

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2530

RIN 1210-AB15

Final Rule Relating to Time and Order of Issuance of Domestic Relations Orders

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule.

SUMMARY: This document finalizes an interim final rule published on March 7, 2007, which was adopted in response to the specific statutory directive contained in section 1001 of the Pension Protection Act of 2006, Public Law No. 109-280 (PPA), requiring the Secretary of Labor to issue, not later than one year after the date of the enactment of the PPA, regulations clarifying certain issues relating to the timing and order of domestic relations orders under section 206(d)(3) of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The rule provides guidance to plan administrators, service providers, participants, and alternate payees on the qualified domestic relations order (QDRO) requirements under ERISA. The rule is being adopted in response to the specific statutory directive contained in the PPA.

DATES: The final rule is effective on **[INSERT DATE THAT IS 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION:

A. Qualified Domestic Relations Order Provisions

Section 206(d)(3) of title I of ERISA, and the related provisions of section 414(p) of the Internal Revenue Code of 1986 (Code), establish a limited exception to the prohibitions against assignment and alienation contained in ERISA section 206(d)(1) and Code section 401(a)(13).¹ Under this limited exception, a participant's benefits under a pension plan may be assigned to an alternate payee, defined as the participant's spouse, former spouse, child, or other dependent, pursuant to an order that constitutes a qualified domestic relations order (QDRO) within the meaning of those provisions. Such QDROs, in addition, survive the federal preemption of State law imposed by ERISA section 514(a) by virtue of ERISA section 514(b)(7).

Pursuant to the QDRO provisions, a plan administrator must determine, in accordance with specified procedures, whether an order purporting to divide a participant's benefits under a plan meets the applicable requirements set forth in

¹ The QDRO provisions were added to ERISA and the Code by the Retirement Equity Act of 1984 (REA), Public Law No. 98-397, 98 Stat. 1426 (1984). Except where no corresponding provision exists, all references to paragraphs of ERISA section 206(d)(3) should be read to refer to corresponding provisions of Code section 414(p). The Secretary of Labor has authority to interpret the QDRO provisions, section 206(d)(3), and its parallel provision at section 414(p) of the Code, and to issue QDRO regulations in consultation with the Secretary of the Treasury. 29 U.S.C. 1056(d)(3)(N) and 26 U.S.C. 414(p)(13). The Secretary of the Treasury has authority to issue rules and regulations necessary to coordinate the requirements of section 414(p) (and the regulations issued by the Secretary of Labor thereunder) with the other provisions of Chapter 1 of Subtitle A of the Code. 26 U.S.C. 401(n). The Secretary of the Treasury and the Pension Benefit Guaranty Corporation were consulted in connection with the final rule.

section 206(d)(3) of ERISA.² If the plan administrator determines that the order meets these requirements and is, accordingly, a QDRO within the meaning of section 206(d)(3), the plan administrator must distribute the assigned portion of the participant's benefits to the alternate payee or payees named in the order in accordance with the terms of the order.

Subparagraphs (G) and (H) of ERISA section 206(d)(3) set forth provisions relating to the procedures that a plan must establish, and a plan administrator must observe, in determining whether an order is a QDRO and in administering the plan and the participant's benefits during the period in which the plan administrator is making such a determination. The plan's procedures must be reasonable, must be in writing, must require prompt notification and disclosure of the procedures to participants and alternate payees upon receipt of an order, and must permit alternate payees to designate representatives for notice purposes. In addition, the plan administrator must complete the determination process and notify participants and alternate payees of its determination within a reasonable period after receipt of the order.

Subparagraph (H) of section 206(d)(3) provides specific procedural protection of a potential alternate payee's interest in a participant's benefits during the plan's determination process and for a period of up to 18 months (the 18-month period) during which the issue of the qualified status of a domestic relations order is being

² For purposes of the Code, the requirements of section 414(p)(2) and (3) (parallel to ERISA section 206(d)(3)(C) and (D)) do not apply to governmental plans, church plans, or eligible plans under Code section 457(b). See Code section 414(p)(9) and (11).

determined—whether by the plan administrator, by a court of competent jurisdiction, or otherwise. During the 18-month period, a plan administrator must separately account for any amounts that would have been payable to the alternate payee if the order had been immediately treated as a QDRO and must pay these amounts (including any interest thereon) to the alternate payee if the order is determined to be a QDRO within such period. If the issue as to whether the order is a QDRO is not resolved within the 18-month period, the plan administrator is to pay such amounts to the person or persons who would have been entitled to the amounts if there had been no order. Any determination that an order is a QDRO that is made after the close of the 18-month period is to be applied prospectively only.

