participant's intent is carried out. In particular, the Council focused on steps that plans and service providers can take to ensure the proper beneficiary receives the intended benefit payment from the plan. The Council also examined issues and concerns regarding resolution of disputes regarding beneficiary designations applicable to retirement and life insurance plans.

The Council recommends that DOL (1) develop educational materials to help plan participants understand the importance of beneficiary designations, how they work and the importance of updating them when life events occur, (2) develop suggestions and guidance for employers, plan administrators and service providers on how to improve plan design and administrative practices to diminish disputes in the area of payments based on beneficiary designations, and (3) issue guidance for plans, plan administrators and plan fiduciaries in several areas that would aid in the resolution of beneficiary disputes.

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EXECUTIVE SUMMARY

The 2012 ERISA Advisory Council examined current issues surrounding beneficiary designations in retirement and life insurance plans to determine entitlement to benefits payable upon death of the participant. This process included examining the issues that may arise where there is a question about whether the beneficiary designation accurately reflects the participant's intent and resulting disputes over who is entitled to ERISA plan benefits following the death of the participant. These issues range from the failure to change a beneficiary designation after divorce, incorrectly completed beneficiary designation forms, forms that are inconsistent with plan terms and "stale" designations which have not been updated to reflect changed life circumstances. The report paid special attention to plan provisions and administrative practices that could avoid beneficiary designation disputes and ensure that the participant's intent is effectuated. In addition, the report assessed whether participants know when they should consider changing their beneficiary designation and/or the steps that they must take in order to make these changes as well as plan communications to notify participants of the necessity of these changes.

The Council received testimony (written, oral or both) from representatives of Department of Labor (DOL), organizations representing plans and employers, service providers serving small and large employers, employer representatives, probate and domestic relations attorneys, and organizations representing the interests of individuals. The Council also received sample documents from many witnesses including enrollment kits, beneficiary designations, instructions for completing the designations, "screen shots" from providers' websites, and plan provisions regarding beneficiary designations. The testimony and materials identified a number of practices that can help ensure that the benefits payable upon the death of the participant reach the participant's intended beneficiaries. Based on testimony received, the Council recommends that DOL develop materials to help educate participants, plan sponsors and service providers about practices that are intended to reduce the potential for disputes regarding beneficiary designations. In addition, the Council recommends that DOL issue guidance in several discrete areas that are targeted to resolving beneficiary disputes and beneficiary recordkeeping requirements.

The Council received testimony on other subjects related to beneficiary designations that may be of particular interest to the family law, trust and estate bars, and personal financial planners. Consequently, we anticipate that DOL may communicate this report to appropriate bar associations (*e.g.*, American Bar Association Sections of Family Law and Real Property, Trusts and Estates, American Academy of Matrimonial Lawyers, American College of Trust and Estate Counsel, American College of Financial Services) and other related organizations to facilitate a greater level of knowledge and understanding by their members of these issues.

In addition, the testimony demonstrated that there are important issues involving disposition of death benefits after divorce pursuant to Qualified Domestic Relations Orders. The Council acknowledges that these issues merit further study by DOL.

RECOMMENDATIONS

The Council has examined current issues surrounding beneficiary designations in retirement and life insurance plans and recommends that DOL:

1. Develop educational materials to help plan participants understand the importance of beneficiary designations, how they work and the importance of updating them when certain life events occur. The materials should explain the following: (a) the importance of completing beneficiary designations; (b) the consequences to participants and their beneficiaries where the beneficiary designation forms are not properly or timely completed; (c) the importance of reviewing and periodically updating their beneficiary designations for all employer-sponsored plans and employee benefits; (d) the significance of reviewing and changing designations when life events (*e.g*., marriage, divorce, birth of a child) occur; and (e) the importance of maintaining records such as paper and/or electronic copies of all executed designations.

2. Develop suggestions and guidance for employers, plan administrators and service providers on how to improve plan design and administrative practices to diminish disputes in the area of payments based on beneficiary designations. The Council has identified proactive decisions and actions which plan sponsors and others have taken that have been effective in reducing potential disputes in a number of areas, including: (a) responsibility for administering beneficiary designations; (b) plan provisions on the designation of default beneficiaries; (c) plan provisions to address common situations that give rise to beneficiary disputes; (d) procedures for locating beneficiaries; (e) review and acceptance of beneficiary designations; (f) procedures to ensure that participants are aware of beneficiary designation status and (g) procedures for the maintenance and updating of beneficiary designation forms.

3. Issue guidance for plans, plan administrators and plan fiduciaries regarding beneficiary designation disputes. Such guidance should cover the following areas: (a) the availability and applicability of the ERISA claims procedure for beneficiary designation disputes, including review of the definition of adverse benefit determination; (b) the ability of plans to charge participant accounts for dispute resolution costs when there is a dispute over the proper payment of benefits to a beneficiary; and (c) retention of beneficiary designations and related documents, including spousal waivers.

BACKGROUND

Beneficiary designations are frequently used in retirement and life insurance plans to determine entitlement to benefits payable upon death of the participant. In the case of certain benefits subject to spousal protections, ERISA imposes requirements on both the form and timing of beneficiary designations. Other types of beneficiary designations are a matter of plan design. The complexity of the rules under ERISA may, in some cases, lead to beneficiary designations that do not accurately reflect the participant's intent. This can frequently result in disputes regarding who is entitled to the plan benefits following the death of the participant. The following examples illustrate where such disputes can commonly arise:

- Participants fail to change beneficiary designations to reflect life events. The most common and frequently contentious disputes occur where participants marry or divorce but fail to update their beneficiary designations to reflect this change of status before their death. In these cases, failure to act can result in disputes between the participant's spouse, ex-spouse, and other potential beneficiaries including, among others, parents, children or other siblings.

- Beneficiaries allegedly murder the participant. Some state laws, so-called "slayer statutes," prevent the designated beneficiary who is the wrongdoer from receiving the proceeds. In such instances, questions may arise concerning whether ERISA preempts these state statutes.

- Simultaneous deaths of the participant and the designated beneficiary. In such cases, questions can arise concerning the impact of survivorship rules on the receipt of benefits. In addition, the effect of state laws on these questions is unclear.

- Lost or stale beneficiary designations because of a change in service providers, administrators or other reasons may result in benefits under the plan that may not flow to the intended beneficiary.

- Elected beneficiary designation is impermissible under the terms of the plan, thereby resulting in questions as to whom the benefit should be paid under the terms of the plan.

In cases where beneficiary designation disputes occur, including but not limited to those listed above, plan fiduciaries are required to spend time, as well as financial and other resources, to identify the correct beneficiary in order to fulfill their fiduciary duties. Fiduciaries may be required to take various actions that may include defending lawsuits, commencing interpleader actions in court or expending time and financial resources to locate the correct beneficiary under the terms of the plan, so that the plan can avoid paying benefits to an erroneous beneficiary. Such payment could expose the plan and its fiduciaries to liability.

In other cases, the fiduciary of the plan could be placed in the unfortunate position of having to pay the same benefit twice — once to the mistaken beneficiary and again to the correct beneficiary after identification and clarification. In the case of a double payment, the plan may be forced into legal procedures to recover the erroneous payment. However, under current case

law, such recovery may be difficult or in some cases impossible. See, e.g., *CIGNA Corp. v. Amara,* 131 S. Ct. 1866 (2011); *Sereboff v. Mid Atlantic Medical Services, Inc*., 547 U.S. 356 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *U.S. Airways Inc. v. McCutchen,* 663 F.3d 671 (3rd Cir. 2011), *cert. granted*, No. 11-1285 (6/25/12).

A related issue is whether costs incurred when the plan fiduciary is required to engage in legal and other dispute resolution proceedings can be charged to the participant's account under the plan.

In addition to concerns over the proper disposition of benefits, beneficiary designations present unique administrative challenges. Because of legal requirements and historical practices, the beneficiary designation for retirement and insurance plans is one of the few employee benefit transactions that remain almost entirely based on paper records. This creates significant challenges for both plan sponsors and service providers who are focused on meeting the needs of participants.

A unique challenge associated with maintaining beneficiary designation forms is the fact that they generally have a "life" that is much longer than the typical election made by participants under their benefit plans. A beneficiary designation can remain on file for a very long time, sometimes decades, without review by the participant, which increases the likelihood that the original designation may not reflect the current intent of the participant and may thus be considered "stale." In addition, the long shelf life can result in the designation form being lost, especially in cases where there are changes in plan administrators/service providers and the transfer process is not complete or thorough.

Another area of challenge is lack of participant knowledge. Many participants may be unaware of when they should consider changing their beneficiary designation(s) and/or the steps they must take in order to make any necessary changes and have them become effective. This is an area where more participant education could be valuable. Outreach to participants from various groups including DOL, plan sponsors, service providers, estate planners, and family and elder care lawyers may be more effective than from the plan alone. These efforts should emphasize the importance of keeping beneficiary designation(s) updated and making any changes, as warranted, to reflect participants' intent as to whom benefits should be paid under the plan upon their death.

Finally, even where the beneficiary designation correctly indicates the participant's intent with respect to benefits to be paid; in some cases beneficiaries may be unaware of how to determine the benefit or amount payable and/or the process they must follow to obtain the benefit.

Much of the testimony received by the Council addressed many of the issues set forth above, and in some cases, sample documents were provided to illustrate how certain plan designs can reduce the number and character of the disputes arising from beneficiary designations.

SUMMARY OF TESTIMONY AND COUNCIL DISCUSSION

The Council heard testimony that covered a wide range of issues affecting beneficiary designations and the payment of benefits following the death of a participant. However, a number of common themes emerged from the testimony. This section of the report -- including the summary of testimony and Council discussion -- is organized around these broad themes that are set forth below.

