Appendix A

Department of Labor Advisory Opinion Letters

AO 90-46A

Dec. 4, 1990

Ms. Ellen O. Pfaff
Lane Powell Moss & Miller
3800 Rainier Bank Tower
Seattle, Washington 97101-2647

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 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

[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.

property law that considers the pension earned by a married spouse to be community property is preempted under this provision, unless some exception applies.

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:

> (B) For purposes of [section 206(d)(3)] –
>
> > (i) the term "qualified domestic relations order" means a domestic relation 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 right 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

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

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

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]

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

[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).

AO 92-17A
Sec. 206(d)(3)

Aug. 21, 1992

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

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]

[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)

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.

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 order.

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."

Sections 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]

[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

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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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 order satisfies the requirements of ERISA section 206(d)(3)(G)(ii).

August 4, 1994

AO 94-32A

Mr. Homer L. Elliott
Drinker Biddle & Reath
Philadelphia National Bank Building
Broad and Chestnut Streets
Philadelphia, PA 19107

ERISA SECTION
404(a)(1),
206(d)(3)

Dear Mr. Elliott:

This responds to your request for an advisory opinion on behalf of the VIZ Manufacturing Company (the Company) regarding its Savings and Investment Profit-Sharing Plan (the Plan). Your request concerns 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).[1] At issue is a proposed amendment to the Plan that would allow the costs of determining and administering a QDRO to be charged against the account of the participant affected by the QDRO. Your submission contains the following facts and representations.

The Plan is maintained to provide retirement benefits to eligible employees. Consistent with the Plan documents, alienation of benefits payable under the Plan is prohibited except in the case of a QDRO or any domestic relations order entered before January 1, 1985.

The Plan has received and continues to receive domestic relations orders that purport to be QDROs. In each instance the Plan Administrator must comply with certain notice and procedural requirements in determining whether the domestic relations order is a QDRO. You represent that it is not unusual for a domestic relations order to go through several modifications before it meets the requirements necessary to be a QDRO and each time the Plan Administrator may need to seek the advice of an attorney concerning whether or not the order is a QDRO.

Section 14.4 of the Plan provides that Plan expenses shall be paid solely out of the trust established with respect to the Plan. You represent that the expenses incurred in the determination and administration of any particular domestic relations order affect the earnings available to be allocated to the accounts of all plan participants. Further, you state that since the determination and

[1]References to the Internal Revenue Code sections that parallel these provisions of Title I of ERISA are omitted from the following, but may be assumed to be incorporated by reference when the parallel section of Title I is cited.

administration of any particular domestic relations order does not affect all participants and beneficiaries, but only the participant (and any alternate payee(s)) subject to the domestic relations order, the Company desires to amend the Plan to provide that the costs associated with determining the qualified status of a domestic relations order and with administering distributions under a QDRO be charged against the account of the participant affected.

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 (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 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)(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.

Section 206(d)(3)(I) of ERISA specifies, among other things, that if a plan fiduciary acts in accordance with part 4 of Title I of ERISA in the administration of a domestic relations order, including the determination of whether to treat a domestic relations order as being (or not being) a qualified domestic relations order, then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant to ERISA.

Section 206(d)(3)(J) of ERISA provides that a person who is an alternate payee under a QDRO shall be considered a beneficiary under the plan.

As appears from the foregoing, section 206(d)(3) of ERISA expressly grants an alternate payee the right to receive pension plan benefits payable under a QDRO. In general, it is the view of the Department that a plan may not encumber the exercise of a right mandated by Title I of ERISA by imposing conditions on the exercise of the right that are not contemplated by the statute.[2] We note, in this regard, that nothing in Title I of ERISA requires or permits a plan to impose any separate fees or costs (apart from the appropriate allocation of reasonable administrative expenses of the plan as a

[2]The Department distinguishes such statutorily-granted rights of participants and beneficiaries from rights that a plan may, but is not required to, provide under Title I of ERISA. Thus, for example, under ERISA sections 404(c) and 408(b)(1), and the Department's implementing regulations, 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, provided such charges are consistent with Titles I and IV of ERISA and in accordance with the documents and instruments governing the plan.

whole) in connection with a determination of the status of a domestic relations order or the administration of a QDRO.[3]

