

**Questions and Proposed Answers for the Department of Labor Staff for the
2007 Joint Committee of Employee Benefits Technical Session
Held on May 7, 2007**

The following questions and answers are based on informal discussions between private-sector representatives of the Joint Committee on Employee Benefits (JCEB) and Department of Labor (DoL) staff. The questions were submitted by ABA members, and the responses were given at a meeting of JCEB and government representatives. The responses reflect only unofficial, nonbinding staff views as of the time of the discussion, and do not necessarily represent the official position of the Department of Labor. Further, this report on the discussions was prepared by JCEB representatives, based on their notes and recollections of the meeting.

Question 1: The Pension Protection Act of 2006 amended the Department of Labor plan asset regulation by changing the definition of “benefit plan investor” to exclude foreign and governmental plans. The benefit plan investor definition is relevant for purposes of the “significant participation” test, under which an entity is found to hold plan assets if investment by benefit plan investors is “significant” (i.e., 25% or more of the value of interests in the entity). This change in definition is effective for "transactions" occurring after August 17, 2006. While this definition would clearly apply to new entities, funds, etc. first established after August 17, 2006, how does it apply, if at all, to an entity, fund, etc. established on or before that date?

Proposed

Answer 1: The significant participation test is to be performed every time there is an "acquisition" of any equity interest. DOL Reg. 2510.3-101(f)(1) This suggests that, if there is a new acquisition after August 17, 2006, the new definition of benefit plan investor is used when performing the significant participation test required on account of such acquisition.

Furthermore, per DOL Adv. Op. 89-05A, an “acquisition” includes the redemption of a partner’s equity interest in a partnership since it would result in an increase in the interests of the remaining partners. This implies that, if there is a redemption after August 17, 2006, the new definition of benefit plan investor is used when performing the significant participation test required on account of such redemption.

Therefore, the only situation where the new benefit plan investor definition would not be used with respect to an existing entity, fund, etc. is if there are no acquisitions or redemptions occurring after August 17, 2006.

DoL

Answer 1: Staff believes that in determining whether transactions involving the assets of an investment entity that occur after August 17, 2006, involve “plan assets,” the definitions of “benefit plan investor” in ERISA section 3(42) would be used in

applying the significant participation test. For example, if an entity accepted its last new investor on January 31, 2005, then in determining whether ERISA's fiduciary rules apply to the management of that entity with respect to transactions (e.g., an investment in or by the entity) in which it engages after August 17, 2006 (i.e., by reason of a plan assets look-through), the new definitions of "benefit plan investor" in ERISA section 3(42) would apply. However, consistent with the present look-through regulation, the 25% test described in section 3(42) would focus on the investors immediately after the most recent acquisition of an equity interest in the entity (January 31, 2005). Currently there is a regulatory project to assess how the regulations need to be amended to conform to section 3(42). Staff invited the practitioners to submit fact patterns and issues raised by section 3(42). Staff also indicated, however, that questions related to section 3(42)'s effective date could possibly be addressed interpretively outside of the regulatory project.

Question 2: Section 701 of the Pension Protection Act of 2006 establishes a three-year vesting criteria and places a limit on interest credits for cash balance and pension equity plans in existence on June 29, 2005. These requirements are respectively implemented by a) Internal Revenue Code Section 411(a)(13)(B) and ERISA Sec. 203(f)(2) ; and b) Internal Revenue Code Section 411(b)(5)(B)(i)(I), ERISA Section 204(b)(5)(B)(i)(I), and ADEA Sec. 4(i)(10)(B)(i)(I), each as added by the Act. The provisions generally apply to plan years beginning after December 31, 2007; however, a delayed effective date is described for certain plans maintained pursuant to one or more collective bargaining agreements between employers and employee representatives. This special rule for collectively bargained plans provides that the referenced changes are not to apply to plan years beginning before-

“(A) the earlier of- (i) the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof on or after such date of enactment), or (ii) January 1, 2008, or (B) January 1, 2010.”

As presently written, the above-quoted language necessarily calls for a January 1, 2008 "delayed" effective date. Of course, this represents no delay at all to the general effective date, contrary to the apparent intent to do so suggested by the title and as confirmed in the relevant corresponding section of the Technical Explanation prepared by the Staff of the Joint Committee on Taxation. Consequently, is the wording in question misstated and, if so, what is the correct language?

