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Attention: QDRO Regulation

Interim Final QDRO Rule

To Whom It May Concern:

This is in response to a request for written comments on the above interim final rule, which was published in the March 7, 2007 issue of the Federal Register (Vol. 72 No. 44 page 10070), relating to domestic relations orders (the "Rule"). The Rule provides guidance to plan administrators, service providers, participants, and alternate payees on the requirements for a qualified domestic relations order ("QDRO") under section 206(d)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and section 414(p) of the Internal Revenue Code of 1986, as amended (the "Code").

We commend the Department of Labor ("DOL") for presenting illustrative examples that should lead to more consistent court and plan determinations about how the timing of a domestic relations order ("DRO") affects whether a DRO is a QDRO. A

DRO is defined as a judgment, decree or order made pursuant to state domestic relations law that “relates to the provision of child support, alimony payments, or marital property rights” to alternate payees, who must be “the spouse, former spouse, child or other dependent of a participant.”

We suggest some modifications to clarify concerns where:

- (1) a DRO is issued after, or revises a prior DRO;
- (2) a DRO is issued after certain events, such as the death, divorce or remarriage of the participant; or
- (3) other QDRO requirements or protections may be violated by a DRO that meets condition (1) or (2), such as a DRO that violates the prohibition on a QDRO from requiring a plan to provide increased benefits (determined on the basis of actuarial value).

We also suggest that the Rule make two points more explicit:

- (1) DROs are not confined to divorces, but may also pertain to other circumstances where pension benefits might be assigned by court action to a spouse, former spouse, child or other dependent, for example, marital separations or support controversies. The examples in the Rule, however, are limited to divorces.
- (2) QDROs are limited to “pension plans”(as ERISA defines that term). The placement of the Rule in the Rules and Regulations for Minimum Standards for Employee Pension Benefit Plans, based as it is on explicit terms of ERISA, implies that QDROs are inapplicable to life insurance plans and other welfare-benefit plans. However, a number of courts have applied this provision to plans that are not pension plans. *E.g.*, *Barrs v. Lockheed Martin Corp.*, 287 F.3d 202 (1st Cir. 2002) and *Metropolitan Life Insurance Company v. Marsh*, 119 F.3d 415 (6th Cir. 1997). We urge the Department to make this explicit distinction in order to make it clear that QDROs apply only to pension plans.

We further suggest that the Rule address three related issues:

- (1) how retroactive a QDRO may be, such as under what conditions may a QDRO that is issued after the participant's death provide for survivor benefits;
- (2) a plan's benefit liabilities if a QDRO, which entitles an alternate payee to benefits is submitted to a pension plan after the plan has made those benefit payments to the participant or another party, and
- (3) whether, how and from whom an alternate payee may obtain pension benefits to which he or she is entitled if the plan is released from benefit liability under section 206(d)(3)(I) of ERISA. There is a similar plan release provision under section 205(c)(6), which pertains to required spousal survivor benefits. In both cases, if the plan fiduciaries behave prudently in paying the alternate payee's benefits to another person, the plan is not required to pay duplicate benefits to the alternate payee. On the other hand, if the fiduciaries did not behave prudently in paying someone other than the alternate payee, then the alternate payee is entitled to obtain the benefits from the plan.

Finally, we encourage the DOL to prepare for public comment additional draft rules that will provide guidance to courts, plan administrators, service providers, participants, and alternate payees about the QDRO requirements and protections, as described *infra*.

#### Issues Pertaining to Multiple Domestic Relations Orders

The examples in proposed section 2530.206(b)(2) illustrate two important points: ERISA does not prohibit a QDRO that provides a benefit to one alternate payee from (a) modifying an earlier QDRO that provides a benefit to the same alternate payee, or (b) being issued after an earlier QDRO that provided benefits to a different alternate payee, provided that in this case the later order does not affect the provision of benefits to the alternate payee under the earlier QDRO.

We recommend that the DOL enhance the two examples, as follows:

The first example could refer to increases, as well as decreases, in the benefits of an alternate payee who is the former spouse, after his or her divorce from the participant. Although the DOL discussed and approved a decrease of the alternate payee's interest in DOL Advisory Opinion 2004-02A, increases may also occur.