A. Ensuring That Participants Are Aware of the Status of Their Beneficiary Designation(s)

Many witnesses testified about the need to educate participants on the importance of ensuring that they have completed a valid beneficiary designation that is currently on file with the appropriate entity – generally either with the plan sponsor or the service provider. In addition, the importance of educating participants as to the need to consider updating their beneficiary designation upon the occurrence of certain life changing events such as marriage, divorce, death of a spouse, was highlighted in much of the testimony.

1. The importance of completing beneficiary designations

Virtually all plans include beneficiary designations as a standard part of the plan enrollment process. However, few plans require completion and submission of a beneficiary designation as a condition of enrollment. Several witnesses pointed out that in the case of a plan that provides for automatic enrollment, participants who have not made an affirmative election to enroll in the plan are unlikely to submit a completed beneficiary designation form. They noted that education and outreach could be effective in increasing the number of completed beneficiary designations.

Nancy Maitland, Vice President and Senior Legal Counsel, T. Rowe Price Group Inc., stated that among the defined contribution plans that her firm handles approximately 40 percent to 60 percent of the participants had completed beneficiary designation forms. However, she noted that there is a wide variation among plans concerning the number of participants who complete the beneficiary designation forms. In her testimony, she stated that some plans approach 100 percent completion, and others have less than 50 percent of the participants completing beneficiary designation forms. She noted that rarely do plans require submission of a beneficiary designation form as a condition for the participant's enrollment in the plan or the receipt of benefits under the plan.

Susan Diehl, President of PenServe Plan Services Inc., indicated that due to automatic enrollment there are fewer beneficiary designation forms being completed by participants, thereby increasing the number of participants with no beneficiary designations on file with the plan. The Council believes that this is an area in which DOL can provide guidance to plan sponsors and service providers.

2. Re-soliciting beneficiary designations

Beneficiary designation elections, unlike most other plan transactions, are likely to remain in effect for long periods of time without participants' reviewing or updating them to ensure that the designations reflects their current intentions. Because of the passage of time, participants often forget who they designated as beneficiaries at an earlier date. In some cases, participants may not even know whether they have a completed beneficiary designation form.

According to testimony received, for this reason some plans periodically engage in re-solicitation efforts that are designed to encourage participants to review (and update where appropriate) their beneficiary designations. The time period between re-solicitations depends on the type of workforce, industry and the number of participants in the plan. In addition, witnesses noted that re-solicitations most typically occur when a plan changes service providers, particularly when beneficiary designations will be maintained electronically. However, even when re-solicitations occur and there is an attempt to maintain the designations electronically, some designations will still be maintained in paper because the participant did not respond to the re-solicitation request. The reasons the participant may fail to respond may range from inertia to difficulty reaching the participant due to retirement or competency issues. Plans and plan sponsors may also conduct a re-solicitation at periodic intervals to update the plan information. Witnesses stated that plans or plan sponsors bear the cost of such re-solicitation initiatives.

Several witnesses were asked about the practice of invalidating old beneficiary designations during re-solicitation initiatives and encouraging participants to submit new beneficiary designations. The uniform view among the witnesses was that this practice should not be encouraged or adopted because in some cases participants who submitted an earlier beneficiary designation may not be able to submit a new designation. For example, this might occur upon the incapacity or the inability of the participant to obtain spousal consent which had been obtained earlier and filed with the plan or service provider holding the original beneficiary designation.

3. Importance of maintaining beneficiary designations records

The Council also heard testimony about the practice of identifying beneficiaries (or including a notice of whether a beneficiary designation is on file) on participant statements or other plan communications. While there was consensus among both the witnesses and the Council that this is a desirable practice and should be encouraged, the Council recognizes that it is most feasible where the plan sponsor or the service provider has the capability of adequately maintaining electronic records of executed beneficiary designations.

Regardless of administrative practices, or the number of participants in the plan, there was wide consensus that plans should include information about the importance of beneficiary designations and the plan's procedures for beneficiary designations as a part of standard plan communications. This information should be a standard part of all plan communications and should be communicated to all plan participants. Based on the testimony received, the Council notes that the requirements governing the content for summary plan descriptions (SPDs) do not currently require the inclusion of information about beneficiary designations. The Council

highlights this issue for DOL as a possible opportunity to provide more effective education for both plan sponsors and plan participants, and also may be appropriate for regulatory action. The Council believes that plan sponsors should be encouraged to include this information as part of the plan enrollment process as well as in plan communications on an ongoing basis.

Joyce A. Mader, speaking on behalf of the National Coordinating Committee for Multiemployer Plans (NCCMP), sought input from NCCMP affiliates and found that every responding plan encouraged its participants to keep their beneficiary designations up-to-date. One respondent, she said, includes the selected beneficiary designations on participants' annual pension statements, noting that this may be an effective form of communication.

4. Significance of reviewing and changing designations when life events occur

Witnesses agreed that notifying participants of the importance of updating their beneficiary designations when there is a life-changing event is extremely important. However, most witnesses did not believe that DOL should require plan sponsors to contact participants after life changing events to request an updated beneficiary designation. This would be a tremendous hardship on most employers, especially in the case of large employers who are less likely to be aware of when many life changing events occur. Witnesses noted that while such notification may be possible in small plans (and perhaps in some Taft-Hartley plans), DOL would not want to adopt a "one size fits all" standard. The Council endorses this view.

For example, Vicki Blanton, testifying on behalf of the American Benefits Council, stated that "It is important to note that new rules should not require the plan administrator to actively and affirmatively reach out to plan participants upon the occurrence of certain life events, such as marriage, divorce, birth of child, etc. This would place an undue burden on the plan administrator, and such a requirement would be fraught with risk due, in part, to the fact that the plan administrator often does not learn of the occurrence of the life event in a timely manner." Additionally, Ms. Blanton noted that many times a participant may change a beneficiary in one plan but fail to change the beneficiaries in other plans in which he/she currently participates or has participated. She stated that it would be helpful if plan participants were reminded to consider beneficiary designations in all plans where they have a benefit entitlement, including plans maintained by former employers. The Council believes that education and outreach materials should be developed for plan sponsors and service providers that adopt this approach.

Ronald Dean, testifying on behalf of the National Employment Lawyers Association, stated that ensuring that participants maintain up-to-date beneficiary designations is purely a matter of personal responsibility. He noted that often the most diligent and careful individuals fail to maintain current beneficiary designations. He also stated that in many divorce cases, family law attorneys fail to remind their clients about changing beneficiary designations, and when the lawyers do so, the beneficiary designation update is included on a long list of "things you should do after your divorce." He stated that, unfortunately, such advice is often overlooked or forgotten by the participants. Mr. Dean noted that it would be beneficial if DOL, plan sponsors and service providers provided educational information and reminders for participants regarding the need to complete and update beneficiary forms.

Robert Richter, testifying on behalf of the ASPPA, stressed that while service providers assist with the collection of beneficiary designation forms, the plan sponsor has ultimate responsibility for plan administration and beneficiary designations. He noted that the employer or plan sponsor is typically in a better position to be aware of changes in family status that may impact beneficiary designations than the service provider. Mr. Richter noted that his conclusion is based on his experience with small employers who tend to have more personal relationships with their employees. However, he highlighted the role that service providers can play in educating participants about the importance of maintaining valid and updated beneficiary designations, removing the barriers in reaching participants to complete their beneficiary designations and motivating participants to review and update their beneficiary designations upon life changing status.

Kathy Callaghan of MetLife also confirmed the need to educate participants about the importance of updating their beneficiary designations. She noted that there should be a review of the designation process upon initial enrollment, at annual enrollment, and periodically where there is a life changing event. She stated that such education might include information about how an accurate, updated designation may avoid state escheat laws, probate costs, court costs and other expenses

5. Conclusion on ensuring that participants are aware of their beneficiary designation status

With respect to the issue of ensuring that participants are aware of their beneficiary designation status, the Council gathered from the testimony received and deliberations by the Council, that the following practices, when adopted and implemented by plans, plan sponsors, and service providers, resulted in a more effective management of beneficiary designations.

- It was unanimously agreed that there should not be any mandatory rules or requirements for plan sponsors or service providers to notify participants to update their beneficiary designations due to changes in life events, a change in service provider for the plan, or regulatory changes.

- There was agreement that it would be beneficial if plan sponsors or service providers provided educational information and reminders to participants through regular plan communications regarding the importance of completing and updating their beneficiary designation forms.

- Family and estate lawyers and personal financial planners can play a role in communicating this information to participants.

- To the extent possible, but especially where the designation forms are completed electronically, plan sponsors and service providers can consider including the participant’s beneficiary election (or lack thereof) on the participant’s benefit statements or other forms of plan communications.

- Where appropriate, plan sponsors and service providers should conduct periodic re-solicitation of beneficiary designation forms for the plan and its participants. The Council believes that the implementation of these measures is the key to successful plan administration and to satisfying participants' intent about disposition of benefits upon death.

B. Improve Plan Design and Administrative Practices

1. <u>Responsibility for administering beneficiary designations</u>

Several witnesses testified about the importance of forms to the success of the beneficiary designation process. A form that is straightforward with clear instructions is more likely to be completed by a participant, and there is less likelihood of making an error. Given the significant variations in plan provisions, no single form could work for all plans. However, several witnesses suggested that DOL consider providing a sample form that could be used as a template for plans. To the extent such a sample form gained wide acceptance, the familiarity of the form might encourage greater acceptability and use by participants which could result in fewer errors in completion.

Many witnesses stated that the use of electronic forms has resulted in fewer mistakes such as incorrect addition of amounts (or percentages) split among designees. Electronic forms also require more information such as addresses and Social Security numbers which assist in locating beneficiaries. However, should a participant wish to designate someone other than a spouse in a plan which requires spousal consent, then spousal consent must be provided via a paper form. For example, T. Rowe Price permits a participant to designate a person other than a spouse electronically, but the participant is told that the designation is not effective until T. Rowe Price receives the paper spousal consent. Also, currently, there does not appear to be an electronic process that meets notarization requirements.