Proposed

Answer 2:

Consistent with prior legislation affecting employee pension and welfare benefits, as well as with certain other sections of the Act, the intent here was to provide for delayed implementation of the 3-year vesting standard and interest crediting limits

applicable to specified cash balance and pension equity defined benefit plans maintained under collective bargaining agreements. The wording should have been as follows:

“...shall not apply to plan years beginning before the earlier of: (A) the later of (i) the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof on or after such date of enactment) or (ii) January 1, 2008, or (B) January 1, 2010”.

DoL

Answer 2: Staff declines to answer because the Treasury Department has interpretive authority on this issue.

Question 3: FAB 2007-01 discusses the application of the level fee requirement to individuals who are employees of an entity that is a fiduciary adviser and who provide investment advice. The FAB says that the level fee requirement applies both to the entity and to the individuals. However, is the answer different if an individual can qualify as a fiduciary adviser on his or her own, e.g., the individual him or herself is a registered investment adviser or a registered broker dealer. In that case, does the level fee requirement apply to both?

Proposed

Answer 3: The level fee requirement would probably still apply to both the entity and the individual to the extent the individual is providing investment advice as an employee of the entity. In addition, because a fiduciary adviser must be a fiduciary of the plan by reason of providing the investment advice, in order for the individual to be the fiduciary adviser rather than the entity, the individual would have to be a fiduciary in his or her personal capacity, which might not be the case.

DoL

Answer 3: Staff indicates that the proposed answer to question 3 is consistent with Field Assistance Bulletin 2007-1; however, they note that the Department is in the process of reviewing that Bulletin in the context of the fee leveling requirement in the Pension Protection Act for investment advice.

Question 4: An employer maintains a 401(k) plan and the plan fiduciaries have selected ABC investment company and its affiliates to serve as directed trustee and recordkeeper for the 401(k) plan. In addition, the 401(k) plan’s administrative committee (the plan fiduciary responsible for selecting investments, the trustee, and the recordkeeper, as well as determining whether to provide investment advice) has selected 15 investment options for the plan, 10 of which are related to ABC investment company (for example, the ABC S&P 500 fund, the ABC international fund, etc. – the “ABC funds”). The committee believes the

participants would benefit from investment advice. The ABC investment company proposes to the committee that representatives of the ABC investment company provide investment advice to the participants at a cost of \$20 per participant per year. The actual cost, however, may be less because ABC investment company will use some of the revenue sharing it receives from the investments under the 401(k) plan to reduce the fees. The compensation of the representatives who meet with the participants will be a level fee (they will be salaried employees of the ABC investment company) and will not vary depending on whether the representatives advise the participants to invest in ABC mutual funds or other investments. In addition, the representatives will acknowledge they are fiduciaries with respect to the investment advice they provide to participants and they will disclose they are employees of the ABC investment company. The investment advice, however, may result in the ABC investment company and its affiliates having more of the plan assets invested in ABC funds. If the committee accepts the proposal, does the arrangement constitute a prohibited transaction? Does the committee have a fiduciary responsibility to obtain other proposals before accepting the proposal?

Proposed

Answer 4:

There is no obligation under ERISA for 401(k) plans to provide investment advice to participants (401(k) plans designed to receive the limited protection under section 404(c) of ERISA must provide investment education but are not required to provide investment advice). If a 401(k) plan is designed or operated in a manner that provides investment advice to participants, this action is a fiduciary act. 29 U.S.C. § 1003(21)(A)(ii) (2006) (ERISA § 3(21)(A)(ii)). *See* FAB 2007-01 (Feb. 2, 2007). The applicable plan fiduciary, in this case the committee, must prudently select the company and method used to provide investment advice. Generally, this means the committee must consider proposals from several investment advice providers to fulfill their duty of prudence. 29 U.S.C. § 1104(a)(1)(B) (2006) (ERISA § 404(a)(1)(B)). Once selected, the committee has an ongoing fiduciary responsibility to monitor the performance of the company selected to provide investment advice. 29 C.F.R. § 2509.75-8, FR-17.

The proposal described above is not a prohibited transaction because the representatives' compensation does not vary with the investment advice provided to participants. 29 U.S.C. § 1108(g)(2)(A)(i) (2006) (ERISA § 408(g)(2)(A)(i)). It is not a prohibited transaction even if the investment advice results in an increase in the plan assets in ABC funds or the fees received by ABC investment company and its affiliates due to the greater amount of plan assets in the ABC funds.