The second example could reinforce its message by referring to Example (3) in proposed DOL Reg. section 2530.206(d)(3), which illustrates the effect of section 206(d)(3)(iii) of ERISA. That statutory section prohibits a QDRO, which designates at least one alternate payee, from reducing the benefits to which a different alternate payee is already entitled pursuant to an earlier QDRO.

#### Issues Pertaining to Timing of Domestic Relations Orders

The examples in proposed DOL Reg. section 2530.206(c)(2) address three significant timing issues, namely, whether a QDRO may be issued after three customary events (1) the participant's death, (2) the participant's divorce, or (3) the participant's receipt of his or her first pension payment.

We recommend the DOL enhance the three examples, as follows.

Example (1) presents the case where the death occurs between the presentation of a DRO that is not a QDRO, and the time the DRO is modified "to correct defects" and become a QDRO.

It would be useful to have an example in which no DRO is submitted to the pension plan prior to the death of the participant. For example, the former spouse may be unaware of the existence of a pension plan prior to the participant's death, as occurred in *Patton v. Denver Post*, 326 F.3d 1148 (10th Cir. 2003). In that case, the QDRO provided the former spouse with an entitlement to survivor benefits that were otherwise available only to a surviving spouse under the plan. In this case, the plan had not paid any survivor

benefits, so the plan could not use the relief provisions applicable to pension plans whose fiduciaries had prudently paid the alternate payee's pension benefits to another person. The court accordingly held that the former spouse was entitled to those benefits from the plan. Or the alternate payee and the pension plan may have been unaware of the participant's death when the initial DRO was being prepared, as occurred in *Galenski v. Ford Motor Company Pension Plan*, 421 F. Supp. 2d 1015 (E.D. Mich. 2006). In this case, the court again held that the alternate payee was entitled to the benefits from the plan. We thus concur with the similar suggestions set forth in Roberta Karen Chevlowe's comment letter of March 30, 2007 and Robert Treat's comment e-mail of March 31, 2007.

Finally, it is advisable for the DOL to state that the result would not have changed if the participant had not been actively employed when he died, so that readers do not believe that the active employment is a significant factor.

Example (2) presents a case where the DRO is issued after a divorce. We recommend that the DOL add a reference to section 206(d)(3)(F) of ERISA, which permits former spouses to be treated as surviving spouses in the beneficiary designation made by a QDRO. This would clarify why such an order may be a QDRO even though it provides a benefit to an individual whom the plan terms would not otherwise permit the participant to designate.

Example (3) presents the case where the order is issued after the start of annuity payments. We recommend that the DOL add a reference to Example (1) of proposed section 2530.206(d)(3), which illustrates that QDROs must not require payment of benefits that are not otherwise available, such as a change in benefit form or beneficiary after annuity payments have begun. *See, e.g., McGowan v. NJR Serv. Corp.*, 423 F.3d 241 (3d Cir. 2005), cert. denied 2007 U.S. LEXIS 1136 (U.S. Jan. 16, 2007). *But cf.* Keron A. Wright, "*Stuck on You*": *The Inability of an Ex-Spouse to Waive Rights Under an ERISA Pension Plan* [*McGowan v. NJR Serv. Corp.*, 423 F.3d 241 (3d Cir. 2005)],

45 Washburn L.J. 687 (Spring 2006).

Finally, we recommend that there be a discussion of the significance of the requirement that a DRO be “made pursuant to a domestic relations law” if the order is obtained to enforce the participant’s divorce obligations, but the original order did not require payments from the participant’s pension plan. *Cf. Hopkins v AT&T Global Information*, 105 F.3d 153 (4th Cir. 1997) (an order was both a DRO and a QDRO in these very circumstances) and *DeSantis v. DeSantis*, 714 So. 2d 637 (Fla. 4th DCA 1998) (an order was not a DRO because under Florida law the order arose in a post-divorce enforcement action that is treated as an ordinary creditor’s action rather than a reopening of the divorce decree).

#### Issues Pertaining to Retention of QDRO Requirements and Protections

The three examples in proposed section 2530.206(d)(2) address three significant substantive QDRO requirements: (1) QDROs may not require a benefit or form of benefit not otherwise available; (2) plan payments must be segregated for up to eighteen months during the determination of whether a DRO is a QDRO; and (3) a QDRO designating one alternate payee may not supersede a QDRO designating another, prior alternate payee.