Steve Gorin, Partner, Thompson Coburn, LLP, provided testimony on the role of beneficiary designations in estate planning. He observed that a beneficiary designation is one of the easiest ways to implement an estate plan. However, the needs of the estate planner also can introduce considerable complexity in the beneficiary designation itself. For example, using a beneficiary designation to maximize a credit shelter trust may require complex language on the form that may be difficult for a plan administrator to interpret and apply. To address this concern, he suggested creating some type of reliance mechanism that would protect the plan administrator if a benefit is paid to a person or entity that the executor of the estate designates.

Under the prudence requirements of ERISA Section 404, the use of a third party to maintain beneficiary designations does not absolve plan fiduciaries from assuring the proper maintenance of such records. ERISA Sections 107 and 209 discuss the requirements for record retention but do not discuss any requirements for obtaining, updating or maintaining beneficiary designations. Accordingly, the Council recommends that DOL provide guidance on application of these rules to beneficiary designation forms.

2. <u>Plan provisions on designation of default beneficiaries</u>

If no beneficiary designation is made, the beneficiary is usually determined by the terms of the plan document. Retirement plan documents typically include default beneficiary provisions that apply in the event the retirement account owner fails to designate a beneficiary. The most common order used for a default is the current spouse, children, parents, siblings and the estate. However, witnesses suggested variations on the default provisions. In the case of defined contribution plans exempt from the qualified joint and survivor annuity rules, the participant's spouse is typically the beneficiary by default unless the participant designates a beneficiary with the spouse's consent.

Many individuals rely on these defaults at the time of plan enrollment and the Council heard testimony about the advisability of encouraging participants to use the default when it reflects their intent. Mr. Richter felt that the default provisions will often match the participant's intent and advocated more aggressive communication of plan defaults to participants to encourage reliance on the default designations where appropriate. This avoids the potential need to change beneficiary designations for changes in family status, especially divorce. Mr. Dean thought this also could work well for participants. However, it appears that few plans follow this practice and some witnesses identified both the pros and cons of the approach.

Although the Council did not adopt the approach focusing on the use of the defaults as the primary method for identification of the beneficiary, the Council does suggest that plans review the option of having a default beneficiary plan provision as a "back-stop" for those participants who do not complete or properly execute a beneficiary designation form. Witnesses set forth various suggestions for default provisions.

C. The Interaction of Plan Provisions and ERISA Preemption

As noted above, plans usually designate default beneficiaries in the event a participant does not file a valid beneficiary designation form. In addition, plans may contain other provisions that are designed to ensure that benefits reach intended beneficiaries. In many cases, these provisions are designed to result in the payment of benefits in a manner consistent with state laws that would otherwise be preempted by ERISA.

1. <u>ERISA preemption jurisprudence impacting issues surrounding beneficiary designations</u>

Preemption issues surrounding beneficiary designations in employer provided retirement and life insurance plans generally arise from the intersection of state domestic relations, probate law and ERISA. The U.S. Supreme Court has decided three cases which impact the legal analysis in this area. *See Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 555 U.S. 285 (2009); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *Boggs v. Boggs*, 520 U.S. 833 (1997).

In *Boggs v. Boggs*, 520 U.S. 833 (1997), the Supreme Court held that a state community property law that allows a nonparticipant spouse to transfer by testamentary instrument an interest in

undistributed pension plan benefits was preempted by ERISA. Through ERISA's alienation, survivors' annuities, and QDRO provisions, ERISA spelled out who would, and would not, have rights to pension benefits; the state law would conflict with ERISA's statutory provisions.

In *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), the issue before the Court was whether ERISA preempts Washington's state law, which automatically nullifies or overrides plan beneficiary designations used in ERISA welfare and pension plans after a divorce. The Court found that the state statute "binds ERISA plan administrators to a particular choice of rules for determining beneficiary status. The administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents." *Id.* at 147. The Court maintained that it was significant that this state statute governed the payment of benefits, a central matter of plan administration, and thus it interfered with nationally uniform plan administration. *Id.* at 148. The Court held that ERISA preempted the state automatic nullification after divorce law.

In *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 555 U.S. 285 (2009), the Supreme Court addressed the issue of whether a plan administrator must give effect to a waiver of benefits in a divorce decree if it is in conflict with the beneficiary designation on file with the plan. The Supreme Court held that retirement plans may rely only on the plan terms and beneficiary designation forms in determining the proper recipient of survivor benefits. Thus, in most situations, a plan administrator may now ignore a divorce decree and pay out a survivor benefit in accordance with the plan's terms and beneficiary designation forms on file.

The courts have struggled with issues surrounding beneficiary designations regarding employee benefits and determining whether federal law preempts state laws *Compare IBEW Pacific Coast Pension Fund v. Lee*, 462 Fed. Appx. 546 (6th Cir. 2012) (although ERISA provides rules for making the determination over proper beneficiary for benefits, reliance on state law to determine validity of marriage did not run afoul of ERISA); *Melton v. Melton*, 324 F.3d 941 (7th Cir. 2003) (applying *Egelhoff*, ERISA preempts Illinois doctrine of constructive trusts); *Metropolitan Life Ins. Co. v. Johnson*, 297 F.3d 558, 565-67 (7th Cir. 2002) (collecting cases) (applying *Egelhoff*, finds ERISA preempted state doctrine of substantial compliance; applied federal common law holding that the court had to look at insurer's intent to change beneficiary designation by undertaking positive actions; life insurance benefits awarded to children despite participant's failure to fully comply with designation requirements); *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001) (ERISA preempts a surviving spouse's state law action seeking to impose a constructive trust on community property interest in deceased husband's life insurance policy); *BankAmerica Pension Plan v. McMath*, 206 F.3d 821 (9th Cir. 2000) (holding ERISA does not preempt California's doctrine of "substantial compliance" in an action involving a dispute over the proper beneficiary of a deceased participant's 401(k) plan benefits, where the participant failed to sign the beneficiary designation form; state doctrine of substantial compliance and imposition of a constructive trust does not affect the administration of the plan and would aid in determining the proper recipient of the proceeds).

2. **ERISA preemption, recordkeeping and the impact on beneficiary designations**

Joe Canary, Director of the Office of Regulations and Interpretations of EBSA, stated that DOL, working through the Office of the Solicitor (SOL), has taken positions in federal court cases regarding ERISA, ERISA preemption, and the requirements that govern in the event of disputes regarding the person or persons entitled to benefits under ERISA pension plans. He noted that the DOL's website includes links to important SOL briefs on these ERISA issues and ERISA-related Supreme Court briefs, *see* http://www.dol.gov/sol/media/briefs/main.htm, and he directed the Council to those briefs for more information.

Mr. Canary briefly reviewed the ERISA recordkeeping requirements as they applied to benefit designations, and noted that the Council may want to explore the role of state insurance law recordkeeping requirements in cases involving insured plans.

Mr. Canary stated that he thought that it would be difficult to try to develop a regulation implementing ERISA's general preemption provision, and noted that the DOL historically has used advisory opinions dealing with specific facts and state laws. However, he noted that he thought DOL would be interested in any suggestions the Council developed on how the Department could through regulation or other forms of guidance help address questions or problems with beneficiary designations in ERISA plans.

3. **Common situations where state law and ERISA may conflict in beneficiary disputes**

Mr. Richter discussed the U.S. Supreme Court decisions and the impact on other types of state laws including simultaneous death[1] and slayer statutes.[2] Mr. Richter recommended dealing with some of these issues by plan design – that is, by writing plan provisions to require automatic revocation of designation upon divorce, automatic revocation of designation if a beneficiary murders the participant; and setting forth the rules for dealing with simultaneous deaths. Mr. Richter did stress that if a plan were to include such provisions that the plan should be very specific as to the processes that the plan would use.

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[1] State simultaneous death statutes deal with the situation where two persons (usually a husband and wife) both die under conditions in which it is impossible to determine which one died first and establish rules for the inheritance of their property.

[2] Slayer statutes prohibit a murderer from inheriting the property of whom s/he has murdered. The slayer rule allows courts to presume the murderer disclaims his/her property interest, and therefore behave as though the murderer predeceased the victim.

Ms. Callaghan agreed that automatic revocation of a designation upon divorce was used by many plans, but she could not confirm whether those plans had more or fewer disputes than other plans.

Ms. Maitland discussed a case where the participant divorced and changed the designation to his son. When the participant died, the ex-wife sued T. Rowe Price, claiming that because the son's Social Security number was not on the designation form, the participant had not substantially complied with changing the form. Ms. Maitland stated that the court struggled with whether to use state law or federal common law to resolve this question.

Ms. Blanton also testified about the use of plan provisions to eliminate conflict between state laws and ERISA. She specifically alluded to plan provisions that: (i) prohibit a beneficiary from collecting the plan benefit if the beneficiary is responsible for the death of the participant (such as slayer statutes), (ii) revoke a designation upon divorce, (iii) provide a hierarchy for distribution where there is no beneficiary designation, and (iv) provide a hierarchy where there is simultaneous death between the participant and the beneficiary. She stated that such provisions were clearer than relying on state law, provided certainty and uniformity and resulted in far fewer beneficiary disputes than would occur without such default rules.

Joyce Mader testified that based on a survey of the NCCMP's members, many plans did have provisions that prohibit a beneficiary from collecting the plan benefit if the beneficiary was responsible for the death of the participant. Ms. Mader also stated that the NCCMP's member plans were split by plan size on whether to have a plan provision that automatically revokes a designation upon divorce. Larger national plans generally did not have such provisions because it was difficult to determine whether a divorce had indeed occurred. She noted that some plans had provisions concerning how to interpret the beneficiary designation itself. For example, if beneficiaries are named but there are no percentages for distribution, the plan would interpret that designation as a direction to distribute the proceeds equally.