Accordingly, it is the view of the Department that imposing a separate fee or cost on a participant or alternate payee (either directly or as a charge against a plan account) in connection with a determination of the status of a domestic relations order or administration of a QDRO would constitute an impermissible encumbrance on the exercise of the right of an alternate payee, under Title I of ERISA, to receive benefits under a QDRO. Additionally, in the Department's view, because Title I of ERISA imposes specific statutory duties on plan administrators regarding QDRO determinations and the administration of QDROs, reasonable administrative expenses thus incurred by the plan may not appropriately be allocated to the individual participants and beneficiaries affected by the QDRO.[4]

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

[3]By contrast, Title I of ERISA expressly permits plans to impose separate administrative costs in a variety of cases. For example, section 104(b)(4) of ERISA states that the plan administrator may impose a reasonable charge to cover the cost of furnishing copies of plan documents or instruments upon request of a participant or beneficiary. See also, section 602 of ERISA, which permits a group health plan, subject to certain conditions, to require the payment of 102% of the applicable premium for any period of continuation coverage elected by an eligible participant or beneficiary.

[4]Of course, in administering QDROs, plan administrators must follow 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, it is the view of the Department that 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.

September 29, 1999

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

99-13A
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]

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

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

shared the same address. You represent that Pension Programs performed additional investigation in its review 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[5] the order is a QDRO under ERISA. 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 Interpretations
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

[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.

> 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.

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

[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.

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 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

[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.

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.

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] 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

[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.

administrators. You represent that these plan administrators contend that an income withholding notice is not a "judgment, decree, or order," and 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]

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)."

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[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.

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.”

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

Appendix B

ERISA
Advisory Opinion Procedure

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

ERISA Proc. 76-1—Procedure for ERISA Advisory Opinions.

It is the practice of the Department of Labor (the Department) to answer inquiries of individuals or organizations affected, directly or indirectly, by the Employee Retirement Income Security Act of 1974 (Pub. L. 93-406, hereinafter "the Act") as to their status under the Act and as to the effect of certain acts and transactions. The answer to such inquiries are categorized as "information letters" and "advisory opinions." This "ERISA Procedure" (ERISA Proc. 76-1) describes the general procedures of the Department in issuing information letters and advisory opinions under the Act, and is designed to promote efficient handling of inquiries and to facilitate prompt responses.

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

This advisory opinion procedure consists of rules of agency procedure and practice, and is therefore excepted under 5 U.S.C. 552(b)(3)(A) of the Administrative Procedure Act from the ordinary notice and comment provisions for agency rulemaking. Accordingly, the procedure is effective August 27, 1976.

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

SEC. 2. *General practice.* It is the practice of the Department to answer inquiries of individuals and organizations, whenever appropriate, and in the interest of sound administration of the Act,

as to their status under the Act and as to the effects of their acts or transactions. One of the functions of the Department is to issue information letters and advisory opinions in such matters.

SEC. 3. *Definitions.* .01 An "information letter" is a written statement issued either by the Pension and Welfare Benefit Programs (Office of Employee Benefit Security), U.S. Department of Labor, Washington, D.C. or a Regional Office or an Area Office of the Labor-Management Services Administration, U.S. Department of Labor, that does no more than call attention to a well-established interpretation or principle of the Act, without applying it to a specific factual situation. An information letter may be issued to any individual or organization when the nature of the request from the individual or the organization suggests that it is seeking general information, or where the request does not meet all the requirements of section 6 or 7 of this procedure, and it is believed that such general information will assist the individual or organization.

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

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

SEC. 4. *Individuals and organizations who may request advisory opinions or information letters.* .01 Any individual or organization affected directly or indirectly, by the Act may request an information letter or an advisory opinion from the Department.

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

SEC. 5. *Discretionary Authority to Render Advisory Opinions.* .01 The Department will issue advisory opinions involving the interpretation of the application of one or more sections of the Act, regulations promulgated under the Act, interpretive bulletins, or

exemptions issued by the Department to a specific factual situation. Generally, advisory opinions will be issued by the Department only with respect to prospective transactions (i.e., a transaction which will be entered into). Moreover, there are certain areas where, because of the inherently factual nature of the problem involved, or because the subject of the request for opinion is under investigation for a violation of the Act, the Department ordinarily will not issue advisory opinions. Generally, an advisory opinion will not be issued on alternative courses of proposed transactions, or on hypothetical situations, or where all parties involved are not sufficiently identified and described, or where material facts or details of the transaction are omitted.

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

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

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

.02(c) Section 3(27), relating to whether the valuation of any asset is at present value;

.02(d) Section 102(a)(1), relating to whether a summary plan description is written in a manner calculated to be understood by the average participant.