If a plan fiduciary, acting in accordance with the fiduciary responsibility provisions of part 4 of title I of ERISA, treats an order as a QDRO (or determines that such an order is not a QDRO) and distributes benefits in accordance with that determination, paragraph (l) of section 206(d)(3) provides that the obligations of the plan and its fiduciaries to the affected participants and alternate payees with respect to the distribution shall be treated as discharged.

The QDRO provisions detail specific requirements that an order must satisfy in order to constitute a QDRO. The order must be a "domestic relations order," which is a judgement, decree, or order issued pursuant to a State domestic relations law (including a community property law) that 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. Section 206(d)(3)(B)(ii). It must create or recognize the existence of an alternate payee's right to receive all or a portion of the benefits payable with respect to a participant under a plan. Section 206(d)(3)(B)(i). Further, it must clearly specify 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; the amount or percentage of the participant's benefits to be paid by the plan(s) to each such alternate payee, or the manner in which such amount or percentage is to be determined; the number of payments or period to which the order applies; and each plan to which the order applies. Section 206(d)(3)(C). An order will fail to be a QDRO, however, if it requires the plan: to provide any type or form of benefit, or any option, not otherwise provided under the plan; to provide increased benefits determined on the basis of actuarial value; or to pay benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a QDRO. Section 206(d)(3)(D).

B. Pension Protection Act of 2006

Under section 1001 of the Pension Protection Act of 2006 (PPA), Pub. L. No. 109-280, section 1001, 120 Stat. 780 (2006), Congress instructed the Secretary of Labor to issue regulations, not later than one year after the date of the enactment, under section 206(d)(3) of ERISA and section 414(p) of the Code, to clarify that —(1) a domestic relations order otherwise meeting the requirements to be a QDRO, including the requirements of section 206(d)(3)(D) of ERISA and section 414(p)(3) of the Code,

shall not fail to be treated as a QDRO solely because—(A) the order is issued after, or revises, another domestic relations order or QDRO; or (B) of the time at which it is issued. Section 1001 of the PPA also requires that the regulations clarify that such orders are subject to all of the same requirements and protections that apply to QDROs, including the provisions of section 206(d)(3)(H) of ERISA and section 414(p)(7) of the Code.

C. Interim Final Rule and Public Comments

On March 7, 2007, the Department published an interim final rule (IFR) with a request for comments.³ The IFR closely tracks the statutory language of section 1001 of the PPA. The IFR also includes several illustrative examples of specific fact patterns that the Department understands to be relatively common situations faced by plans. The Department received 24 comments in response to the request for comments contained in the IFR. Overall, the comments were favorable.

A number of commenters asked the Department to add additional examples to illustrate the rules in the regulation. The suggested additions generally were slight variations on the existing examples. The Department was not persuaded that additional examples are necessary to illustrate or further clarify the general rules of the regulation. To the contrary, the Department is concerned that, by adding more examples, some might conclude that the examples themselves are the only circumstances to which the general principles, contained in paragraphs (b)(1), (c)(1), and (d)(1) of the final

³ 72 FR 10070.

regulation, apply. Such a conclusion would be inconsistent with the intent of the Department.⁴ Accordingly, the Department, with one exception (discussed below), has decided against adding additional examples.

A number of commenters were concerned that Example (1), set forth in paragraph (c)(2) of the IFR, could be interpreted as requiring a plan fiduciary to reject a posthumous order if the plan fiduciary was not given notice of that order before the death of the participant. The Department does not agree with that interpretation of the example. Example (1) was intended to clarify that a domestic relations order will not fail to be a QDRO solely because it is issued after the death of a participant. The example dealt solely with the timing issue and its conclusion does not depend on the plan's receipt of pre-death notification of the domestic relations order. The facts of the example include pre-death notification merely because, as indicated above, the Department understands this to be a fairly frequent fact pattern confronted by plans. Nothing in the example should be construed as a requirement under section 206 of ERISA that an otherwise valid posthumous order fails to be a QDRO merely because the plan was not put on notice of the order while the participant was alive.⁵ This example, which is in paragraph (c)(2) of the final regulation, has been modified to address the concern raised by these commenters.