Elizabeth Wells, a partner in Law Offices of Elizabeth Wells, was not in favor of plan provisions that automatically revoke beneficiary designations after divorce because she stated that the non-participant spouse is frequently left unprotected. She stated that it was more likely for the non-participant spouse not to receive a benefit that the court ordered rather than the converse.

4. <u>Conclusion on the interaction of plan provisions and ERISA preemption</u>

Witnesses generally agreed that, although plans did not have a significant number of claims where questions of ERISA preemption and state law arose, the preemption issues that did arise could be resolved through plan drafting. The witnesses also generally agreed that plans should consider whether these types of provisions should be incorporated into their plan provisions based on, among other factors, the workforce, plan industry and plan size.

The Council agrees with the witnesses' analyses of these issues. As a consequence, the Council recommends that DOL educate plans about potential conflicts with state law so that plans can address those issues through plan design, taking into account the size, demographics and industry the plan serves.

D. The Issue of Locating Beneficiaries Designated Under the Plan

There appears to be minimal concern over the issue of locating beneficiaries. A number of witnesses indicated that when participants provide complete beneficiary designation information, especially including the Social Security numbers of the beneficiaries, it simplified locating the beneficiaries, even if the addresses on the designation were dated.

The person advising the plan or its service provider of the participant's death is usually in a position to identify the beneficiaries and provide contact information. There was mixed testimony concerning the efficacy of the Social Security Administration and IRS letter forwarding program for locating beneficiaries. Subsequent to the Council's hearings, the IRS announced that it would no longer forward letters on behalf of plan sponsors or administrators of qualified retirement plans who are attempting to locate missing plan beneficiaries. The IRS noted that since its letter-forwarding program began, numerous alternative missing person locator resources, including the Internet, have become available to assist a plan sponsor or plan administrator in locating a missing beneficiary owed a retirement benefit, thereby enabling the program change. See Revenue Procedure 2012-35. The Council heard testimony to the same effect that where a beneficiary is missing, standard locator services are available. These are generally the same services used to locate missing participants. The Council does not believe there are any special problems to address in this area.

E. Resolving Disputes Regarding Payments of Benefits to Beneficiaries

The U.S. Supreme Court has reaffirmed the obligation of ERISA plan fiduciaries to pay benefits in accordance with the terms of the plan documents and the beneficiary designation forms maintained by the plan. *See Kennedy v. Plan Administrator for DuPont Savings and Investment Plan, supra; Egelhoff v. Egelhoff, supra.* The failure to meet this obligation exposes the plan to the risk of double payment and the plan fiduciary to potential claims under ERISA.

While disputes relating to beneficiary designations may not arise with great frequency, when they do they typically raise difficult legal and factual issues, become critically important to the disputing parties, are highly charged and contested and involve potentially significant liabilities.

According to Ms. Maitland, the most common disputes relating to beneficiary designations involve cases of divorce. Similarly, Thomas Hohl of FMR Corp., stated that the most difficult issues relating to the administration of beneficiary designations arise in connection with disputes involving former spouses. Mr. Richter testified that most of the beneficiary disputes involve cases where there has been a divorce and/or multiple marriages with children from prior marriages. Other common reasons for disputes relate to whether proper designations have been made. These encompass issues such as incomplete forms, ambiguous designations and fraudulent practices such as forgery and undue influence. Further, Ms. Diehl identified disputes involving disclaimers, trusts as the named beneficiary, multiple beneficiary forms and cases where a will names different beneficiaries than the retirement plan.

Where disputes do arise, some plans will hold the benefits to be distributed until the contesting parties agree on how the disputed payments are to be disbursed. Ms. Diehl and Mr. Richter both testified that typically plans contain language that provides that where there is a beneficiary dispute, the fiduciary will freeze accounts and will not release the monies without a court order or other legal document. At the very least, this process will cause a delay in benefit payments until the situation can be resolved.

Ms. Maitland stated that its standard record keeping agreement indemnifies the service provider against liability for claims unless the service provider is negligent or engages in willful misconduct or material breach of its duties.

A plan provision that charges the costs of resolving the beneficiary designation dispute to the plan account or benefit that is being contested may serve as a catalyst to encourage the contesting parties to resolve their competing claims. If the parties can arrive at a consensual agreement, with adequate protection to the plan, the plan fiduciaries may then distribute the funds in accordance with the agreement reached by the parties. However, where this process does not resolve the dispute, plans typically address these competing claims by one of the three methods described below:

- Use of the plan's claims procedures;
- Use of an interpleader action; or
- Use of a combination of the plan's claims procedures and an interpleader action.

Each of these approaches is discussed separately below.

1. <u>The use of plan's claim procedures to resolve payment disputes</u>

Under Section 503 of ERISA, every employee benefit plan must establish and maintain reasonable procedures governing the filing of employee benefit claims, notification of benefit determinations, and appeal of adverse benefit determinations. Ms. Maitland confirmed that the most common procedure for resolving beneficiary claims is through the plan's claims review procedures. Ronald Dean urged the Council to consider as a "best practice' the use of full administrative review in a beneficiary dispute, noting that [i]t is up to the plan to interpret its rules and to find facts related to benefits."

Under DOL benefit claims regulation, 29 CFR Section 2560.503-1, a "claim for benefits" is triggered by a claimant's request for a plan benefit or benefits that is filed with a plan in accordance with the plan's reasonable procedures. Generally, if a claim is wholly or partially denied, the plan administrator must notify the claimant of the plan's adverse benefit determination within a reasonable period of time, but not later than 90 days after receipt of the claim. A claimant must have a reasonable opportunity to appeal an adverse benefit determination to an appropriate named fiduciary of the plan. The claim and the adverse benefit determination must be subject to a full and fair review. The plan administrator must notify the claimant of the plan's benefit determination on review within a reasonable period of time, but no later than 60 days after receipt of the claimant's request for review by the plan, unless the plan administrator determines that special circumstances require an extension of time for processing

the claim. The plan administrator must provide a claimant with written or electronic notification of a plan's benefit determination on review. The notification in the case of an adverse benefit determination must set forth specific information, which includes (i) the specific reason or reasons for the adverse benefit determination, (ii) reference to the specific plan provision on which the benefit determination is based, (iii) a statement that the claimant is entitled to receive reasonable access to, and copies of, all documents, records and other information relevant to the claimant's claim for benefits, and (iv) a statement describing any voluntary appeal procedures offered by the plan, and a statement of the claimant's right to bring an action under section 502 of ERISA.

Under the regulation, the term "adverse benefit determination" is defined in pertinent part as "a denial, reduction, or termination of, or a failure to provide or make payment (in whole or in part) for, a benefit, including any such denial, reduction, termination or failure to provide or make payment that is based on a determination of a participant's or beneficiary's eligibility to participate in a plan …." 29 CFR Section 2560.503-1(m)(4).

Some plans impose a limitation on the time by which a beneficiary must file a legal action to challenge the denied claim. For example, the testimony of Petros Koumantaros, Managing Shareholder & Chief Executive Officer of Spectrum Pension Consultants, Inc., included provisions from a prototype plan which requires a beneficiary to file an action with respect to the denied claim within 180 days following the date of the plan fiduciaries' final denial.

Plans typically contain language in which the plan fiduciary is granted the discretionary authority to interpret the plan's provision. In such event, a court will review the decision of the plan fiduciary under a deferential abuse of discretion standard of review.

2. <u>Interpleader action when there is a payment dispute</u>

In cases where there are competing claims to a benefit, a plan may elect to initiate a lawsuit, called an interpleader action, in a federal or state court. In an interpleader action, the plan, acting as the plaintiff-stakeholder, will commence a lawsuit alleging, among other things, that (i) it has no claim to the benefit, (ii) there are competing claimants; and (iii) it does not know to which claimant the benefit should be delivered. In the action, the plan names the competing claimants as defendants and seeks the court's direction as to which defendant(s) is the proper beneficiary entitled to the contested benefit. The defendants will each have an opportunity to present the merits of their case and the court will issue its decision. In some cases, the plan document expressly authorizes the plan fiduciary to file such an action. For example, the Spectrum Pension Consultants prototype plan contains the following provision:

> <u>Inability to Determine Beneficiary</u>. In the event that the Plan Administrator is unable to determine the identity of a Participant's Beneficiary under circumstances of competing claims or otherwise, the Plan Administrator may file an interpleader action seeking an order of the court as to the determination of the Beneficiary. The Plan Administrator, the Trustee and other Plan fiduciaries may act in reliance upon any proper order issues … in maintaining, distributing or

otherwise disposing of a participant's Account under the Plan terms, to any Beneficiary specified in the court order.

Mr. Dean stated that in his experience, if done correctly, the entire interpleader process can be conducted inexpensively. On the other hand, other witnesses such as Mr. Richter stated that interpleaders are rarely used as they can be a very lengthy and costly process. Both of these witnesses noted that the plan can recover the costs of the interpleader action through a plan provision that charges the costs of resolving beneficiary designations disputes to the plan benefit at issue or by requesting that the court order such amounts be paid directly from the disputed benefit. Ms. Diehl testified that the plan language usually dictates whether the costs of the interpleader action are deducted from the plan account involved in the proceeding or charged against the plan as a whole. On the other hand, Mr. Hohl testified that the costs of the interpleader action are usually borne by the plan sponsor and are not paid by the plan or deducted from the beneficiary's benefit.