.02(e) Section 103(a)(3)(A), relating to whether the financial statements and schedules required to be included in the Annual Report are presented fairly in conformity with generally accepted accounting principles applied on a consistent basis;

.02(f) Section 103(b)(1), relating to whether a matter must be included in a financial statement in order to fully and fairly present the financial statement of the plan;

.02(g) Section 202 (other than section 202(a)(3) and (b)(1)) relating to minimum participation standards;

.02(h) Section 203 (other than sections 202(a)(3)(B), (b)(1) (flush language), (b)(2), (b)(3)(A);

.02(i) Section 204 of the Act (other than sections 204(b)(1)(B), (b)(1)(A), (C), (D), (E)), relating to benefit accrual requirements;

.02(j) Section 205(e), relating to the period during which a participant may elect in writing not to receive a joint and survivor annuity;

.02(k) Section 208, relating to mergers and consolidation of plans or transfer of plan assets;

.02(1) Section 209(a)(1), relating to whether the report required by section 209(a)(1) is sufficient to inform the employee of his accrued benefits under the plan, etc.

.02(m) Sections 302 through 305, relating to minimum funding standards;

.02(n) Section 403(c)(1), relating to the purposes for which plan assets must be held;

.02(o) Section 404(a), relating to fiduciary duties as applied to particular conduct; and,

.02(p) Section 407(a)(2) and (3) and (c)(1), relating to fair market value, as applied to whether the value of any particular security or real property constitutes fair market value.

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

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

.03(a) If an inquiry presents an issue on which the answer seems to be clear from the application of the provisions of the Act to

the facts described, the advisory opinion will be issued in accordance with the procedures contained herein.

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

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

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

SEC. 6. *Instructions to individuals and organizations requesting advisory opinions from the Department.* .01 If an advisory opinion is desired, a request should be submitted to: ~~Advisory Opinion, Office of Regulatory Standards and Exceptions, Pension and Welfare Benefit Programs, U.S. Department of Labor, Washington, D.C. 20216.~~

* Office of Regulations and Interpretations, Room N5669, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

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

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

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

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

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

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

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

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

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

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

SEC. 7. *Instructions to individuals and organizations requesting advisory opinions relating to prohibited transactions and common definitions.* .01 [Reserved]

.02 [Reserved]

.03 [Reserved]

SEC. 8. *Conferences at the Department of Labor.* If a conference has been requested and the Department determines that a conference is necessary or appropriate, the individual or organization or the authorized representative will be notified of the time and place of the conference. A conference will normally be scheduled only when the Department in its sole discretion deems it will be necessary or appropriate in deciding the case. If conferences are being arranged with respect to more than one request for an opinion letter involving the same individual or organization, they will be so scheduled as to cause the least inconvenience to the individual or organization.

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

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

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

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

.02 Background files (including the request for an advisory opinion, correspondence between the Department and the

individual or organization requesting the advisory opinion) shall be available upon written request. Background files may be destroyed after three years from the date of issuance.

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

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

SEC. 13. *Effective date.* This procedure is effective August 27, 1976, the date of its publication in the Federal Register.

Signed at Washington, D.C., this 24th day of August 1976.

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

Appendix C

IRS Sample Language for a Qualified Domestic Relations Order

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

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

I. PURPOSE

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

A. Statutory QDRO Requirements

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

Section 414(p)(1)(A) provides, in general, that a QDRO is a domestic relations order that creates or recognizes the existence of an alternate payee's right, or assigns to an alternate payee the right, to receive all

or a portion of the benefits payable with respect to a participant under a plan, and that meets the requirements of paragraphs (2) and (3) of § 414(p). Section 414(p)(2) requires that a QDRO clearly specify: (A) the name and last known mailing address (if any) of the participant and of each alternate payee covered by the order, (B) the amount or percentage of the participant's benefits to be paid by the plan to each alternate payee, or the manner in which that amount or percentage is to be determined, (C) the number of payments or period to which the order applies, and (D) each plan to which the order applies.

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

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

B. Small Business Job Protection Act of 1996

Section 1457(a)(2) of the Small Business Job Protection Act of 1996 ("SBJPA") directs the Secretary of the Treasury ("Secretary") to develop sample language for inclusion in a form for a QDRO described in § 414(p)(1)(A) of the Code and §206(d)(3)(B)(i) of the Employee Retirement Income Security Act of 1974 ("ERISA") that meets the requirements contained in those

sections, and the provisions of which focus attention on the need to consider the treatment of any lump sum payment, qualified joint and survivor annuity ("QJSA"), or qualified preretirement survivor annuity ("QPSA"). Accordingly, the Service and Treasury are publishing the discussion and sample QDRO language set forth in the Appendix to this Notice.