⁴ The examples in paragraphs (b)(2), (c)(2), and (d)(2) of the final regulation show how the rules in paragraphs (b)(1), (c)(1), and (d)(1), respectively, apply to specific facts. They do not represent the only circumstances for which these rules apply.

⁵ Example (1) in paragraph (d)(2) of the IFR regulation also dealt with a posthumous domestic relations order, but in this example no pre-death notice is given to the plan. This example dealt solely with the type or form of benefit. Although the order in this example fails to be a QDRO, the conclusion is unrelated to the absence of pre-death notification to the plan. This example is unchanged and is in paragraph (d)(2) of the final regulation.

A number of commenters expressed concern that Example (3), set forth in paragraph (c)(2) of the interim final regulation, could be read to require plans to provide a type or form of benefit, or an option, not otherwise available under the plan contrary to section 206(d)(3)(D)(i) of ERISA. Example (3) was intended to clarify that a domestic relations order will not fail to be a QDRO merely because it is issued after the annuity starting date. The example dealt solely with the timing issue and assumed that for all other purposes, including the requirements of paragraph (d)(3)(D)(i), the order met the requirements of section 206. In this regard, it is the view of the Department that a domestic relations order issued after the annuity starting date would not violate the requirements of section 206(d)(3)(D)(i) merely because the order requires the allocation of some or all of the participant's determined benefit payment under the applicable optional form of benefit to an alternate payee. In such cases, the plan is merely required to pay a portion of the benefit otherwise due to the participant to another person. On the other hand, any domestic relations order received by a plan after the original annuity starting date of the participant that would require reannuitization with a new annuity starting date would violate section 206(d)(3)(D)(i), unless the plan specifically provides for such an option. Examples of an order requiring a reannuitization with a new annuity starting date would include an order issued after the annuity starting date directing the plan to substitute one measuring life for another or directing the plan to change the form of benefit, such as from a single life annuity to a qualified joint and survivor annuity (QJSA) with a death benefit or from an annuity to a lump sum payment. In an effort to clarify the application of the principles in this

paragraph, the Department has modified Example (3), set forth in paragraph (c)(2) of the final regulation, and has added Example (4) to paragraph (d)(2) of the final rule.

With regard to the principle, expressed above, that a domestic relations order issued after the annuity starting date does not violate the requirements of section 206(d)(3)(D)(i) merely because the order requires the allocation of some or all of the participant's determined monthly benefit payment to an alternate payee, the Department, based on its review of sections 206 and 205 of ERISA, the case law, and other relevant guidance, is of the view that such principle does not apply to a domestic relations order that is received after the annuity starting date and that requires an allocation to an alternate payee of some or all of the death benefit that, under the form of benefit in effect, is payable to another beneficiary.⁶ An example of this is a plan's receipt of a domestic relations order after the annuity starting date of a QJSA that assigns to the participant's former spouse a shared payment of the participant's current spouse's survivor benefits under the QJSA.

A number of commenters asked the Department to undertake an education campaign on QDROs. The Department's Employee Benefits Security Administration (EBSA) already conducts various educational outreach programs aimed at increasing awareness of the requirements of ERISA and helping fiduciaries meet their legal obligations. In response to these specific comments, however, EBSA will update its

⁶ See Boggs v. Boggs, 520 U.S. 833 (1997); Hopkins v. AT & T Global Info. Solutions Co., 105 F.3d 153 (4th Cir. 1997); Rivers v. Central & S.W. Corp., 186 F.3d 681 (5th Cir. 1999); Carmona v. Carmona, 548 F. 3d 988 (9th Cir. 2008); 26 CFR 1.401(a)-20 Q&A-25(b)(3) (second sentence); and 29 CFR 4022.8(d).

educational handbook “QDROs – The Division of Pensions Through Qualified Domestic Relations Orders” that is available at www.dol.gov/EBSA/publications.

A number of commenters raised QDRO issues pertaining to matters that the Department considers to be beyond the scope of the directive contained in section 1001 of the PPA. This section of the PPA specifically directed the Department to clarify certain timing issues. These timing issues are addressed, with examples, in paragraphs (b) through (d) of the final regulation. QDRO issues beyond this specific directive may be addressed in future guidance by the Department in consultation with the Pension Benefit Guaranty Corporation and the Internal Revenue Service.