3. **Plan's claim procedure followed by interpleader action in disputes**

As a variant of the above methods, Mr. Dean suggested a process whereby the contesting parties would first pursue the claim through the plan's administrative claims procedures. After a final decision is rendered by the plan fiduciary, if one or more of the contesting parties want to challenge the decision further, then the plan will file an interpleader action. Mr. Dean brought to the attention of the Council the case of *Trustees of the Electricians' Salary Deferral Plan v. Wright,* 2012 U.S. App. LEXIS 17542 (8th Cir. Aug. 21, 2012). In this case, there was dispute between the designated beneficiary and the decedent's mother over a death benefit. The plan administrator decided that the designated beneficiary should receive the death benefit and the mother appealed to the plan fiduciary, who upheld the denial. The plan initiated an interpleader action and deposited the amount in dispute into the court. The court then dismissed the plan from the case. The district court determined the entitlement of the competing claimants, which decision was affirmed on appeal. Because the administrative process was exhausted, the trial and appellate courts were able to apply the deferential abuse of discretion standard of review to the trustees' decision, without having to engage in a fact finding process.

As demonstrated by the above case, there are significant advantages to this approach. By first requiring the exhaustion of the plan's administrative process, it may avoid the necessity of the parties having to seek legal review. If litigation is ultimately required because the parties cannot resolve their differences, the plan can provide its views on the dispute to the court. As Mr. Dean testified, the court will then have the "benefit of the plan's expertise" and the plan can insure consistency and application of its rules. Mr. Dean also believes that, practically speaking, if the parties are represented by knowledgeable legal counsel and the plan fiduciaries have discretionary authority under the plan documents to interpret their plan, it may assure a more rapid resolution of the dispute as the parties recognize that the reviewing court likely will defer to the plan fiduciary's decision.

In the NCCMP survey presented by Ms. Mader, one of the responding multiemployer benefit plans noted that "the threat of interpleader" has been successful in convincing the disputing parties to resolve their benefit disputes.

4. Conclusion Resolving Disputes Regarding Payments of Benefits to Beneficiaries

Based on the testimony, the Council believes that the use of the ERISA claims process is a meaningful, efficient, and economical method for addressing and dealing with disputes concerning beneficiary designations. One of the reasons for using the claims process is that it is part of the plan's regular administrative operations. Consequently, the Council recommends that DOL issue guidance for plans, plan administrators and plan fiduciaries which explains the availability and applicability of the ERISA claims procedure where there are beneficiary designation disputes, including review of the definition of adverse benefit determination, and the ability of plans to charge participant accounts for dispute resolution costs when there is a dispute over the proper payment of benefits to a beneficiary.

E. Other Related Issues

A number of witnesses stated that family and estate bar practitioners do not have sufficient awareness and knowledge of QDRO requirements, and can even include distribution provisions that are inconsistent with plan provisions. Ms. Mader specifically remarked that she did not believe that many family lawyers were aware of DOL's regulations or guidance. She complimented the materials on DOL and PBGC websites, and stated that she frequently referred family attorneys to those websites. She also stated that although many of the plans she represents have model QDROs available, along with booklets explaining the plan's procedures, when they are offered to the family lawyers the lawyers reject the models, preferring their own version.

With regard to posthumous QDROs, Ms Blanton explained that American Airlines would honor such a QDRO if the plan had notice that it was in process before the participant died. Ms. Mader stated that most NCCMP member plans comply with posthumous QDROs.

Ms. Wells explained that many courts assumed that a court order or a divorce decree alone is sufficient for the division of marital retirement assets, even though plans require a QDRO. Moreover, she believed that a substantial number of family lawyers, even those who she would consider knowledgeable in this area, did not appreciate the significance of obtaining a QDRO before the divorce is final. In addition, Ms. Wells noted that many of these practitioners do not understand the nuances of the plan's payment options, so that the QDRO is not specific enough to assist the plan in making its distribution. She also raised numerous questions concerning the posthumous QDRO rules including the definition of "in-process" and what actions are necessary to consider the QDRO in-process for a particular plan. Finally, even if more family lawyers were knowledgeable about QDROs, Ms. Wells noted that many individuals do not hire attorneys to help them with their divorce.

Ms. Wells thought that a checklist with follow-up items for the divorced participants or beneficiaries provided by their attorneys was a good idea, assuming that the individual engaged an attorney.

Based on testimony the Council received that the family and estate bar associations are not as aware of, or knowledgeable about, benefit plan requirements as they could or should be relating to effective beneficiary designations, the Council suggests that DOL communicate this report to appropriate bar associations (*e.g*., American Bar Association Sections of Family Law and Real Property, Trusts and Estates, American Academy of Matrimonial Lawyers, American College of Trust and Estate Counsel) and related personal financial planning organizations(*e.g*., American College of Financial Planners) to facilitate a greater level of knowledge and understanding by their members of these relevant issues.

The Council heard testimony about problems involving disposition of death benefits pursuant to qualified domestic relations orders (QDROs). While clearly an important area that can affect disposition of death benefits, the Council determined that a full review of the impact of QDROs on death benefits was beyond the scope of this topic. However, the testimony demonstrated that there are important issues involving disposition of death benefits after divorce pursuant to QDROs that merit further study by DOL.

Because of the current litigation over the constitutionality of the Defense of Marriage Act, and the potential impact of that litigation on ERISA plans, the Council did not request testimony on, and therefore did not address, issues surrounding domestic partnerships, same sex marriage relationships and the definition of marriage under ERISA plans. The Council also did not address electronic disclosure issues due to their complexity, DOL review of comments submitted in response to a Request for Information and pending legislation.

CONCLUSION

The Council's efforts focused on providing plans, plan sponsors and plan administrators with suggestions for plan design and administrative practices that will assist in diminishing disputes over the distribution of plan assets based on issues surrounding beneficiary designations. These suggestions, based on the testimony received, include types of plan provisions to deal with common issues involving beneficiary designations; plan operations and procedures which some plans have found effective in minimizing disputes; materials distributed to participants so that they understand the importance of beneficiary designations and the consequences of their failure to update the designations as a result of life events; and guidance from DOL to help plans to better handle disputes arising from disputes over distributions to beneficiaries. The Council realizes that not every suggestion is appropriate for every plan or plan sponsor, due to differences in plan size, geographic diversity, industry type, work force and other factors. The plan fiduciaries are uniquely situated to make such decisions based on their knowledge of their plan. The Council hopes that plans and plan sponsors will review these suggestions and consider which of them will work for their plan and participants.

APPENDIX: WITNESS SUMMARIES

Joe Canary
Director, Office of Regulations and Interpretations
Employee Benefits Security Administration, DOL

Based upon the broad categories of interests outlined in the position statement prepared by the Issue Chair and Vice-Chair, Mr. Canary focused his testimony on the applicable ERISA provisions, key areas in which the Department of Labor ("DOL") has issued guidance that may prove helpful, and some suggestions on areas in which the Council might want to do more investigation and make recommendations to DOL.

Mr. Canary directed the Council's attention to ERISA's requirements that, in determining to whom benefits should be paid, plan fiduciaries are only to look to (i) the ERISA statute, (ii) the plan's governing documents, and (iii) the participant's beneficiary designation. This standard (known as the beneficiary designation rule) should be considered in evaluating ERISA preemption issues and the interplay between ERISA and state laws. Furthermore, fiduciaries should only look beyond the plan's terms and the beneficiary designation when the ERISA statute so requires.

Mr. Canary pointed to several topics the Council is reviewing regarding beneficiary designations and related areas in which DOL has issued guidance that may apply directly or indirectly to beneficiary designation issues:

<u>Preemption of States Laws</u>: Mr. Canary pointed to DOL's amicus briefs and briefs filed by the federal government in U.S. Supreme Court proceedings. He expressed an interest in learning what issues arise in the area of designations under life insurance policies.
<u>Lost or Missing Spouses</u>: Mr. Canary pointed to missing participant guidance in FAB 2004-02 and DOL Regulation 2550.404a-3 that deal with issues involving the wind up of abandoned plans. He noted that while not all of this guidance would be applicable because they address terminated plans, some concepts addressed may be helpful.
<u>QDROs</u>: Mr. Canary suggested reviewing DOL's QDRO booklet and DOL's final regulation on the timing of QDROs in relation to a participant's death. With respect to the latter, he noted that DOL was particularly interested in hearing about where other "timing" guidance might be helpful.

<u>Retention of Beneficiary Designation</u>: DOL issued an Information Letter in the 1980s and Advisory Opinion 84-19A that speak to recordkeeping obligations under Sections 107 and 209 of ERISA. Mr. Canary also noted that the general prudence requirements apply and that use of a third party to maintain beneficiary designations does not absolve the plan fiduciaries from assuring the proper maintenance of such records.

Among several other issues of importance or of interest to DOL and raised by Mr. Canary, two of note included (i) the resolution of beneficiary designation issues under a plan's claims procedures and (ii) the ability to charge the costs of resolving beneficiary designation disputes to the plan.

Robert Richter
President, American Society of Pension Professionals and Actuaries
Vice President, SunGard

Robert Richter, a Vice President at SunGard's Relius retirement services division, testified on behalf of the American Society of Pension Professionals and Actuaries (ASPPA) where he serves as President. He indicated that his testimony would focus primarily on qualified retirement plans and not group term life insurance.

Mr. Richter stressed that while service providers assist with beneficiary designations, employers have ultimate responsibility for plan administration. Consistent with this approach, in most cases, employers retain beneficiary designations and simply direct service providers as to payment. He believes there are three reasons why this is the case. First, beneficiary disputes involve potentially significant liabilities. If service providers were to take a more active role, they would need to charge plans for the potential exposure. Second, employers are generally in a better position to be aware of changes in family status that may impact beneficiary designations. Third, if the employer maintains beneficiary designations, nothing needs to be done when the plan changes service providers.