Example (1) addresses a DRO issued before the participant’s death, namely, after a divorce decree, that is modified after such death to provide for an installment payment option not available from the plan. As in Example (1) of proposed DOL Reg. section 2530.206(d)(2), the DOL should specify whether there is any significance to the fact that the death occurred while the participant was actively employed.

We recommend that the DOL present another additional illustrative example to clarify that plan documents may specifically and consciously allow more flexibility in the form and timing of distribution to an alternate payee than to either (1) a participant, or (2) an ordinary beneficiary under a beneficiary designation that is not a QDRO. For

example, the plan document or the “QDRO Procedures” adopted pursuant to the terms of a defined benefit pension plan may allow immediate lump-sum payments for an alternate payee but not in other cases. In our experience, such provisions are not uncommon, since a plan sponsor may rationally wish to pay out benefits pursuant to a QDRO, so that the plan administrator need not be burdened with the need to interpret a QDRO and plan records years or decades after a vested participant terminates employment. Thus, it would be useful for an illustrative example that states that such plan provisions would make a form of distribution “otherwise available” for QDRO qualification purposes. It may also be useful to discuss the degree of specificity that might be required for such a provision. Finally, we concur with the recommendation of Adam P. Segal’s comment e-mail of March 8, 2007 that the DOL address the conditions under which the segregation period may be less than eighteen months.

Example (2) addresses the applicability of the QDRO segregation requirement when a single alternate payee presents successive DROs. This example raises a basic question we recommend that the DOL address. Must there be successive periods in such a case, and if so, how different must successive DROs be, if at all, for a prudent fiduciary to be required to suspend and segregate benefit payments for successive periods? Such suspension could impose significant hardship on a participant who is expecting monthly annuity payments. It is common for a marital dissolution to result in at least two successive DROs. First, a general divorce or separation order may direct that a QDRO be prepared that incorporates the terms set forth in a draft decree. At this point, the spouse or the spouse’s attorney often approaches the plan administrator about the best method of complying with the plan’s QDRO procedures. It would appear that in such case there should be only one eighteen-month period, beginning with the submission of the first order. On the other hand, in the often bitter context of matrimonial litigation, it is not difficult to imagine some abuse arising on the part of potential alternate payees seeking undue leverage against a participant in pay status or otherwise, who is legitimately

counting on a modest pension. The submission of successive DROs could result in successive segregation periods, although some amounts would be released to the participant at the end of each period. The DOL may wish to clarify the segregation responsibilities of a plan administrator presented with a second DRO claimed to be a QDRO while plan benefits are segregated with respect to an earlier DRO claimed to be a DRO. When does the presentation of the second DRO start a new segregation period, in which case must the segregated funds be released?

These considerations illustrate the importance of the DOL providing regulatory guidance with respect to: (1) the procedures by which a plan may determine whether a DRO is a QDRO; (2) the applicable procedures for the segregation of plan benefit payments, including how such amounts are to be invested during the segregation; (3) the fiduciary obligation of the plan fiduciaries in such situations; and (4) the conditions under which a plan's obligation to a plan participant and alternate payee may be discharged if such procedures are followed. A careful balancing of the interests of the participant, the proposed alternate payee and the plan is required.

Example (3), which describes the effect of a prior QDRO with a different alternate payee, would be even clearer if it referenced the second example of proposed DOL Reg. section 2530.206(d)(2).

#### Issues Pertaining to Retroactivity of QDROs

We recommend that the DOL address the conditions under which a modification of a DRO into a QDRO may be retroactively effective so that the Rule fully addresses the timing issues of QDROs. There seems to be no basis for a QDRO to be retroactive unless it is a modification of the beneficiary designation of the same alternate payee by an earlier DRO. The issue is then usually whether the QDRO may have the same effective date as the original DRO.