D. Overview of Final Rule

Scope of the Regulation

Paragraph (a) of the regulation provides that the scope of the regulation is to implement the directive contained in section 1001 of the PPA to clarify certain timing issues with respect to domestic relations orders and qualified domestic relations orders under ERISA.

Subsequent Domestic Relations Orders

Paragraph (b)(1) of the regulation provides that a domestic relations order otherwise meeting ERISA's requirements to be a QDRO shall not fail to be treated as a QDRO solely because the order is issued after, or revises, another domestic relations order or QDRO. Paragraph (b)(2) provides examples of this rule. Example 1 illustrates this rule as applied to a subsequent order revising an earlier QDRO involving the same parties. Example 2 illustrates this rule in the context of a subsequent order involving the same participant and a different alternate payee.

Timing of Domestic Relations Order

Paragraph (c)(1) of the regulation provides that a domestic relations order otherwise meeting ERISA's requirements to be a QDRO shall not fail to be treated as a QDRO solely because of the time at which it is issued. Paragraph (c)(2) provides examples of this rule. Example 1 illustrates the principle that a domestic relation order will not fail to be a QDRO solely because it is issued after the death of the participant. Example 2 illustrates that a domestic relation order will not fail to be a QDRO solely because it is issued after the parties divorce. Example 3 illustrates that an order would not fail to be a QDRO solely because it is issued after the participant's annuity starting date.

Requirements and Protections

Paragraph (d)(1) of the regulation provides that any domestic relations order described in paragraph (b) or (c) of the regulation shall be subject to the same requirements and protections that apply to all QDROs under section 206(d)(3) of ERISA. Paragraph (d)(2) provides examples of this rule. Example 1 illustrates that, although an order will not fail to be a QDRO solely because it is issued after the death of the participant, the order would fail to be a QDRO if it requires the plan to provide a type or form of benefit, or any option, not otherwise provided under the plan. Example 2 illustrates application of the protective rules regarding segregation of payable benefits to a second order involving the same participant and alternate payee. Example 3 illustrates that, although an order will not fail to be a QDRO solely because it is issued after another QDRO, the order will fail to be a QDRO if it assigns benefits already assigned to another alternate payee under another QDRO. Example 4 illustrates the principle that although an order will not fail to be a QDRO solely because it is issued after the annuity starting date, the order would fail to be a QDRO if it requires the plan to provide a type or form of benefit, or any option, not otherwise provided under the plan.

E. Regulatory Impact Analysis

Executive Order 12866 Statement

Under Executive Order 12866 (58 FR 51735), a regulatory action determined to be “significant” is subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a “significant regulatory action” as an action

that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as “economically significant”); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. This regulatory action is not economically significant within the meaning of section 3(f)(1) of the Executive Order. However, the Office of Management and Budget (OMB) has determined that the action is significant within the meaning of section 3(f)(4) of the Executive Order, and the Department accordingly provides the following assessment of its potential costs and benefits.

This final rule is intended to clarify the statutory requirements for QDROs under section 206(d) (3) of ERISA and section 414(p) of the Code. The provisions of section 206(d)(3) generally assist State authorities in deciding permissible ways in which pension benefits may be divided in domestic relations matters. The rules and processes under section 206(d)(3) make it possible for plan administrators to determine whether a State order seeking to assign pension benefits to an alternate payee should be given effect under the plan; clear rules concerning what constitutes a QDRO have the effect of assisting plan administrators in reviewing orders received by the plan, as

well as participants and alternate payees in planning how to take pension assets into account when significant events require making a division of marital assets.

In directing the Department, in section 1001 of the Pension Protection Act, to clarify the application of the QDRO provisions, Congress recognized that existing uncertainty about the application of those provisions has caused difficulties meriting resolution through regulatory action. Such uncertainty can impose litigation and other costs on plans, participants, and alternate payees, as well as on State domestic relations authorities, that will be reduced through the promulgation of this rule. Consistent with the view of Congress, this rule clarifies, first, that the sequence in which multiple orders may be issued does not, in itself, affect whether the orders are QDROs, and, second, that the time at which an order is issued does not, in itself, determine whether an order is or is not a QDRO. The rule further reiterates that an order must meet the specific requirements of section 206(d)(3) of ERISA and section 414(p) of the Code.

