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To: EBSA, E-ORI - EBSA
Subject: Comments on Interim Final QDRO regulations under PPA

There are several timing-related issues that I would like to see addressed in the final regulations. In no particular order of importance, they are:

Issue 1: Is there a particular triggering date (e.g., date of issuance of DRO, or date of service on plan, annuity starting date, etc.) as of which alternate payee status is to be determined in the case of a child or other dependent?

Comment: Logically it would seem that alternate payee status should be determined as of the date the order is issued. This is because the idea behind the QDRO exception to ERISA preemption is preserve for the family courts the ability to access plan benefits to provide for the payment of child, spousal or family support, as well as to divide the marital interest in a plan, so long as such does not impermissibly interfere with the purposes for which ERISA and the conforming portions of the Code were passed (i.e., to provide for retirement security, protect plan assets, and have uniform set of administrative and fiduciary rules and responsibilities). As is evident from the PPA mandate, Congress does not want any unnecessary restrictions in this area. Any rule that would restrict in any way the ability of the state family courts to protect individuals who are children and other dependents just because they may lose dependent status between the time the order is issued and the time it is implemented by the plan would not be consistent with the statute or Congressional intent. Such a rule is not needed to prevent the QDRO exception from being abused, because family courts do not have jurisdiction to issue orders involving matters other than those pertaining to marital interests and support.

Issue 2: If an individual qualifies as an alternate payee child or other dependent at the time the order is issued, can that status be lost based because of subsequent events (i.e., reaching the age of majority, or the loss of dependent status?)

Comment: This is related to issue #1. In my view, there is no reason why, if a state court has issued an order to provide for payment of support to a child or other dependent, that the plan should not honor it regardless of whether, before the assigned amounts are paid out, the individual is no longer a child or other dependent.

Issue 3: If an order provides for payment of a support arrearage to child or dependent from the participant's benefits, is there any reason why the individual would not qualify as an alternate payee regardless of the time the order is issued, served on the plan, or administered?

Comment: If a participant's benefits are assigned in payment of an arrearage on *previously* ordered child or dependent support, it should not make any difference whether individual is still a child or other dependent of the participant at the time the order is issued or subsequently. If the benefits could have been paid to satisfy that obligation while the individual was a child or dependent, why should those benefits become off limits if that obligation has not been satisfied by the time the individual loses child or dependent status? It would seem that the only requirement should be that the order provide for the payment of support due on account of an individual's status as a minor child or other dependent of a participant, as in that way the benefits are used for a purpose that is clearly acceptable under REA.

Proposed example re Issues 1 - 3: A family court orders the payment from the plan of unpaid arrearage in previously ordered child support. The payee is an individual who was a child or other dependent of a participant when the support order was issued, but is no longer a child or dependent at the time the order is issued. Because the payment relates to the participant's

obligation to pay support for an individual who was a child or other dependent at the time the original order was issued, the order would be a QDRO if it otherwise meets the QDRO requirements. The same would not be true with respect to an order issued for current support that is not served upon the plan until after the individual is no longer a child or other dependent entitled to support.

Issue 3: What is the relationship, if any, between when the plan receives notice of an existing order (or that an order is being sought) in relation to the acceptability of a DRO issued after the death of a participant?

Comment: Notice should be irrelevant to the qualification of any posthumous order, as existing law fully protects the a plan's ability to distribute death or survivor benefits in the ordinary course. Thus, if the benefits are fully distributed before the benefits are frozen either by the receipt of a DRO or by receipt of notice sufficient to trigger a freeze under the plan's QDRO procedures, the plan would have no liability under a DRO because at that point there are no more benefits payable "with respect to a participant" and the DRO could not be a QDRO. Further, if the benefits are in pay status (such that the plan has yet to satisfy fully its benefit obligation) by the time the plan receives the DRO, the plan would be still be protected by the 18 month rule, as well as by the "no new forms of benefit" rule. Under this rule, if the participant dies preretirement and the surviving spouse is in pay status, then the QDRO would need to be of the "shared interest" variety to be qualified.