For example, may a former spouse obtain spousal survivor benefits if the participant remarries and his or her new spouse becomes entitled to a qualified joint and survivor annuity between the time a DRO is issued and the time it is modified to become a QDRO? Does it matter whether the participant is in pay status? The Supreme Court, in *Boggs v. Boggs*, 520 U.S. 833 (1997), held that Section 205 of ERISA generally prohibits the participant's spouse from being deprived of such survivor benefits, without such spouse's consent, even where the participant is not yet in pay status and has not begun to receive pension benefits. Thus, it would appear that a former spouse may not use a QDRO to deprive the current spouse of those survivor benefits even where the participant is not yet in pay status. *But see, Hopkins v. AT&T Global Information*, 105 F.3d 153 (4th Cir. 1997), in which a former spouse was prevented from obtaining spousal survivor benefits seven years after her divorce because the participant had not only remarried in that time but had begun to receive a qualified joint and survivor annuity from the pension plan. Under the reasoning of this decision, which preceded *Boggs v. Boggs, supra*, a QDRO obtained before the participant went into pay status could deprive the participant's current spouse of any survivor benefits. In fact, in another pre-*Boggs* case, a former spouse was able to obtain a QDRO which deprived the participant's widow of part of the spousal survivor benefits which she was receiving. *Bailey v. Board of Trustees of the New Orleans Steamship Ass'n/ ILA Pension Trust Fund*, 100 F.3d 28 (5th Cir. 1996).

Similarly, may a former spouse obtain the pension benefits provided for him or her in a DRO if a participant goes bankrupt between the time the DRO is issued and the time it is modified to otherwise meet the QDRO requirements? If the effective date is retroactive, the alternate payee's interest in plan benefits would not be part of the participant's bankrupt estate and would thus be unaffected by the participant's bankruptcy. This was the conclusion in *Gendreau v. Gendreau*, 122 F.3d 815 (9th Cir. 1997). On the other hand, if the effective date may not be retroactive, the alternate payee never obtains an interest in any plan benefits under the beneficiary designation of the

QDRO, and such interest would be in the bankruptcy estate and may not be reached by the alternate payee as an alternate payee, though it could possibly be reached by the alternate payee as a creditor of the bankrupt. This was the conclusion in *King v. King*, 214 BR 69 (D. Conn. 1997).

Finally, may the form of payments in the beneficiary designation of a DRO be retroactively modified in a QDRO, if the plan does not otherwise permit such retroactive modifications? We recommend that the DOL present an example which presumes that the plan does not generally permit such post-death benefit modifications. The conclusion would appear to be that a QDRO may not generally make such a retroactive modification because section 206(d)(3)(D)(ii) of ERISA prohibits QDROs from requiring the plan to provide increased benefits on the basis of actuarial value as would occur if survivor benefits could be selected after it is known that the participant has died. For example, if the initial DRO does not provide the alternate payee with any survivor benefits, may the order be modified to provide such benefits after the participant dies unexpectedly? DROs modified in this fashion were found not to be QDROs in *Samaroo v. Samaroo*, 193 F.3d 185 (3d Cir. 1999) and *Sanzo v. NYSA-ILA Pension Fund*, 2005 U.S. Dist. LEXIS 37572 (D. N.J.). On the other hand, such a post-death modification was permitted in *Payne v. GM/UAW Pension Plan*, 1996 U.S. Dist. LEXIS 7966 (E.D. Mich.) in part because the plan did not clearly prohibit such modifications. Similarly, there would be appear to be no violation of the prohibition on QDROs increasing actuarial costs if the original DRO provided for survivor payments but other features had to be changed in order for the DRO to qualify as a QDRO.

#### Timing Issues Pertaining to Alternate Payee's Ability to Collect Obtain QDRO Benefits

We recommend that the DOL discuss the rights of an alternate payee who does not present a QDRO to the pension plan before the participant or one of his or her designees begins to receive plan benefits to which the alternate payee is entitled under the QDRO beneficiary designation. In such case, the plan may have no liability to the

alternate payee for the benefit payments that the plan made if the plan fiduciaries have fulfilled their responsibilities in making such payments. On the other hand, the beneficiary designation of the QDRO remains a part of the plan. Thus, the alternate payee should retain the right to recover those benefits from the individual who received those benefits when he was not entitled to those benefits. In particular, the alternate payee should be able to obtain relief with a benefit claim against such party under section 502(a)(1)(B) of ERISA. State law claims may also be permitted, although ERISA would appear to preempt such claims. *But see* Senate Rep. No. 98-575, 98<sup>th</sup> Cong. 2d. Sess., reprinted in 1984 U.S. Code Cong. & Ad. News at 2568 (the report suggests that such state relief may be available). *But see also National City Corporation Non-Contributory Retirement Plan v. Ferrell*, 2005 U.S. Dist. LEXIS 36149 (N.D. W. Va.) in which the court, in dicta in n. 5, observed that the alternate payee would not have any enforceable benefit rights in such a situation.