By reducing uncertainty over the application of the statutory requirements in specific circumstances, the rule is expected to reduce costs that might otherwise arise from the necessity of resolving uncertainty in such circumstances. By providing clearer rules for plan administrators, the rule is also expected to increase the efficiency of plan administration. In addition, the Department is issuing this rule in direct response to a Congressional directive. As described above, section 1001 of the PPA requires the Department to issue regulations clarifying that an order otherwise meeting the

requirements for a QDRO under section 206(d)(3) of ERISA should not fail to be treated as a QDRO solely because it was issued after or revised another order, or because of the time at which it was issued. In issuing this final rule, therefore, the Department is fulfilling objectives expressly endorsed by Congress. Because the rule applies only in certain specific circumstances and affects only a small subset of domestic relations orders, the Department believes that its economic impact will be small, overall, but positive.

The rule is not anticipated to impose increased compliance costs, because it merely establishes the legal effect of certain sequences of events. Although it may cause some orders to be treated as QDROs that otherwise might be disputed (or fail to be treated as a QDRO), the rule provides certainty with respect to the circumstances it covers, which will aid State authorities seeking to divide pension benefits and assist plan administrators seeking to discharge their obligations under section 206(d)(3) of ERISA, without limiting the power of State authorities to determine the proper division of marital assets. The rule is expected generally to provide benefits to pension plans, plan participants and alternate payees, and State domestic relations authorities by increasing the clarity of the rules that apply to QDROs.

Based on the foregoing assessment, the Department concludes that the benefits of this final rule justify its costs.

Paperwork Reduction Act

The final regulation being issued here is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.) because it does not contain an “information collection” as defined in 44 U.S.C.3502 (11).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C 551 et seq.) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a final rule will not have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present a regulatory flexibility analysis at the time of the publication of the notice of proposed rule-making describing the impact of the rule on small entities and seeking public comment on such impact. Because this rule was issued as an interim final rule, the RFA does not apply and the Department is not required to either certify that the rule will not have a significant impact on a substantial number of small businesses or conduct a regulatory flexibility analysis. Nevertheless, the Department has considered the likely impact of the rule on small entities in connection with its assessment under Executive Order 12866, described above, and believes this rule will not have a significant impact on a substantial number of small entities. For purposes of this discussion, the Department continues to consider a small

entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans which cover fewer than 100 participants. The Department invited comments on the effect of the interim final rule on small entities, but no comments were received.

Congressional Review Act

The final rule being issued here is subject to the provisions of the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and will be transmitted to Congress and the Comptroller General for review. The final rule is not a “major rule” as that term is defined in 5 U.S.C. 804, because it does not result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), the final rule does not include any federal mandate that may result in expenditures by State,

local, or tribal governments, or impose an annual burden exceeding \$100 million on the private sector.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires federal agencies to adhere to specific criteria in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This final rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. One exception described in section 514(b)(7) is for qualified domestic relations orders, as defined in section 206(d)(3) of ERISA. The rule does not alter the provisions of the statute; it merely clarifies the status of certain types of domestic relations orders under ERISA.

List of Subjects in 29 CFR Part 2530

Alternate payee, Divorce, Domestic relations orders, Employee benefit plans, Marital property, Spouse, Plan administrator, Pensions, Qualified domestic relations orders.

For the reasons set forth in the preamble, the Department amends Subchapter D, Part 2530 of Title 29 of the Code of Federal Regulations as follows:

SUBCHAPTER D—MINIMUM STANDARDS FOR EMPLOYEE PENSION BENEFIT PLANS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

PART 2530—RULES AND REGULATIONS FOR MINIMUM STANDARDS FOR EMPLOYEE PENSION BENEFIT PLANS

1. The authority citation for part 2530 is revised to read as follows:

Authority: Secs. 201, 202, 203, 204, 210, 505, 1011, 1012, 1014, and 1015, Pub. L. 93-406, 88 Stat. 852-862, 866-867, 894, 898-913, 924-929 (29 U.S.C. 1051-4, 1060, 1135, 26 U.S.C. 410, 411, 413, 414); Secretary of Labor's Order No. 13-76. Section 2530.206 also issued under sec. 1001, Pub. L. 109-280, 120 Stat. 780.

2. Revise § 2530.206 to read as follows:

§ 2530.206 Time and order of issuance of domestic relations orders.

