QDROs

The Division of Retirement Benefits Through Qualified Domestic Relations Orders

U.S. Department of Labor
Employee Benefits Security Administration

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Appendix A

Department of Labor Interpretations

December 4, 1990

Ms. Ellen O. Pfaff
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Seattle, Washington 98101-2647

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

Dear Ms. Pfaff:

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

The Plan is a tax-qualified retirement plan[2] under which benefits are payable upon the participant's retirement or death. The Plan provides that benefits may not be assigned or alienated except in the case of a "qualified domestic relations order." Bruce A. Nordstrom is a Plan participant whose benefit account is not in pay status.

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

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

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

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

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

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

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

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

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

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

> Finally, women may be denied their rights to pension benefits by the dissolution of a marriage by divorce, regardless of how many years she served as an economic partner to a man covered by a pension plan. Even in cases in which the State domestic relations court is willing to consider the pension an asset of the marriage and award the ex-wife a share of it, her rights have been thwarted. Pension plans have refused to honor those court orders claiming that they required an impermissible assignment of benefits and were preempted by ERISA.
>
> H.R. 4280 makes it clear that honoring a legitimate State court order awarding an ex-spouse some or all of a worker's pension does not violate the antiassignment clause of ERISA. In addition, the legislation creates an exception from ERISA's broad preemption of State laws for qualified domestic relations orders.[3]

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

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[3]130 Cong. Rec. 13327 (1984).

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

[5]Id. 19.

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

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

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

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

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210

August 21, 1992

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

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

Dear Ms. Neydon:

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 205 (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(ii) if married for at least 1 year, the surviving spouse shall be treated as meeting the requirements of section 205(f).

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

Based on the foregoing, when a pension plan receives an order requiring that all or a part of the benefits payable with respect to a participant be distributed to an alternate payee, the plan administrator must determine that the judgment, decree or order is a "domestic relations order" within the meaning of section 206(d)(3)(B)(ii) of ERISA -- i.e., that it relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of the participant, and that it is made pursuant to a State domestic relations law by a State authority with jurisdiction over such matters. Additionally, the plan administrator must determine that the order is qualified under the requirements of section 206(d)(3)(B)(i) of ERISA. It is the view of the Department that the plan administrator is not required by section 206(d)(3) or any other provision of Title I to review the correctness of a determination by a competent State authority that an individual is a "spouse," "former spouse," "child," "other dependent" or "surviving spouse" of the participant under state domestic relations law.[2]

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

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

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations

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

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

September 29, 1999

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

Dear Mr. Belisle:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

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

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

July 12, 2000

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

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

Dear Ms. Inman-Campbell:

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

You represent the applicable facts to be as follows. The plan participant was married when he retired from employment. In connection with his retirement, the participant and his then-wife[1] executed the necessary forms to entitle him to begin to receive his retirement benefits under the employer's defined benefit pension plan (the Plan).[2] You further state that the participant elected, with his wife's consent, to decline to receive his benefits under the Plan in the form of a qualified joint and survivor annuity (QJSA) and elected instead to receive a single life annuity. The consent form executed by the participant's wife stated:

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

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

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

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

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

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

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

> The order attempts to force the Plan to provide a type or form of benefit not otherwise available under the Plan. As explained in previous determination reports, there are no survivor benefits available for any alternate payee. There are no survivor benefits available for [the participant's ex-wife]. The court cannot award the Company-paid survivor benefit to [the participant's ex-wife] because she is not a Plan-qualified beneficiary. The court cannot award a non-existent benefit to an alternate payee.
>
> * * * * *
>
> At his retirement, [the participant] designated his spouse, [the participant's former wife], as the beneficiary for the Company-paid survivor benefit. Pursuant to the terms of the Plan, the Company-paid survivor benefit can be paid only to a Plan- qualified beneficiary — spouse, minor children, parent, or stepparent, not a former spouse. At

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

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

(Emphasis original).

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

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

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

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

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

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

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

(i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 205 (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(ii) if married for at least 1 year, the surviving spouse shall be treated as meeting the requirements of section 205(f).