DoL

Answer 4:

Staff references DOL response to Question 3 and the guidance provided under FAB 2007-01. When an investment company is hired to provide advice, fee leveling applies to both the company and the individuals providing advice.

Question 5: An employer maintains an ERISA covered short-term disability plan and provides employees with two weeks of paid time off (PTO) each year. Benefits under the short-term disability plan commence after the employee satisfies a seven-day exclusion period. During the seven-day exclusion period, an employee may use PTO to receive pay. Once approved for benefits under the short-term disability plan, the employee receives a benefit of 60% of the employee's standard rate or pay. The employer counts the employee's time on short-term disability toward an employee's time off required under the Family Medical Leave Act (FMLA)? May the employer allow an employee to elect to use PTO to supplement short-term disability benefits and still have the days count toward the FMLA requirement? May the employer require an employee to supplement short-term disability benefits and still have the days count toward the FMLA requirement? Does the plan's status as a plan covered under ERISA restrict the employer's ability to require an employee to use PTO to supplement short-term disability benefits?

Proposed

Answer 5: An employer may allow an employee to elect to use PTO to supplement short-term disability benefits and still have the days count toward the FMLA requirement. *See* 29 C.F.R. § 825.207(a) (providing that paid leave may be substituted "for all or part of any (otherwise) unpaid FMLA leave"). An employer may not require an employee to take a full day of PTO and receive short-term disability benefits for the same day and count that day toward the FMLA requirement because the employee would be paid more than 100% of pay. *See* 29 C.F.R. § 825.207(d)(1). *See also* FMLA 2003-5 (December 17, 2003) ("[A]n employer cannot require an employee to substitute, under FMLA, any paid vacation or other leave during the absence that would otherwise be covered by payment from plans covering temporary disabilities. Because the leave pursuant to a temporary disability benefit plan is not unpaid leave, the provision for substitution of paid leave is inapplicable. An employee's receipt of such payment precludes the employee from electing and prohibits the employer from requiring the substitution of any form of accrued paid leave for any part of the absence covered by such payments."). Most short-term disability plans, however, replace only approximately 60% of an employee's pay. An employer may require an employee to supplement short-term disability benefits up to the point where an employee receives an amount equal to 100% of the employee's pay and still have the days count toward the FMLA requirement. 29 C.F.R. § 825.207(a). This is because that portion of the employee's leave is unpaid and, therefore, is still subject to the substitution rule that allows paid leave to be substituted for unpaid leave. *See* 29 C.F.R. § 825.207(c). These results are the same regardless of whether the short-term disability plan is covered under ERISA. The plan's status as a plan covered under ERISA does not affect the employer's ability to require an employee to use PTO to supplement short-term disability benefits.

DoL

Answer 5: Staff declines to comment on the proposed answer because the question concerns interpretation of the Family Medical Leave Act which is within the purview of other offices of the Department of Labor.

Question 6: An employer maintains an ERISA covered short-term disability plan and provides employees with two weeks of paid time off (PTO) each year. Benefits under the short-term disability plan commence after the employee satisfies a seven-day exclusion period. During the seven-day exclusion period, an employee may use PTO to receive pay. Once approved for benefits under the short-term disability plan, the employee receives a benefit of 60% of the employee's standard rate or pay. The employer counts the employee's time on short-term disability toward an employee's time off required under the Family Medical Leave Act (FMLA)? May the employer allow an employee to elect to use PTO to supplement short-term disability benefits and still have the days count toward the FMLA requirement? May the employer require an employee to supplement short-term disability benefits and still have the days count toward the FMLA requirement? Does the plan's status as a plan covered under ERISA restrict the employer's ability to require an employee to use PTO to supplement short-term disability benefits?