(a) Scope. This section implements section 1001 of the Pension Protection Act of 2006 by clarifying certain timing issues with respect to domestic relations orders and qualified domestic relations orders under the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. 1001 et seq. The examples herein illustrate the application of this section in certain circumstances. This section also applies in circumstances not described in the examples.

(b) Subsequent domestic relations orders. (1) Subject to paragraph (d)(1) of this section, a domestic relations order shall not fail to be treated as a qualified domestic relations order solely because the order is issued after, or revises, another domestic relations order or qualified domestic relations order.

(2) The rule described in paragraph (b)(1) of this section is illustrated by the following examples:

Example (1). Subsequent domestic relations order between the same parties. Participant and Spouse divorce, and the administrator of Participant's 401(k) plan receives a domestic relations order. The administrator determines that the order is a QDRO. The QDRO allocates a portion of Participant's benefits to Spouse as the alternate payee. Subsequently, before benefit payments have commenced, Participant and Spouse seek and receive a second domestic relations order. The second order reduces the portion of Participant's benefits that Spouse was to receive under the QDRO. The second order does not fail to be treated as a QDRO solely because the

second order is issued after, and reduces the prior assignment contained in, the first order. The result would be the same if the order were instead to increase the prior assignment contained in the first order.

Example (2). Subsequent domestic relations order between different parties.

Participant and Spouse 1 divorce and the administrator of Participant's 401(k) plan receives a domestic relations order. The administrator determines that the order is a QDRO. The QDRO allocates a portion of Participant's benefits to Spouse 1 as the alternate payee. Participant marries Spouse 2, and then they divorce. Participant's 401(k) plan administrator subsequently receives a domestic relations order pertaining to Spouse 2. The order assigns to Spouse 2 a portion of Participant's 401(k) benefits not already allocated to Spouse 1. The second order does not fail to be a QDRO solely because the second order is issued after the plan administrator has determined that an earlier order pertaining to Spouse 1 is a QDRO.

(c) Timing. (1) Subject to paragraph (d)(1) of this section, a domestic relations order shall not fail to be treated as a qualified domestic relations order solely because of the time at which it is issued.

(2) The rule described in paragraph (c)(1) of this section is illustrated by the following examples:

Example (1). Orders issued after death. Participant and Spouse divorce, and the administrator of Participant's plan receives a domestic relations order, but the administrator finds the order deficient and determines that it is not a QDRO. Shortly thereafter, Participant dies while actively employed. A second domestic relations order correcting the defects in the first order is subsequently submitted to the plan. The second order does not fail to be treated as a QDRO solely because it is issued after the death of the Participant. The result would be the same even if no order had been issued before the Participant's death, in other words, the order issued after death were the only order.

Example (2). Orders issued after divorce. Participant and Spouse divorce. As a result, Spouse no longer meets the definition of "surviving spouse" under the terms of the plan. Subsequently, the plan administrator receives a domestic relations order requiring that Spouse be treated as the Participant's surviving spouse for purposes of receiving a death benefit payable under the terms of the plan only to a participant's surviving spouse. The order does not fail to be treated as a QDRO solely because, at the time it is issued, Spouse no longer meets the definition of a "surviving spouse" under the terms of the plan.

Example (3). Orders issued after annuity starting date. Participant retires and begins receipt of benefits in the form of a straight life annuity, equal to \$1,000 per month, and with respect to which Spouse has consented to the waiver of the surviving spousal rights provided under the plan and section 205 of ERISA. Subsequent to the

commencement of benefits (in other words, subsequent to the annuity starting date as defined in section 205(h)(2) of ERISA and as further explained in 26 CFR 1.401(a)-20, Q&A-10(b)), Participant and Spouse divorce and present the plan with a domestic relations order requiring 50 percent (\$500) of Participant's future monthly annuity payments under the plan to be paid instead to Spouse, as an alternate payee (so that monthly payments of \$500 are to be made to Spouse during Participant's lifetime). Pursuant to paragraph (c)(1) of this section, the order does not fail to be a QDRO solely because it is issued after the annuity starting date. If the order instead had required payments to Spouse for the lifetime of Spouse, this would constitute a reannuitization with a new annuity starting date, rather than merely allocating to Spouse a part of the determined annuity payments due to Participant, so that the order, while not failing to be a QDRO because of the timing of the order, would fail to meet the requirements of section 206(d)(3)(D)(i) of ERISA (unless the plan otherwise permits such a change after the participant's annuity starting date). See 29 CFR 2530.206(d)(2), Example (4).