Mr. Richter testified that the problem with having plan sponsors maintain beneficiary designations is that plan sponsors are not in the business of administering plans. Plan sponsors rarely require that forms be returned which can lead to reliance on the default provisions in the plan. However, he felt that default provisions will often match the participant's intent and advocated more aggressive communication of plan defaults to participants encouraging reliance on the default designations where appropriate. This, he noted, avoids the potential need to change beneficiary designations for changes in family status, especially divorce.

Mr. Richter described the development of a federal common law governing beneficiary designations, citing several Supreme Court opinions. However, he also pointed out that plan documents can effectively avoid conflict by drafting provisions that specifically address such situations as revocation of a beneficiary designation on divorce, simultaneous death and invalidating beneficiaries who are criminally responsible for the death of the participant.

Mr. Richter highlighted the role that service providers can play in educating participants about the importance of beneficiary designations, removing barriers in making beneficiary designations and motivating people to review and update beneficiary designations for changes in status. He also advocated that there should be some type of review process for submitted beneficiary designation forms, and discussed the following specific form features for consideration: (1) general versus specific spousal consent (he indicated his preference for specific consent to avoid the need for indefinite retention of an original general consent document); (2) whether spousal consent should be revocable (noting inherent difficulties with revocability) (3) notary vs. plan representative as witness to spousal consent (preferring the use of a notary to avoid any possible claim of collusion or undue influence); (4) whether form should require information about relationship to participant; (5) whether designation of spouse should be revoked upon divorce; (6) whether beneficiary designation should be effective upon receipt or upon acceptance by the

plan administrator; (7) whether to impose one year of marriage requirement for spousal benefits; (8) use of electronic technologies for storing beneficiary designations (noting potential evidence problems and difficulties where spousal consent is required); and (9) best practices for reminding participants to update beneficiary designations (noting potential problems where reminders provide beneficiary-specific information).

Kathy Callaghan
Senior Manager, Group Life Products, MetLife

Ms. Callaghan noted that once the death benefit claim reaches her shop, all opportunities to improve the accuracy of the designation or the designation process have lapsed.

Ms. Callaghan confirmed certain unique challenges with respect to beneficiary designations:

- The extended time period for maintaining designations, frequently over decades,
- The past practice where most plans used paper documents, such as three-by-five cards,
- The likelihood that designations are maintained in multiple locations, particularly where there are multiple plans or multiple insurance policies,
- The inaccuracies in completing paper form designations, a 15 to 40 percent error rate, and
- The potential for multiple beneficiary designation rules and variations in plan provisions where no valid election is on file; contrasting for example, pension and welfare benefit plans.

She confirmed the need to educate participants about the importance of updated beneficiary designations as well as a review of the designation process - upon initial enrollment, at annual enrollment and periodically where there is a life event. She noted that such education might include information about how an accurate, updated designation may avoid state escheat laws, probate costs, taxes, court costs (interpleader actions, etc.) and other expenses.

Ms. Callaghan recommended plan sponsors:

- Use a single recordkeeper where possible for all beneficiary designations,
- Deploy electronic beneficiary designation processes (telephonic, web) to maximize the potential for accuracy, completeness (particularly in terms of capturing data) and even avoidance of simple math errors (such as where allocations do not equal 100 percent),
- Use services that review all new designations for accuracy, clarity, adherence to plan rules,
- Resolicit designations whenever there are life events, and
- Use recordkeepers who, when taking over new business, image or transcribe paper records into electronic recordkeeping systems, while offering telephonic and web update options, all with the goal of achieving and maintaining current, accurate beneficiary designations.

Ms. Callaghan suggested adoption of safe harbors to protect fiduciaries and their representatives for beneficiary determinations – offering deference to plan administrator determinations where such administrative practices and policies are followed. She asserts such a safe harbor will

benefit participants by “ensuring that the intent of the participant is realized which … (she believes) is the goal of both plan sponsors and their service providers.” She also endorsed:

- A Uniform Facility of Payment Provision: suggesting that all plan documents/contracts incorporate common provisions for a default payout order - to the participant’s spouse/partner, children, parents, and siblings; then estate, where the participant’s estate should be the beneficiary when all potential payees have been exhausted,
- A Uniform Provision to Nullify Spousal Designations upon Divorce: forcing the participant to affirmatively designate the now ex-spouse, if desired, by completing a new designation,
- “User-friendly” instructions highlighting critical content, common rejection reasons, and
- Standardized beneficiary designation form content.

Nancy Maitland
Vice President and Senior Legal Counsel
T. Rowe Price Group Inc.

T. Rowe Price Group, Inc. is a global investment management firm. Through its subsidiary, T. Rowe Price Retirement Plan Services, Inc. (“RPS”), it provides recordkeeping and plan administrative services to over two million retirement plan services.

Ms. Maitland stated that among the defined contribution plans that RPS services approximately 40-60 percent of participants complete beneficiary designation forms. However, there is a wide dispersion among these plans. Some plans approach 100 percent and others have less than 50 percent of the participants completing beneficiary designation forms. Rarely do plans require submission of a beneficiary designation as a condition for enrollment or receipt of benefits.

Ms. Maitland stated that the most common default protocol that is used by plans serviced by RPS is: (1) spouse; (2) children per stirpes; and (3) estate.

With respect to the plans that RPS services, the plan documents do not require a specific form of beneficiary designation. Ms. Maitland believed that a regulatory model or template form would be helpful to plan sponsors and plan administrators. She stated that the most common procedure for resolving beneficiary claims is through the plan’s benefit claim review procedures.

With new plans that come onto the RPS platform, re-solicitation of beneficiary designations is common. RPS encourages the use of online forms. However, Ms. Maitland stated that it will accept paper forms. Plan sponsors can decide whether or not to invalidate an existing beneficiary designation form. RPS offers a beneficiary designation solicitation service, but Ms. Maitland noted that it is not widely used.

RPS makes various efforts to communicate with participants to remind them to review their existing beneficiary designations. These efforts include sending out flyers, messages on websites and home pages, etc. The participant account statements also provide the name(s) of the beneficiary(ies) who has/have been designated and the percentages of benefit allocated to the beneficiaries. If no beneficiary has been designated, the participant is asked to contact RPS.

Ms. Maitland stated that the most common dispute relating to beneficiary designation involves cases of divorce.

Although the Internal Revenue Code and the E-sign law permit electronic notarization in certain instances, Ms. Maitland noted that RPS does not accept such documents. It only accepts hard copy notarized forms.

Thomas J. Hohl
Vice President and Associate General Counsel
FMR Corp.

Through its subsidiaries, Fidelity Investments provides various administrative recordkeeping, communication, investment management, trustee and custodial services to pension, profit sharing, welfare benefit and other plans.

Mr. Hohl stated that most plans provide the beneficiary designation form to an employee when that employee has met the plan's eligibility requirements. Fidelity recommends to its plan clients that a re-solicitation of beneficiary designations occur when a new plan is placed on the Fidelity platform. Fidelity also recommends that plan sponsors provide annual reminders to employees to update beneficiary designations to reflect changes in life events. On the participant's benefit statements, Fidelity sends reminders to participants to review their beneficiary designations, but does not include the name of the beneficiary that has been designated.

Mr. Hohl stated that the most difficult issues relating to the administration of beneficiary designations arise in connection with disputes involving former spouses. He noted that a plan provision that automatically revokes a beneficiary designation (so-called "nullification provisions") upon an employee's divorce could reduce these types of disputes. In the case of nullification after divorce, Fidelity requires that a QDRO re-designate a new beneficiary.

Mr. Hohl stated that an issue that plan sponsors wrestle with is the applicability of state law "slayer" statutes to ERISA plans. He noted that although there is some tax guidance on the issue, it would be helpful to plan sponsors and plan administrators for DOL to issue guidance under ERISA.

Other administrative matters that Mr. Hohl noted include issues relating to QPSA, small estates, ERISA pre-emption, particularly state law child support orders and prison incarceration issues, payments to minors, "look-through" trusts, minimum distribution requirements after the death of the participant, qualified disclaimers and nullification after divorce. In particular, Mr. Hohl stated that processing of distributions to minor beneficiaries, look-through trusts and qualified disclaimers are among the most common situations that may delay plan distributions.

Mr. Hohl requested that DOL issue a model form for beneficiary designation, a safe harbor for benefit distribution and further guidance on preemption.

Susan Diehl
President of PenServ Plan Services Inc. ("PenServ")

Susan Diehl discussed the differences between small plans and large plans. She indicated that maintenance of beneficiary designations varies based on the type of enrollment, the size of the employer, and whether or not there is a TPA. For non-ERISA plans (even IRAs), the service provider maintains the records. For ERISA plans it is typically the employer or the TPA which maintains the records, depending on the size of the employer. In situations where the investment companies do maintain the beneficiary data, it is typically only the primary beneficiary information and not the contingent or subsequent beneficiary information. She said "in the past 15 years, the number one question we get on beneficiary designations is who's the beneficiary." She mentioned that look-through trusts are a very big issue in qualified plans including IRA's. She indicated that sample beneficiary forms would be a good idea as well as sample trust certification forms. Finally, she stated that most plans have default provisions if there is no beneficiary designation on file.

Ms. Diehl discussed the PenServ's recordkeeping system. She indicated that they generally require electronic enrollment (but still use paper forms if necessary) and that the beneficiary information is captured on the company's website with various pop-ups. She said that PenServ suggests that PenServ provide information about beneficiary designations quarterly so that participants can review their designations; in addition PenServ provides notices during reenrollment and on the benefit statements. She also indicated that electronic designations are much better than paper designations and much easier to administer, noting that it is much easier to generate notifications if electronic. She indicated that PenServ has developed "apps" for cell phones for truck drivers, as they usually don't have computers.

She testified that once the Form 5500 is completed, her firm as a full TPA prepares a management letter to their clients to alert them to any issues that were uncovered during that plan year. For instance, if there are a high number of participants that have not named their beneficiary, her firm will put that in the management letter.