Proposed example: After the death of the participant, a former spouse is issued a DRO making the former spouse a deemed surviving spouse with respect to a participant. If the benefits payable with respect to the participant are not in pay status at the time the order is received by the plan (i.e., the beneficiary has not incurred his or her "annuity starting date"), the order would be a QDRO if it otherwise meets the statutory requirements. If on the other hand the benefits are already in pay status (e.g., to the participant's actual surviving spouse), such an order would not be qualified because at that point the only benefit payable with respect to the participant under the plan is a surviving spouse annuity *for the existing spouse* (or, whatever other form in which the benefits are being paid), such that there are no longer any benefits for whom the alternate payee could become the surviving spouse. This is required because otherwise the order would impermissibly seek to require the plan to pay benefits in a form not otherwise provided for in the plan, or to pay increased benefits. However, in such circumstances, the alternate payee would be free to obtain a DRO awarding all or any portion of the existing surviving spouse annuity to be paid to the alternate payee as a *shared* interest, since under such an order the form and amount of benefits payable by the plan would not change. Note that because the alternate payee is not considered a surviving spouse in this instance, the alternate payee may be any spouse, former spouse, child or other dependent of the participant. Note also that if the benefits are in pay status to a former spouse under another QDRO, the "one QDRO only rule" would preclude any reassignment of those benefits, unless the family court first amends the existing QDRO.

Issue 4: What is the relationship, if any, between the timing of the DRO and the applicability of the QPSA rules?

Comment: Treas. Reg. § 1.401(a)-13(g)(4)(B)(2) and (C)(2) , as well as the PBGC sample QDRO) both make clear that if a percentage of a participant's benefit is assigned as a *separate* interest to an alternate payee, and if the participant then dies pre-retirement; the plan may not pay a QPSA on the assigned portion, which must instead be paid as provided in the QDRO. This rule is consistent with the fact that a QPSA is determined with reference to benefits that would have been paid to the participant if the participant had entered pay status immediately before his or her death under a QJSA. Obviously, to the extent the accrued benefit is assigned to an alternate payee, the putative QJSA would be reduced, and no QPSA could be paid on that piece. This special rule is important to prospective alternate payees because it means that the assigned benefit is not going to be effected by the death of the participant, i.e., is not in danger of being

paid as a 50% QPSA. It also means that the alternate payee need not be a surviving spouse to receive the assigned amount.

However, if the participant dies pre-retirement before such an order is issued, then there is a question as to whether the family court may still award a separate interest or percentage that is not subject to the QPSA reduction. One possible approach is to say that once the participant has died with no order in place the only available benefit is a QPSA (since at that point, the putative QJSA would have not yet have been affected), and therefore that the only available order is one that involves the QPSA benefit. A second, and I believe the better approach, would be to allow separate interest awards only where the alternate payee has an *existing interest* at the time of the death, whether or not that interest has yet been perfected by a QDRO. Such an interest would consist of a marital interest (see, *Gendreau* and other cases), but not an interest based on support alone, unless there was a previous support order specifically provided for the payment to be made from or secured by the plan benefits. The existing interest exception should be allowed because any putative QJSA (the basis for the QPSA computation) would have been in derogation of that interest.

Proposed example: After the preretirement death of a participant, a former spouse discovers the existence of benefits in which the former spouse had an existing marital interest and obtains a DRO assigning that interest to him or her. The order does not make the former spouse a deemed surviving spouse with respect to the participant's remaining share of the benefits. Because the QPSA benefits are not in pay status at the time the order is received by the plan, and the order otherwise satisfies the requirements for a QDRO, the plan must accept the order as qualified and pay the assigned portion to the former spouse as provided in the QDRO (i.e., not as a QPSA). If instead of perfecting an existing interest, the posthumous order had created a new interest in the plan (e.g., for support), then the order would not be qualified to the extent it purported to requirement payment of any benefits subject to the QPSA rules other than in the form of a QPSA.

Thank you for your efforts in this area.

Jim Crawford

P.S. If the opportunity presents itself, it would help if you would clarify that the term "dependent", as used both the ERISA and Code versions of the QDRO rules has the same meaning in both, and that it is a dependent meeting the definition under Code section 152, based on the context in which the order is issued. For example, the definition would be different for an order dealing with medical coverage than it would be for ordinary support.

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