(d) Requirements and protections. (1) Any domestic relations order described in this section shall be a qualified domestic relations order only if the order satisfies the same requirements and protections that apply under section 206(d)(3) of ERISA.

(2) The rule described in paragraph (d)(1) of this section is illustrated by the following examples:

Example (1). Type or form of benefit. Participant and Spouse divorce, and their divorce decree provides that the parties will prepare a domestic relations order assigning 50 percent of Participant's benefits under a 401(k) plan to Spouse to be paid in monthly installments over a 10-year period. Shortly thereafter, Participant dies while actively employed. A domestic relations order consistent with the divorce decree is subsequently submitted to the 401(k) plan; however, the plan does not provide for 10-year installment payments of the type described in the order. Pursuant to paragraph (c)(1) of this section, the order does not fail to be treated as a QDRO solely because it is issued after the death of Participant, but the order would fail to be a QDRO under section 206(d)(3)(D)(i) and paragraph (d)(1) of this section because the order requires the plan to provide a type or form of benefit, or any option, not otherwise provided under the plan.

Example (2). Segregation of payable benefits. Participant and Spouse divorce, and the administrator of Participant's plan receives a domestic relations order under which Spouse would begin to receive benefits immediately if the order is determined to be a QDRO. The plan administrator separately accounts for the amounts covered by the domestic relations order as is required under section 206(d)(3)(H)(v) of ERISA. The plan administrator finds the order deficient and determines that it is not a QDRO. Subsequently, after the expiration of the segregation period pertaining to that order, the plan administrator receives a second domestic relations order relating to the same parties under which Spouse would begin to receive benefits immediately if the second order is determined to be a QDRO. Notwithstanding the expiration of the first

segregation period, the amounts covered by the second order must be separately accounted for by the plan administrator for an 18-month period, in accordance with section 206(d)(3)(H) of ERISA and paragraph (d)(1) of this section.

Example (3). Previously assigned benefits. Participant and Spouse 1 divorce, and the administrator of Participant's 401(k) plan receives a domestic relations order. The administrator determines that the order is a QDRO. The QDRO assigns a portion of Participant's benefits to Spouse 1 as the alternate payee. Participant marries Spouse 2, and then they divorce. Participant's 401(k) plan administrator subsequently receives a domestic relations order pertaining to Spouse 2. The order assigns to Spouse 2 a portion of Participant's 401(k) benefits already assigned to Spouse 1. The second order does not fail to be treated as a QDRO solely because the second order is issued after the plan administrator has determined that an earlier order pertaining to Spouse 1 is a QDRO. The second order, however, would fail to be a QDRO under section 206(d)(3)(D)(iii) and paragraph (d)(1) of this section because it assigns to Spouse 2 all or a portion of Participant's benefits that are already assigned to Spouse 1 by the prior QDRO.

Example (4). Type or form of benefit. Participant retires and commences benefit payments in the form of a straight life annuity based on the life of Participant, with respect to which Spouse consents to the waiver of the surviving spousal rights provided under the plan and section 205 of ERISA. Participant and Spouse divorce after the annuity starting date and present the plan with a domestic relations order that eliminates

the straight life annuity based on Participant's life and provides for Spouse, as alternate payee, to receive all future benefits in the form of a straight life annuity based on the life of Spouse. The plan does not allow reannuitization with a new annuity starting date, as defined in section 205(h)(2) of ERISA (and as further explained in 26 CFR 1.401(a)-20, Q&A-10(b)). Pursuant to paragraph (c)(1) of this section, the order does not fail to be a QDRO solely because it is issued after the annuity starting date, but the order would fail to be a QDRO under section 206(d)(3)(D)(i) and paragraph (d)(1) of this section because the order requires the plan to provide a type or form of benefit, or any option, not otherwise provided under the plan. However, the order would not fail to be a QDRO under section 206(d)(3)(D)(i) and paragraph (d)(1) of this section if instead it were to require all of Participant's future payments under the plan to be paid instead to Spouse, as an alternate payee (so that payments that would otherwise be paid to the Participant during the Participant's lifetime are instead to be made to the Spouse during the Participant's lifetime).

Signed at Washington, D.C., this 3rd day of June 2010.

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