Ms. Diehl briefly mentioned required distributions and 403(b) plan issues due to the multiple providers. She noted that in many cases it is the responsibility of the custodian or issuer to assist with respect to required distributions. She testified that some states do not recognize custodial accounts, and strictly require trusts. This, she noted, has produced some interesting results when the beneficiaries under the Will are different from the beneficiary designation under the plan.

She also discussed best evidence rules and indicated that best evidence rules sometimes cause a problem if a plan's system is totally electronic—the paper needs to be housed somewhere. Many TPAs require that the employer maintain the paper copy. The Best Evidence Rule, in the designated beneficiary realm, has at times served to complicate matters where a state that has adopted the "Best Evidence Rule" may require the party who maintains the beneficiary forms, i.e., financial institution, the TPA or the plan sponsor, to have the *original signature* on the beneficiary form.

During the question and answer period, Ms. Diehl was asked about procedures surrounding plan conversions. She indicated that PenServ does obtain the information from the prior TPA but frequently it is necessary to do a whole new enrollment process, renaming beneficiaries. She indicated that face to face, live chats, and video conferencing education also helps -- being able to talk to a real person so that the participants can get answers.

Other questions included automatic enrollment, default designations and missing participants. Ms. Diehl indicated that due to automatic enrollment fewer beneficiary designations are being completed. She agrees with the default designations, but noted that such defaults effectively take away the financial planning aspect of beneficiary designations. Her firm has procedures in place for locating missing participants and beneficiaries.

Petros Koumantaros
Managing Shareholder & Chief Executive Officer, appearing with
Brian Downer, Managing Consultant
Spectrum Pension Consultants, Inc.

Spectrum Pension Consultants, Inc. is a regional consulting firm primarily servicing small to mid-size employers. Mr. Koumantaros' testimony focused on the particular challenges that administrative matters such as beneficiary designations present to small employers who do not have large human resource departments. He believes that plan recordkeepers are in a position to leverage their role in maintaining beneficiary designations, which is a service that affects both current and former employees participating in plans.

Mr. Koumantaros said that his firm utilizes online processes wherever possible. When spousal consents are required, these forms can be printed on the website, notarized or witnessed in writing and then uploaded to the recordkeeping system. His firm also includes beneficiary information on participant statements and they remind people to update beneficiary designations for life status changes. He also indicated that since most recordkeepers are sent data about changes in payroll status, those changes could be used to trigger a reminder about life event changes that could require updating beneficiary designations.

He further stressed the importance of dealing with beneficiary designations when a plan converts to a new recordkeeping services provider. At that point, his firm makes every effort to enroll or re-enroll employees as new participants, including collection of updated beneficiary designations. Spectrum utilizes every available channel of communication, including e-mail, in-person meetings, telephone and live chat to engage participants in the process. When involved, an advisor or other intermediary can play an important role in communicating the importance of beneficiary designations.

Mr. Koumantaros indicated that some of the most challenging situations involve locating missing beneficiaries. His firm uses FAB 2004-02, which sets forth guidelines for locating missing participants. They have determined that the IRS letter forwarding program has about a 90 percent success rate in locating missing beneficiaries. They have also used Facebook and other social media sites where Social Security numbers are not available.

Vicki Blanton
Senior Benefits Counsel, American Airlines
Testifying on behalf of the American Benefits Council

Vicki Blanton, Senior Benefits Counsel in the Legal Department of American Airlines, testified on behalf of the American Benefits Council (ABC). She focused her testimony on the beneficiary designation processes used by American Airlines and other employers and some of the problems they raise.

Ms. Blanton indicated that the beneficiary designation process has evolved from paper forms held in files at the employer to electronic designations generally handled by the third party administrators. She indicated that beneficiary designation forms are typically collected at the time of enrollment but are not usually required as a condition of enrollment.

At American Airlines, beneficiary designations are noted on participant statements as well as through online systems. Ms. Blanton specifically noted, though, that plan administrators should *not* be required to reach out to plan participants upon the occurrence of certain life events (marriage, divorce, birth of child, etc.). She believes this would place an undue burden on the plan administrator, particularly because the plan administrator often does not learn of the occurrence of the life event in a timely manner.

Ms. Blanton also discussed problems that arise because beneficiary designation forms can be quite dated by the time they are needed (i.e., when a participant dies). She cited problems that can arise where certain state laws prohibit a beneficiary from collecting benefits, such as state laws nullifying the designation of a spouse in the event of divorce. She suggested that DOL could publish guidance that would establish defaults that could be overridden by plan language.

Ms. Blanton indicated that amounts invested in a participant's account at death typically remain invested in accordance with the participant's last instruction until distribution. She indicated it would be very helpful for DOL to confirm that plan fiduciaries continue to have fiduciary protection under ERISA Section 404(c) for such investment action through the date of the distribution (assuming the plan otherwise meets the requirements of 404(c)).

She indicated that more awareness is needed on the part of participants on the importance of completing and updating beneficiary forms. Participants should understand that a beneficiary designation is the cheapest and easiest way to implement an estate plan. She suggested that DOL consider making some public service announcements on the subject.

Ms. Blanton testified that periodic re-solicitation of beneficiary designations, perhaps once every two to three years, could increase awareness and ensure participants update as appropriate. However, these events should simply be opportunities to update beneficiary designations and other information and should not void beneficiary designations already on file. She expressed a similar view that upon a plan merger, a prior plan beneficiary designation form should be valid until a new designation form is completed.

Elizabeth Wells
Law Offices of Elizabeth M. Wells

Elizabeth Wells focused her testimony on the problems arising in divorce situations involving defined contribution (DC) retirement plans. She stated that a common scenario is the following: the husband and wife are married, the wife has not waived her right as beneficiary, the parties divorce, and then the participant dies. Problems typically arise where a state divorce order provides that the wife (very possibly with the agreement of the parties) is to receive a part of the husband's DC plan benefit, but because the wife did not have the domestic relations order qualified before the husband's death, the state court order (and possibly the parties' agreement) will be frustrated.

Another example is where a state court order provides that the wife is not entitled to any benefit from the DC plan, but the wife is nevertheless designated as the beneficiary under the plan. These were the facts in the 2009 U.S. Supreme Court case of *Kennedy v. DuPont*. In *Kennedy*, because the husband did not change the beneficiary designation after his divorce, and because the plan did not automatically revoke the beneficiary designation upon divorce, the wife was the beneficiary on the date the husband died, despite the state court order that the wife should receive no benefit from the plan.

Ms. Wells noted that retirement benefits are an after-thought in many divorces. She stated that it would be helpful if the parties, either prior to the beginning of the divorce proceeding or prior to the finalizing of the divorce, were provided with a checklist of those items that should be considered such as beneficiary designations under retirement or welfare plans. Education is the key. She testified that efforts should be made to refocus the decision-making from the "back end" of the divorce proceeding to the "front end." Once the divorce decree is finalized, the former spouse may lose some or all of his or her rights. She noted further that these problems are compounded by the fact that more frequently parties are not hiring divorce lawyers. Also, according to Ms. Wells' testimony, sometimes divorces must happen quickly, for example, in cases of domestic violence or where children are involved.

Ms. Wells suggested that some of these problems can be addressed through plan language. For example, the plan can contain language that upon a divorce, the spouse does not lose his/her rights as a spouse. As another example, the SPD could have a section describing what a participant and his former spouse will be entitled to under the plan in the event of a divorce. A common problem is that divorce lawyers do not have a copy of the retirement plan documents at the time of the divorce. These documents are typically considered after the divorce is final and when the attorneys begin the process of drafting a QDRO.

Joyce Mader, Partner, O'Donoghue & O'Donoghue
Testifying on behalf of National Coordinating Committee for Multiemployer Plans (NCCMP)

Ms. Mader testified on behalf of the National Coordinating Committee for Multiemployer Plans (NCCMP). The NCCMP is a nonprofit, nonpartisan organization, with members in every major industry with multiemployer plans. The NCCMP requested input from its members regarding what, if any, challenges they face concerning the administration of beneficiary designations and what best practices they would recommend to the Council. Ms. Mader wove these responses into her testimony.

Ms. Mader stated that based on her experience multiemployer plans may provide more communication than required by law to address issues involving beneficiary designations. Ms. Mader testified that responsible plan fiduciaries are in the best position to determine the plan rules that should govern beneficiary designations for each multiemployer plan because they know the specific needs and capabilities of the participants and beneficiaries covered by the plan, as well as the administrative challenges that may result from the size, geographic diversity and industries of the plan. Accordingly, Ms. Mader noted that one standard rule for beneficiary designations could not suit all plans. She noted that generally, the current rules are appropriate considering the extremely low number of beneficiary disputes reported by the plans that responded to the NCCMP's survey.

Ms. Mader pointed out that a defined benefit plan is still the most common retirement plan for a multiemployer plan participant. Ms. Mader noted that whether a participant completes a beneficiary designation may depend on the benefits being offered. She also noted that if a certain benefit is not widely offered that few participants are likely to complete a beneficiary designation form for that benefit. Ms. Mader highlighted that defined benefit plans, and certain money purchase plans, generally offer a qualified joint and survivor annuity as the automatic payment form for a married participant and noted that spousal consent is needed to waive the payment to the spouse, but beneficiary designation may be more relevant for those plans that include participant contributions.

Ms. Mader also discussed the structure of defined contribution pension plans. Money purchase plans and certain profit sharing plans that originated as money purchase plans must provide a qualified joint and survivor annuity as the automatic form of distribution. If the participant is not married or a portion of the account is not subject to the automatic distribution rules, the beneficiary designation will control that portion of the account.

Ms. Mader testified that multiemployer health plans may provide life and/or accidental death and dismemberment (AD&D) benefits. As stated in her testimony, health plans with life and AD&D benefits reported that it was common for participants to complete a beneficiary designation and a majority of participants completed the form, as well as other plans that are categorized as welfare benefit plans.