Proposed

Answer 6: An employer may allow an employee to elect to use PTO to supplement short-term disability benefits and still have the days count toward the FMLA requirement. *See* 29 C.F.R. § 825.207(a) (providing that paid leave may be substituted "for all or part of any (otherwise) unpaid FMLA leave"). An employer may not require an employee to take a full day of PTO and receive short-term disability benefits for the same day and count that day toward the FMLA requirement because the employee would be paid more than 100% of pay. *See* 29 C.F.R. § 825.207(d)(1). *See also* FMLA 2003-5 (December 17, 2003) ("[A]n employer cannot require an employee to substitute, under FMLA, any paid vacation or other leave during the absence that would otherwise be covered by payment from plans covering temporary disabilities. Because the leave pursuant to a temporary disability benefit plan is not unpaid leave, the provision for substitution of paid leave is inapplicable. An employee's receipt of such payment precludes the employee from electing and prohibits the employer from requiring the substitution of any form of accrued paid leave for any part of the absence covered by such payments."). Most short-term disability plans, however, replace only approximately 60% of an employee's pay. An employer may require an employee to supplement short-term disability benefits up to the point where an employee receives an amount equal to 100% of the employee's pay and still have the days count toward the FMLA requirement. 29 C.F.R. § 825.207(a). This is because that portion of the employee's leave is unpaid and, therefore, is still subject to the substitution rule that allows paid leave to be substituted for unpaid

leave. *See* 29 C.F.R. § 825.207(c). These results are the same regardless of whether the short-term disability plan is covered under ERISA. The plan's status as a plan covered under ERISA does not affect the employer's ability to require an employee to use PTO to supplement short-term disability benefits.

DoL

Answer 6: Staff declines to comment on the proposed answer because the question concerns interpretation of the Family Medical Leave Act which is within the purview of other offices of the Department of Labor.

Question 7: An employer maintains an ERISA covered 403(b) plan. As permitted under the Internal Revenue Code, the 403(b) plan excludes employees who normally work less than 20 hours per week. *See* Code § 403(b)(12)(A). The employer employs 100 employees, 40 of whom are part-time employees (40% of the workforce). Does the exclusion of the part-time employees violate the coverage requirements under ERISA?

Proposed

Answer 7: An employer may exclude employees who normally work less than 20 hours per week as a class from a 403(b) plan. Normally, ERISA limits exclusions based on service. 29 U.S.C. § 1052(a) 2006 (ERISA § 202(a)) ("No pension plan may require, as a condition of participation in the plan, that an employee complete a period of service with the employer or employers maintaining the plan extending beyond the later of the following dates - (ii) the date on which he completes 1 year of service."). Federal laws, however, are to be construed in a manner that does not abrogate a provision of one federal law and, therefore, because Congress specifically provided for the exclusion of employees who normally work less than 20 hours per week as a class from a 403(b) plan under the Internal Revenue Code, the Department of Labor would interpret this exclusion as permitted under ERISA.

DoL

Answer 7: Staff declines to comment on the proposed answer because the question concerns matters that are within the purview of the Treasury Department.

Question 8: Currently proposed changes to Form 5500 would eliminate the limited reporting option for Code Section 403(b) pension plans beginning with the 2008 plan year. *See* 71 Fed. Reg. 41616, 41619. If that proposal is included in final Form 5500 revisions, will the currently available exemption (or transition rule) for plans that were filed in the previous year under the small plans requirements, but have participant counts from 100 to 120 at the beginning of the 2008 year, elect to continue filing as a small plan until they exceed 120 participants? *See* 26 CFR

Section 2520.103-1. Since 403(b) plans file under limited reporting rules, it's uncertain whether the prior year's filing was a large or small plan filing.

Proposed

Answer 8: Since 403(b) plans have, prior to the 2008 plan year, filed under the limited reporting option, they will be permitted to file under the small plan rules for 2008 if they have between 100 and 120 participants at the beginning of that plan year.

DoL

Answer 8: This question addresses a proposed rulemaking that is currently under advisement, and Staff is unable to definitively speak to this issue at this time. Staff anticipates that this question will be addressed in the final revisions to the Form 5500. Staff believes that the proposed answer reaches a logical conclusion.

Question 9: An employer maintains an ERISA covered 403(b) plan. As permitted under the Internal Revenue Code, the 403(b) plan excludes employees who normally work less than 20 hours per week. *See* Code § 403(b)(12)(A). The employer employs 100 employees, 40 of whom are part-time employees (40% of the workforce). Does the exclusion of the part-time employees violate the coverage requirements under ERISA?

Proposed

Answer 9: An employer may exclude employees who normally work less than 20 hours per week as a class from a 403(b) plan. Normally, ERISA limits exclusions based on service. 29 U.S.C. § 1052(a) 2006 (ERISA § 202(a)) (“No pension plan may require, as a condition of participation in the plan, that an employee complete a period of service with the employer or employers maintaining the plan extending beyond the later of the following dates - (ii) the date on which he completes 1 year of service.”). Federal laws, however, are to be construed in a manner that does not abrogate a provision of one federal law and, therefore, because Congress specifically provided for the exclusion of employees who normally work less than 20 hours per week as a class from a 403(b) plan under the Internal Revenue Code, the Department of Labor would interpret this exclusion as permitted under ERISA.