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

C. Department of Labor Interpretive Authority

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

II. SAMPLE LANGUAGE

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

The sample language addresses a variety of matters, but is not designed to address all retirement benefit issues that may arise in each

domestic relations matter or QDRO. Further, some of the sample language, while helpful in facilitating the administration of a QDRO, is not necessarily required for the order to satisfy the requirements for a QDRO. Alternative formulations would be permissible for use in drafting orders that meet the statutory requirements for a QDRO.

III. OTHER SOURCES OF INFORMATION

The Pension Benefit Guaranty Corporation ("PBGC") recently published a booklet entitled **Divorce Orders & PBGC**, which discusses the special QDRO rules that apply for plans that have been terminated and are trusteed by PBGC, and provides model QDROs for use with those plans. This publication may be obtained by calling PBGC's Customer Service Center at 1-800-400-PBGC or electronically via the PBGC internet site at http://www.pbgc.gov

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

IV. COMMENTS

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

DRAFTING INFORMATION

The principal authors of this Notice are Diane S. Bloom of the Employee Plans Division and Susan M. Lennon of the Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations); however, other personnel from the Service and Treasury contributed to its development. For further information regarding this Notice, please contact the Employee Plans Division's taxpayer assistance telephone service at (202) 622-6074/ 6075, between the hours of 1:30 p.m. and 4 p.m. Eastern Time, Monday through Thursday. Alternatively, please call Ms. Bloom at (202) 622-6214 or Ms. Lennon at (202) 622-4606. Questions concerning QDROs may be addressed to Susan G. Lahne of the Pension and Welfare Benefits Administration, Department of Labor, at (202) 219-7461. These telephone numbers are not toll-free.

Appendix

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

PART I. DISCUSSION OF QDRO REQUIREMENTS AND RELATED ISSUES

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

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

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

A. IDENTIFICATION OF PARTICIPANT AND ALTERNATE PAYEE

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

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

B. IDENTIFICATION OF RETIREMENT PLAN

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

C. AMOUNT OF BENEFITS TO BE PAID TO ALTERNATE PAYEE

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

1. Types of Benefits

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

2. Types of Qualified Plans

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

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

a. Defined Benefit Plans

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

b. Defined Contribution Plans

A "defined contribution plan" is a retirement plan that provides for an individual account for each participant. The participant's benefits are based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account. Examples of defined contribution plans include a profit sharing plan (including a "401(k)" plan), an employee stock ownership plan (an "ESOP") and a money purchase pension plan. Defined contribution plans commonly permit retirement benefits to be paid in the form of a lump sum payment of the participant's entire account balance.

3. Approaches to Dividing Retirement Benefits

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

and the purpose of the QDRO (such as whether the QDRO is meant to provide spousal support or child support, or to divide marital property).

a. Separate Interest Approach

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

(1) Issues Relevant to Defined Benefit Plans

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

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

For example, a defined benefit plan may offer an "early retirement subsidy" to employees who retire before the plan's normal retirement age but after having worked for a specific number of years for the employer maintaining the plan. In some cases, this subsidized benefit provides payments in the form of an annuity that pays the same annual amount as would be paid if the payments commenced instead at the normal retirement age. Because these benefits are not reduced for early commencement, they have a greater actuarial value than benefits payable at normal retirement age. This subsidy may be available only for certain forms of benefit.

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

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

(2) Issues Relevant to Defined Contribution Plans

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

Investment Choices. The participant's account may be invested in more than one investment fund. If the plan provides for participant-directed investment of the participant's account, consideration should be given to how the alternate payee's interest will be invested.

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

b. Shared Payment Approach

A QDRO may use the "shared payment" approach, under which benefit payments from the plan are split between the participant and the alternate payee. The alternate payee receives payments under this approach only when the participant receives payments. A QDRO may provide that the alternate payee will commence receiving benefit payments when the participant begins receiving payments or at a later stated date, and that the alternate payee will cease to share in the benefit payments at a stated date (or upon a stated event, provided that adequate notice is

given to the plan). In splitting the benefit payments, the QDRO may award the alternate payee either a percentage or a dollar amount of each of the participant's benefit payments; in either case, the amount awarded cannot exceed the amount of each payment to which the participant is entitled under the plan. If a QDRO awards a percentage of the participant's benefit payments (rather than a dollar amount), then, unless the QDRO provides otherwise, the alternate payee generally will automatically receive a share of any future subsidy or other increase in the participant's benefits.