Ms. Mader stated that the plans that responded to the survey were divided on whether plan documents should require that the designation of a former spouse be automatically revoked in the

case of divorce. She noted that a particular group of national plans suggested such a standard would be difficult to administer because they would be unable to determine if participants are divorced due to the size of the plan. She noted that these large plans reported they currently experience problems with participants who do not report divorces. Ms. Mader noted that some of the plans specified that beneficiary designations of a former spouse are not revoked by a divorce. Rather, the designation remains valid until changed by the participant. She noted that participants are frequently reminded of this rule and are urged to update their beneficiary designations, and pointed out that the process is simple with some plans allowing a change pursuant to a power of attorney that is valid under applicable state law.

Ms. Mader testified that every plan responding to NCCMP advised that it had a default provision for beneficiary designations. She noted that the most common order used for a default was the current spouse, children, parents, siblings and the estate. On the issue of an incomplete form, Ms. Mader indicated that some, but not all, plans responded that they would accept the beneficiary designation as long as it was received before the participant's death, provided the beneficiary's name was clearly stated and the form was signed by the participant. She said that other plans refused to honor a beneficiary designation if the form was incomplete or if it contained errors or had omissions. To avoid these issues, Ms. Mader testified that many of the plans reviewed the designation form when submitted to ensure accuracy and proper completion while others reviewed the form at retirement or other termination of employment.

On related administrative matters, she noted that under most plans beneficiary designation matters were subject to the plan's claims procedure, although beneficiary disputes were extremely rare with the interpleader process seldom used, and then only for large benefit amounts. Ms. Mader noted that costs of the benefit dispute are paid by the plan unless an interpleader is filed where the costs are deducted from the benefit. Also, she stated that Internet, commercial search services, and known contacts are used to locate missing beneficiaries. However, if they are unable to locate the missing beneficiary, typically, the benefit is held or paid to the next beneficiary in line, which can include the participant's estate, if it is known that the missing beneficiary is dead.

Ms. Mader also addressed the confusion that divorce attorneys appear to have in drafting Domestic Relations Orders for defined benefit plans. Procedurally, the plans she represents generally refer individuals to DOL's website link regarding QDRO's.

Steve Gorin, Partner, Thompson Coburn, LLP

Mr. Gorin, a probate and estate planning lawyer, provided the Council information about how his practice area intersects with the employee benefit plans community and made recommendations to the Council on how plans could be regulated or operated in a manner that better accommodates the wishes of plan participants upon their deaths. His testimony primarily focused around the areas of (i) durable powers of attorney, (ii) reminders to participants of their beneficiary designations and related changes, (iii) disposition of plan benefits in the event of simultaneous death, application of slayer statues, and divorce, and (iv) flexibility in beneficiary designations.

Mr. Gorin recommended that some guidance be given to plan sponsors on what types of provisions should be in durable powers of attorney ("POA"). He noted that many of his fellow practitioners used a POA fashioned after the model reflected in the Uniform Durable Power of Attorney Act that was acceptable in most states, with some states requiring more specific language to allow for beneficiary designation changes. He recommended giving fiduciaries assurances that they can rely on POAs otherwise approved under state law.

Mr. Gorin also focused on the importance of reminding participants and beneficiaries about their current beneficiary designations so that they are prompted to make changes as needed. He pointed out that changes in service providers and corporate transactions, such as mergers and acquisitions, often result in confusion over the applicability of prior beneficiary designations, loss of those designations, and similar issues. He encouraged efforts to reduce confusion in this area.

Mr. Gorin noted that states varied regarding how to treat situations involving divorce, simultaneous death, and the homicide of the deceased. He noted that the underlying current among the applicable state laws is a desire for fairness. He specifically requested that spousal consent and related beneficiary designations with respect to a plan be permitted through a prenuptial agreement.

Mr. Gorin further testified that it would be very helpful if plan fiduciaries could rely upon the direction of executors or take actions that would allow more flexibility in the beneficiary designation process without exposing themselves to additional liability. He noted that often the terms of the beneficiary designation are too narrow to allow for the executor to ensure plan assets get to the appropriate beneficiary (e.g., the plan provides for payment to the spouse and then to the children, but does not address what to do after that). He noted that payments to grantor trusts and simultaneously created trusts at death prove problematic to some service providers. He also noted that the area of disclaimers could be challenging, including when the intent of the payee is to disclaim in order to allow for payment to a credit shelter trust. Mr. Gorin testified that if plan fiduciaries were given assurances that they could rely upon direction of the executors, some of these issues would be resolved. In any event, he noted that more flexibility in beneficiary designations would be helpful to practitioners in his practice area.

Ronald Dean
Law Offices of Ronald Dean
Testifying on behalf of National Employment Lawyers Association (NELA)

NELA represents the interests of participants and beneficiaries. Mr. Dean confirmed that he has had six cases in forty years in his litigation practice on behalf of participants and beneficiaries. He noted that these issues were more frequent when he represented plans. However, he wondered whether the problems with beneficiary designations are rare because the true beneficiaries are unaware or because these situations rarely occur.

Mr. Dean recommends an annual beneficiary statement; taking care to mention every plan and every beneficiary designation and to avoid simple directives such as "you should review your beneficiary designation." He acknowledged the challenge of a multiemployer plan situation

where welfare plans may be separately administered from the qualified plans and all information is not in one location. However, he noted that NELA does not support an omnibus beneficiary designation that would apply across all plans because, based on experience, participants often have different beneficiary choices for different plans.

Mr. Dean stated that NELA agrees with creating a default rule. With respect to challenges after divorce, he said that educating family lawyers must continue, to encourage them to go beyond passively providing participants recommendations. He stated that such advice too frequently is ignored, forgotten or given inadequate priority.

Mr. Dean described NELA's recommendation for a default plan provision if there is no beneficiary designation on file: The current spouse to the extent of her/his minimum legally required interest (if any); the designated beneficiary (if, at the time of death, the designated beneficiary is a former spouse where such form was completed prior to the divorce, the beneficiary designation form, plan document and summary plan description should provide that it will be conclusively presumed that the former spouse predeceased the participant (just in case there is a secondary or contingent beneficiary -- nothing would preclude the participant from later re-designating the former spouse as beneficiary); spouse; if the participant has a living trust, then in accordance with its terms (not paid into the trust); if the participant has a Will, then in the same manner as set forth in the Will (not distributed through the Will); and per intestate succession in the state of residency of the participant.

Mr. Dean said plans should follow the ERISA claims process to administrative exhaustion, so as to protect the plan and to help the participant. It allows the plan (and the court) to apply the abuse of discretion standard of review. Then, unless the parties involved in the dispute accept the decision of the plan in writing, he recommends interpleader. He also confirmed the need for plan documents to define "substantial compliance" with plan provisions regarding beneficiary designations (signature, relationship, date, etc.) – in case the designation is incomplete or contains inconsistent information.

He noted that NELA supports using declarations to avoid probate for small estates. NELA also supports amendment of QDRO forms, procedures, etc. to provide that all pre-divorce designations of the divorced spouse will be void and have no effect. Mr. Dean notes that a court may still order the participant to name the ex-spouse as beneficiary.

In the written testimony for NELA, Mr. Dean stated that plans that purchase insurance should recognize that the insurance policies will be governed by state law as well as choice-of-state-law-issues (community property, etc.) and that plans should be amended to incorporate language that mirrors the state's slayer statutes; leaving as an open issue the timing (relative to the criminal process) for making payment.

National Women's Law Center and Pension Rights Center (written testimony)

The National Women's Law Center (NWLC) and the Pension Rights Center (PRC) submitted written testimony on the Current Challenges and Best Practices Concerning Beneficiary Designations. A major concern was expanding the use of electronic means to meet the spousal consent requirements. According to the testimony, NWLC and PRC believe that requiring

written consent in front of a notary or plan administrator to waive spousal benefits will reduce coercion and forgery. Written consents are more protective of spouses by providing a meaningful ability to challenge the validity of the spousal consent form and independent authentication of the spouse's signature.

The testimony stated that NWLC and PRC recommend that employers and service providers create their own forms and procedures, but suggested that DOL produce a sample beneficiary form. They suggest that the forms should contain enough information for the plan administrator to locate a beneficiary without much difficulty and that it would be appropriate for DOL to recommend the minimum amount of information to verify and locate the beneficiary, including Social Security Numbers and the employer's contact information. They suggested that a paper copy be sent or given to the participant for review and to keep for future reference. They also suggest DOL solicit comments on the advisability of this idea.

In their testimony, NWLC and PRC suggest that if a form is incomplete, the plan administrator should send a reminder to the participant stating the form is incomplete, what information is missing and the consequences of an incomplete form. However, they disagree with a requirement that participants must use electronic means to designate or change a beneficiary.

NWLC and PRC cited, in their testimony, the Thrift Savings Plan as an example of a plan using the benefit statement to inform participants that a beneficiary designation is on file, the date of that designation, and a reminder to the participant to check that the currency of their designation. They suggest that DOL issue guidance on the use of benefit statements to remind participants of their designations and to provide participants with a list of all their designations upon termination of employment.

In the testimony, NWLC and PRC disagreed with the idea that plans should adopt provisions automatically revoking designations upon divorce because of the complexity of divorces, potential conflicts with valid qualified domestic relations orders, and the prevalence of pro se divorces. They advocate for more publicity of DOL's model QDRO forms.

If a spouse is requested to waive his or her right to a benefit, the spouse should be notified who will receive the benefits. They suggest that DOL, along with the Treasury Department, revise the model spousal waiver language. In addition, NWLC and PRC stated that they believe waivers should be revocable unless payment of benefits has started.

NWLC and PRC, noted in their testimony that they believe DOL should also develop guidance on finding a beneficiary.