DoL

Answer 9: See DOL Answer to Question 7.

Question 10: A small business is willing to maintain a 401(k) retirement plan for its employees, but only if it will have no duty other than to pay over contributions. Neither the business nor its owner is willing to serve as the plan's named fiduciary, administrator, or trustee.

The business adopts a plan-and-trust document that provides that each participant, beneficiary, or alternate payee is the named fiduciary, administrator, and trustee, to the extent of the individual's account. The document provides that each participant's, beneficiary's, or alternate payee's account is a separate trust.

The plan excludes from participation every owner and every highly-compensated employee, and includes every other employee.

The document does not restrict investments except as required by ERISA – for example, to preclude an investment if plan assets would inure to the benefit of an employer, or if the indicia of ownership would be outside the jurisdiction of the United States' district courts.

Assuming a correct plan in all respects other than the several-fiduciaries provisions, does this plan comport with ERISA?

Proposed

Answer 10: Yes. ERISA § 402(a)(1) provides that every plan's written instrument "shall provide for one *or more* named fiduciaries who jointly *or severally* shall have authority to control and manage the operation and administration of the plan." Likewise, ERISA § 403(a) provides that all plan assets "shall be held in trust by one *or more* trustees."

ERISA § 402(b)(2) includes as a requisite feature of a plan that every plan "shall describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan[.]"

ERISA § 405(b)(3)(A) recognizes that a plan's assets may be "held in *more than one trust*". Further, it provides that "a trustee shall not be liable [as a co-trustee or co-fiduciary] except with respect to an act or omission of a trustee of a trust of which he is a trustee."

ERISA § 408(c)(3) provides that "[n]othing in section 406 shall be construed to prohibit any fiduciary from serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest." ERISA § 408(c)(1) provides that it is not a prohibited transaction for a fiduciary to receive a benefit that he or she is entitled to as a participant or beneficiary and under the terms of the plan. For a plan with only two accounts for two employees, no one would question that one of the employees could serve as the plan's administrator and trustee regarding both accounts, including her own account.

ERISA permits an employee to serve as a fiduciary of a plan in which she happens to be a participant. ERISA permits more than one named fiduciary, and

permits their duties to be allocated. ERISA permits more than one trustee, and permits their duties to be separated. An ERISA-governed plan may specify that there are as many plan administrators as there are participants.

DoL

Answer 10: Staff declines to answer Question 10. Staff notes that the facts of Q. 10 tried to absolve the Named Fiduciaries of responsibility by naming each participant, beneficiary and alternate payee as a Named Fiduciary. Staff is concerned that this type of provision would become an alternative to complying with the requirements of section 404(c) of ERISA.

Question 11: Company A has 20,000 employees and sponsors a defined benefit plan for its union employees (15,000 of the employees are employees covered by collective bargaining agreements with 10 different unions). Twenty years after establishing the Company A defined benefit plan as a single employer plan, Company A allows Company B to become a participating employer in the Company A defined benefit plan for union employees. Company A has 5,000 employees; 2,000 of whom are employees covered by collective bargaining agreements with 3 different unions. Company A and Company B are not under common control (as defined in Code §§ 414(b), (c), (m), and (o)). The Company A defined benefit plan provides that Company A is the plan sponsor and although the plan allows other employers to participate in the plan, Company A has all of the fiduciary and administrative control over the plan. Is the Company A defined benefit plan a multiple employer plan or a multiemployer plan?

Proposed

Answer 11: The plan is a multiple employer plan. The classic multiemployer plan is a plan that covers employees of a single union and a number of employers. The classic multiple employer plan is a plan established by one company that is extended to cover employees at two companies (where the second company may be related but is not under common control with the first company). ERISA defines a multiemployer plan as a plan (i) to which more than one employer contributes, (ii) which is maintained pursuant to collective bargaining agreements, and (iii) “which satisfies such other requirements as the Secretary may prescribe by regulation.” 29 U.S.C. § 1102(37)(A) (2006) (ERISA § 3(37)(A)). ERISA does not define a “multiple employer plan.” Although ERISA does not define a multiple employer plan, because this plan covers only two companies and one company had historically maintained the plan as a single employer plan, the plan would be viewed as a multiple employer plan.