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

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

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

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

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

Sincerely,

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

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

June 1, 2001

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

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

Dear Mr. Sapienza:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

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

June 7, 2002

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

2002-03A
ERISA Sec. 206(d)

Dear Mr. McDaniel:

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

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

Like other IV-D agencies, DCSE collects child support both for custodial parents who are receiving economic assistance from the state and for those who are not receiving such assistance, but have applied for the agencys services in collecting support payments. DCSE distributes the support payments that it collects on behalf of the custodial parent as follows. If the custodial parent has a public assistance arrearage[1] and is no longer receiving public assistance, DCSE transmits all child support payments it receives to the custodial parent as current child support payments plus any existing child support arrearage before any of the payment is applied to the public assistance arrearage. If the custodial parent has a public assistance arrearage and is currently receiving public assistance, DCSE applies the payments it receives first to the public assistance arrearage and transmits any remaining funds to the custodial parent as current child support payments. If the custodial parent is not receiving public assistance and has no public assistance arrearage, then DCSE transmits the entire payment to the custodial parent. In all cases, DCSE receives the child support payments, deposits them in its own account, and distributes a check representing the child support payment (minus any public assistance arrearages, if applicable) to the custodial parent.

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

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

cc: Darrell Baughn

February 17, 2004

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

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

Dear Ms. Lastovich:

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

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

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

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

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

During the course of its review of the 2002 Order, the Plan expressed its doubts as to whether such a reduction in the amount assigned could be effected by a QDRO and requested both participant and alternate payee to provide "a written explanation of why this amended order should or should not be reviewed as a qualified domestic relations order." These parties declined to offer argument on this issue and continued to assert that the 2002 Order expressed their consensus on how the participant's benefits should be divided between them.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A plan administrator may determine that an order is not qualified only on the basis of the requirements set forth in section 206(d)(3) of ERISA. In our view, nothing in section 206(d)(3) suggests that a State court (or other appropriate State agency or instrumentality) may not alter or modify a previous domestic relations order involving the same participant and alternate payee, as long as the new domestic relations order itself meets the statutory requirements. Indeed, the purpose of section 206(d)(3) is to permit the division of marital property on divorce in accordance with the directions of the State authority with jurisdiction to achieve the appropriate disposition of property upon the dissolution of a marriage. Where a State authority reasserts jurisdiction over a marital dissolution and issues an order changing a previously established property allocation, it would appear contrary to this purpose to create additional requirements, beyond what is specified in section 206(d)(3) of ERISA, that would thwart the exercise of that authority. Accordingly, provided that a domestic relations order otherwise meets the requirements of section 206(d)(3) of ERISA, a plan administrator may not fail to qualify the domestic relations order merely because the order changes a prior assignment to the same alternate payee.[1] Thus, it is the Department's view that a plan administrator may determine, consistent with the requirements of section 206(d)(3), that a domestic relations order is qualified even if it would supersede or amend a pre-existing QDRO assigning the same participant's benefits to the same alternate payee.

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

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

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

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

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

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

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

Field Assistance Bulletin 2003-3

May 19, 2003

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

From: Robert J. Doyle
Director of Regulations and Interpretations

Subject: Allocation of Expenses in a Defined Contribution Plan

Issue

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

Background

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

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

Analysis

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

[1]The views set forth herein relate solely to the application of Title I of ERISA. We express no view as to whether any particular allocation of expenses might violate the Internal Revenue Code or any other Federal statute.
[2]See Advisory Opinion No. 2001-01A and related hypotheticals for discussion of the principles applicable to distinguishing settlor from plan expenses.
[3]See § 29 CFR 2520.104b-30. See also § 2520.104-4(b)(2)(ii).

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

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

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

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

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

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

[4]See § 2550.404c-1(b)(2)(ii)(A) and 54 FR 30520, 30522 (July 20, 1989)(preamble to 29 CFR § 2550.408b-1).
[5]See §§ 2520.104-46(b)(1)(i)(C), 2520.104b-1(c)(1)(iii) and (iv), 2520.104b-30.
[6]If a plan is intended to be a tax qualified plan, the fiduciary would have a duty to assure that the allocation method does not negatively affect the tax qualified status of the plan.
[7]In reviewing the propriety of such fiduciary actions, the judicial standard is whether the fiduciary acted in an arbitrary or capricious manner. In meeting this standard, the fiduciary has a duty of impartiality to all the plan's participants and may appropriately balance the interests of different classes of participants in evaluating a proposed method of expense allocation. See Varity Corp. v. Howe, 516 U.S. 489, 514 (1996); Restatement

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

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

Allocating Expenses to an Individual v. General Plan Expense

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

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

(Second) of Trusts §183.

[8]See Advisory Opinion No. 2000-10A.

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

Examples of Specific Plan Expenses

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

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

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

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

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

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

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

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

[10]See footnote 9.

U.S. Department of Labor
Employee Benefits Security Administration
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