We also recommend that the DOL include in the discussion of the required segregation of benefits, both in the preamble and in the body of the Rule, a statement that the payments that are made at the end of such segregation to a party other than the alternate payee do not affect the alternate payee's entitlement to those plan benefits that were paid to parties other than the alternate payee. In particular, if a DRO is determined to be a QDRO after the conclusion of the segregation period, section 206(d)(3)(I) of ERISA will prevent the alternate payee from obtaining from the plan the benefit payments attributable to the segregation period if the plan fiduciaries behaved prudently in making those payments to another party. On the other hand, section 206(d)(3)(J) of ERISA provides that a QDRO designates an alternate payee as a beneficiary. This beneficiary designation is every bit as binding on the plan and other interested parties as any other beneficiary designation made pursuant to the terms of the plan. Thus, as described above, the alternate payee should be able to obtain relief under section 502(a)(1)(B) of ERISA and (possibly) under state law.

### Suggestion of Additional QDRO Regulations

There are no current DOL Regulations with respect to QDROs. The DOL maintains an online publication of uncertain precedential value, entitled, “QDROs: The Division of Pensions Through Qualified Domestic Relations Orders (1997)” and Errata Sheet at <http://www.dol.gov/ebsa/publications/qdroerratasheet.html>. Many advisory opinions are described in the publication, but only the parties described in each opinion may rely on that particular opinion. Section 10 of ERISA Procedure 76-1, 41 FR 36281 (Aug. 27, 1976). The DOL publication includes IRS Notice 97-11, 1997-1 C.B. 379, which discusses and presents sample language for QDROs pursuant to a Congressional mandate, but disclaims any intention to interpret the statutory requirements. The IRS Notice was released in response to the requirement of Section 1457(a)(2) of the Small Business Job Protection Act of 1996, P.L. 104-188, and states that the DOL advised the IRS that the discussion and language are consistent with the DOL views. The sparse IRS regulation with respect to QDROs, i.e., Treas. Reg. § 1.401(a)-13(g)(1), merely references the QDRO statutory definition.

The plan administrators, service providers, participants, and alternate payees who are the subjects of the rule being discussed would benefit significantly from the deference that would be accorded DOL Regulations issued pursuant to ERISA section 206(d)(3)(N) in consultation with the Secretary of Treasury, which would address such major issues, as

(1) claims regulations that govern QDRO determinations by pension plans. These procedures must be distinct from the benefit claims procedures set forth in ERISA § 503, 29 U.S.C. § 1133. *See* Statement accompanying release of claims regulations. 65 Fed Reg. 70,245, 70,255 n.39 (November 21, 2000). Such procedures could help determine if plan fiduciaries fulfilled their responsibilities and the plan may thus be relieved of the liability to pay an alternate payee the benefits to which the beneficiary designation of a QDRO entitles the alternate payee;

(2) each of the areas of guidance provided in the DOL online publication, such as pension plan fiduciary obligations when confronted with a possible QDRO filing, the requirements and protections applicable to QDROs, and the issues to consider when drafting QDROs; and

(3) clarification of the continued benefit rights of an alternate payee when plan fiduciaries are relieved of plan liability pursuant to Section 206(d)(3)(I). This issue may arise not only with respect to segregated funds but also, as discussed when there is a period of time between the issue of a QDRO and the submission of the QDRO to the pension plan.

#### Conclusion

The DOL has taken an important step by providing guidance with respect to QDROs in the form of regulations which will be treated with considerable deference by the courts as well as plan administrators, service providers, participants, and alternate payees. We trust that the DOL will give serious consideration to our suggestions to enhance the value of the DOL guidance and thereby improve the administration of ERISA pension and welfare plans.

Respectfully submitted,

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\*Albert Feuer was the principal author with significant assistance from Matthew Eilenberg, Donald Partland, and other members of the Committee on Employee Benefits