DoL

Answer 11: Staff does not believe the question includes sufficient information to evaluate and apply the criteria in ERISA section 3(37) and the Department's regulations. See Advisory Opinion 2002-07A, the Anchor Glass advisory opinion.

Question 12: Participant and spouse divorce. The Plan administrator of Defined Benefit Plan receives a domestic relations order which allocates a portion of the Participant's benefit to the alternate payee. The administrator determines this order to be a QDRO. Subsequently, before benefit payments have commenced, Defined Benefit Plan receives another court order which eliminates all of the benefit to the alternate payee awarded in the first order so that, if the subsequent domestic relations order is implemented, the former spouse will no longer receive any portion of the Participant's benefit from Defined Benefit Plan. Is the subsequent order a QDRO? What is the impact of the subsequent order on the first order that was determined to be a QDRO by the plan administrator?

Proposed

Answer 12: The subsequent order is not a QDRO and it has no impact on the prior order that was determined to be a QDRO by the plan administrator. ERISA §206(d)(3)(B)(i) provides that a "qualified domestic relations order" is a domestic relations order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a Participant under the plan." In Advisory Opinion 2004-2A the Department stated its view that "provided that a domestic relations order otherwise meets the requirements of section 206(d)(3) of ERISA, a plan administrator may not fail to qualify the domestic relations order merely because the order changes a prior assignment to the same alternate payee" and that "a plan administrator may determine, consistent with the requirements of section 206(d)(3), that a domestic relations order is qualified even if it would supersede or amend a pre-existing QDRO assigning the same Participant's benefits to the same alternate payee."

However, under the facts in Question 1, the result of implementing the subsequent order is that there is no longer an order that meets the requirements of §206(d)(3). The subsequent order, by itself, does not satisfy the requirement of ERISA §206(d)(3)(B)(i) because it does not create or recognize the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a Participant under the plan. Therefore, this order is preempted. Similarly, the two orders taken together are not a QDRO because as a result of the subsequent order there is no longer an order requiring that benefits be paid to the alternate payee. Consequently, the original domestic relations order that was determined to be a QDRO by the plan administrator remains in effect.

However, if the second order on its face actually vacates the first order, the original state domestic relations order would no longer be in force, so there would no longer be an order to serve as a basis for the finding that the original order was a QDRO.

DoL

Answer 12: Staff is of the view that the subsequent order may be a QDRO. The Department has never taken the position that an order would fail to qualify solely because it reduces the alternate payee's allocation to zero. Advisory Opinion 2004-02A states, in the context of a subsequent domestic relations order issued by the same court and involving the same alternate payee, that "a plan administrator may determine, consistent with the requirements of section 206(d)(3), that a domestic relations order is qualified even if it would supersede or amend a pre-existing QDRO assigning the same participant's benefits to the same alternate payee." In that opinion, benefits to the alternate payee were reduced, but not eliminated entirely. In addition, section 101 of the Pension Protection Act of 2006 (PPA) directed the Department to issue regulations clarifying that a domestic relations order otherwise meeting the requirements to be a QDRO would not fail to qualify because it was issued after or "revises" another QDRO. Further, example 1 in paragraph (b) of the regulations, codified at 29 C.F.R. § 2530.206(b), uses phrases such as "reduces the portion of Participant's benefits" and "reduces the prior assignment contained in the first order." 72 F.R. 10070, 10073 (Mar. 7, 2007). Thus, there is some support in the AO's use of the word "supersede" and use of the words "revises" in the PPA and "reduces" in the regulation from which a court might conclude that a reduction to zero might be acceptable.

Question 13: The Participant and spouse divorce. Participant participates in Defined Benefit Plan. Participant remarries and then retires a year later. The second spouse is the Participant's spouse on the Participant's annuity starting date. Upon retirement, Participant's benefits from Defined Benefit Plan are paid in the form of a qualified joint and survivor annuity (QJSA) with the second spouse as the surviving spouse. After Participant's benefits have commenced, the plan administrator first receives a domestic relations order that requires the former spouse to be treated as the current spouse for purposes of the qualified joint and survivor annuity from Defined Benefit Plan. Is the domestic relations order a QDRO?