D. FORM AND COMMENCEMENT OF PAYMENT TO ALTERNATE PAYEE

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

1. Separate Interest Approach

a. Form of Alternate Payee's Benefit Payments

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

The choice of the form of benefits should take into account the period over which payments will be made. For example, if the alternate payee elects to receive a lump sum payment, no further payments will be made by the plan with respect to the alternate payee's interest.

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

In addition, the forms of benefit available to the alternate payee may be limited by § 401(a)(9) of the Code, which specifies the date by which benefit payments from a qualified plan must commence and limits the period over which the benefit payments may be made. Section 1.401(a)(9)-1, Q&A H-4, of the Proposed Income Tax Regulations addresses the application of the required minimum distribution rules of § 401(a)(9)

to payments to an alternate payee. The proposed regulation limits the period over which benefits may be paid with respect to the alternate payee's interest. For example, the proposed regulation provides that distribution of the alternate payee's separate interest will not satisfy § 401(a)(9)(A)(ii) of the Code if the separate interest is distributed over the joint lives of the alternate payee and a designated beneficiary (other than the participant).

b. Commencement of Benefit Payments to Alternate Payee

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

2. Shared Payment Approach

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

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

Survivor benefits include both benefits payable to surviving spouses and other benefits that are payable after the participant's death. These benefits can be awarded to an alternate payee. In determining the

assignment of survivor benefits, QDRO drafters should take into account that benefits awarded to the alternate payee under a QDRO will not be available to a subsequent spouse of the participant or to another beneficiary. QDRO drafters may consult with the plan administrator for information on the survivor benefits provided under the plan.

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

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

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

1. Qualified Joint and Survivor Annuity

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

2. Qualified Preretirement Survivor Annuity

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

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

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

4. Alternate Payee Treated as Spouse

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

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

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

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

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

PART II. SAMPLE LANGUAGE FOR INCLUSION IN QDRO

A. SAMPLE LANGUAGE FOR IDENTIFICATION OF PARTICIPANT AND ALTERNATE PAYEE

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

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

B. SAMPLE LANGUAGE FOR IDENTIFICATION OF RETIREMENT PLAN

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

C. AMOUNT OF BENEFITS TO BE PAID TO ALTERNATE PAYEE

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

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

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

1. Separate Interest Approach

The Alternate Payee may elect to receive payment from the Plan of the benefits assigned to the Alternate Payee under this Order in any form in which such benefits may be paid under the Plan to the Participant (other than in the form of a joint and survivor annuity with respect to the Alternate Payee and his or her subsequent spouse), but only if the form elected complies with the minimum distribution requirements of §

401(a)(9) of the Internal Revenue Code. Payments to the Alternate Payee pursuant to this Order shall commence on any date elected by the Alternate Payee (and such election shall be made in accordance with the terms of the Plan), but not earlier than the Participant's earliest retirement age (or such earlier date as allowed under the terms of the Plan), and not later than the earlier of (A) the date the Participant would be required to commence benefits under the terms of the Plan or (B) the latest date permitted by § 401(a)(9) of the Internal Revenue Code. For purposes of this Order, the Participant's earliest retirement age shall be the earlier of (i) the date on which the participant is entitled to a distribution under the Plan, or (ii) the later of (I) the date the Participant attains age 50, or (II) the earliest date on which the Participant could begin receiving benefits under the plan if the Participant separated from service.

2. Shared Payment Approach

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

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

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

If the Alternate Payee is the Participant's spouse or former spouse, drafters may select sample paragraph 1, sample paragraph 2, or sample paragraph 3. Sample paragraph 1 applies if the Alternate Payee is treated as the Participant's spouse for all of the spousal survivor benefits payable with respect to the Participant's benefits under the Plan. Sample paragraph 2

applies if the Alternate Payee is treated as the Participant's spouse for a portion of the spousal survivor benefits payable with respect to the Participant's benefits under the Plan. Sample paragraph 3 applies if the Alternate Payee is not treated as the Participant's spouse for any of the spousal survivor benefits payable with respect to the Participant's benefits under the Plan.

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

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

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

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

3. Alternate Payee not Treated as Spouse

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

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