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Notices

## Notice 97-11, 1997-1 CB 379, 12/30/1996, IRC Sec(s). 414

### Qualified domestic relations orders—qualified plans.

#### Headnote:

IRS highlighted issues relevant to drafting qualified domestic relations order (QDRO), and provided sample language that can be used in QDROs relating to qualified plans subject to [Code Sec. 401\(a\)\(13\)](#); . Sample language was provided at direction of Small Business Job Protection Act of '96, which requested sample that focused on need to consider treatment of any lump sum payment, qualified joint and survivor annuity, or qualified preretirement survivor annuity. Public comment on QDRO discussion and sample language is also sought.

*Reference(s):* [¶ 4145.20\(5\)](#); [Code Sec. 414](#);

#### Full Text:

##### 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 [§](#) section 401(a) or [§](#) section 403(a) of the Internal Revenue Code of 1986 (“qualified plan” or “plan”) and that is subject to [§](#) section 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 [§](#) section 414(p). A “domestic relations order” is defined in [§](#) section 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 [§](#) section 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 [§](#) [§](#) section 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 section 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 sections 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 section 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 section 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 section 414(p)(1)(A) of the Code and section 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. section 1056(d)(3)) contains QDRO provisions that are substantially parallel to those of section 414(p) of the Code. The Department of Labor has jurisdiction to interpret these provisions (except to the extent provided in section 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 sections 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 trustee 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](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 [§](#) section 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 [§](#) section 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 [§](#) section 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 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  section 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  section 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 sections 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 sections 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.