Proposed

Answer 13: The domestic relations order is not a QDRO. Under the terms of the plan of benefits of Defined Benefit Plan and the Internal Revenue Code, Participant's spouse as of Participant's annuity starting date is the spouse for purposes of the survivor benefit. The survivor benefit "vested" in Participant's spouse as of the annuity starting date. *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153 (4th Cir. 1997); *Rivers v. Central & South West Corp.*, 186 F.3d 681 (5th Cir.

1999); *Singleton v. Singleton*, 290 F.Supp.2d 767 (W.D. Ky. 2003). Therefore, the survivor benefits cannot be awarded to the former spouse as required by the domestic relations order and the order is not a QDRO.

The domestic relations order could be revised to provide that the former spouse would receive only a shared interest in Participant's benefits during Participant's life time. Such a requirement would award a portion of Participant's benefit, rather than the current spouse's benefit, to the former spouse but would not require Defined Benefit Plan to provide a type or form of benefit not otherwise provided by the plan.

DoL

Answer 13: Staff declines to comment on this question (and questions 14-18) in the absence of coordination with the Treasury and IRS and due to an open rulemaking on QDRO timing issues. (See 72 FED. REG. 10070 (Mar. 7, 2007)). Staff notes, however, that, on petition for writ of certiorari, the government filed an amicus brief in *McGowan v. NJR Service Corp.*, in which the government recommended against granting certiorari. The question presented in *McGowan* was whether a federal common law rule should be fashioned that requires the plan administrator to recognize a post-retirement waiver by the petitioner's former spouse of her right to the survivor annuity. The brief is available at www.usdoj.gov/osg/briefs/2006/2pet/6invit/2005-0853.pet.ami.inv.html.

A discussion ensued between Staff and the JCEB participants concerning the type of QDRO issues plans deal with on a day-to-day basis. The practitioners suggest that DOL Staff have an informed dialogue with the family law and estate planning sections of the Bar. Staff generally indicates its intention for further outreach to continue to strategize and determine what additional regulatory guidance on QDROs will be helpful.

Question 14: Participant and spouse divorce. Participant participates in Defined Benefit Plan. Participant then retires without a spouse on the annuity starting date. Upon retirement, Participant's benefits from Defined Benefit Plan are paid in the form of a single life annuity for the life of Participant. The plan of benefits of Defined Benefit Plan provides that the benefit form may not be changed after the benefit has commenced. After Participant's benefits have commenced, the plan administrator first receives a domestic relations order that requires the former spouse to be treated as the current spouse for purposes of the qualified joint and survivor annuity from Defined Benefit Plan. Is the domestic relations order a QDRO?

Proposed

Answer 14: The domestic relations order is not a QDRO. Under the terms of the plan of benefits of Defined Benefit Plan, the benefit form may not be changed after

Participant's annuity starting date. Therefore, the requirement in the domestic relations order that the benefit form must be modified after the Participant's annuity starting date requires Defined Benefit Plan to provide a type of form of benefit not otherwise provided by the plan.

The domestic relations order could be revised to provide that the former spouse would receive a shared interest in Participant's benefit during Participant's life time. Such a requirement would not require Defined Benefit Plan to provide a type or form of benefit not otherwise provided by the plan.

DoL

Answer 14: Staff declines to comment on this question in the absence of coordination with the Treasury and IRS and due to an open rulemaking on QDRO timing issues. (See 72 FED. REG. 10070 (Mar. 7, 2007)). Staff notes, however, that, on petition for writ of certiorari, the government filed an amicus brief in *McGowan v. NJR Service Corp.*, in which the government recommended against granting certiorari. The question presented in *McGowan* was whether a federal common law rule should be fashioned that requires the plan administrator to recognize a post-retirement waiver by the petitioner's former spouse of her right to the survivor annuity. The brief is available at www.usdoj.gov/osg/briefs/2006/2pet/6invit/2005-0853.pet.ami.inv.html.

A discussion ensued between Staff and the JCEB participants concerning the type of QDRO issues plans deal with on a day-to-day basis. The practitioners suggest that DOL Staff have an informed dialogue with the family law and estate planning sections of the Bar. Staff generally indicates its intention for further outreach to continue to strategize and determine what additional regulatory guidance on QDROs will be helpful.

Question 15: Participant and spouse divorce. Participant participates in Defined Benefit Plan. After the divorce is final, Participant remarries and then dies a year later while actively employed. The second spouse is Participant's spouse on the date of Participant's death. Upon Participant's death prior to the commencement of benefits from Defined Benefit Plan, the qualified pre-retirement survivor annuity (QPSA) is to be paid automatically to Participant's current spouse. After Participant's death, but before commencement of the distribution of the QPSA to the current spouse, the plan administrator first receives a domestic relations order that requires the former spouse to be treated as the current spouse for purposes of the QPSA. Is the domestic relations order a QDRO?

Proposed

Answer 15: The domestic relations order is not a QDRO. Under the terms of the plan of benefits of Defined Benefit Plan and the Internal Revenue Code, Participant's spouse as of the date of Participant's death is the spouse for purposes of the QPSA. The survivor benefit "vested" in Participant's spouse as of the date of Participant's death. Therefore, the survivor benefits cannot be awarded to the former spouse as required by the domestic relations order and the order is not a QDRO.

DoL

Answer 15: Staff declines to comment on this question in the absence of coordination with the Treasury and IRS and due to an open rulemaking on QDRO timing issues. (See 72 FED. REG. 10070 (Mar. 7, 2007)). Staff notes, however, that, on petition for writ of certiorari, the government filed an amicus brief in *McGowan v. NJR Service Corp.*, in which the government recommended against granting certiorari. The question presented in *McGowan* was whether a federal common law rule should be fashioned that requires the plan administrator to recognize a post-retirement waiver by the petitioner's former spouse of her right to the survivor annuity. The brief is available at www.usdoj.gov/osg/briefs/2006/2pet/6invit/2005-0853.pet.ami.inv.html.

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Question 16: Participant and Spouse divorce and their divorce decree provides that the parties will prepare a domestic relations order assigning 50% of the Participant's accrued benefit under Defined Benefit Plan to Spouse. The decree is silent on the issue of survivor benefits.

Shortly thereafter, Participant dies while actively employed. After the parties divorced, Participant designated the parties' daughter as Beneficiary for purposes of a lump sum death benefit payable to non-spouse beneficiaries of non-married participants. Under Defined Benefit Plan, the lump sum death benefit is 50% of the actuarial present value of the Participant's accrued benefit.

After Participant's death, Spouse first submits to Defined Benefit Plan a copy of the parties' divorce decree and a domestic relations order that provides Spouse with a separate interest benefit for Spouse's lifetime equal to 50% of the Participant's accrued benefit. Prior to the death of the Participant, the parties had not submitted a copy of their divorce decree to Defined Benefit Plan.

Is the domestic relations order a QDRO? Would it matter if the domestic relations order were adjudicated but not submitted to the Plan prior to the Participant's death?

Proposed

Answer 16: The domestic relations order is not a QDRO and Participant's daughter, as Participant's designated beneficiary, is entitled to a lump sum death benefit equal to 50% of the actuarial present value of Participant's accrued benefit. ERISA §206(d)(3)(B)(i) provides that a "qualified domestic relations order" is a domestic relations order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under the plan." ERISA §206(d)(3)(F)(i) provides that, "to the extent provided in any qualified domestic relations order, the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 205. . . [i.e. for purposes of the plan's QJSA and QPSA]." ERISA §206(d)(3). ERISA §206(d)(3)(D)(i) and (ii) provide that a domestic relations order will be deemed a QDRO only if such order—

- (i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
- (ii) does not require a plan to provide increased benefits (determined on the basis of actuarial value). . .

Had a domestic relations order been submitted to Defined Benefit Plan prior to Participant's death that recognized Spouse's right to a separate interest in 50% of Participant's accrued benefit, the domestic relations order would be a QDRO, Spouse would be entitled to a separate interest for Spouse's lifetime portion of Participant's accrued benefit stated in the order, and Daughter would be entitled to a lump sum death benefit based on 50% of the actuarial present value of the portion of Participant's accrued benefit not awarded to Spouse (i.e., Participant's total accrued benefit minus Spouse's portion of Participant's accrued benefit).

However, because Participant died prior to Defined Benefit Plan's receipt of any domestic relations order relating to Spouse's rights to all or a portion of Participant's accrued benefit, Participant's Daughter vested in the entire lump sum death benefit provided under Defined Benefit Plan's plan of benefits.

It does not matter whether the order was adjudicated prior to Participant's death. A domestic relations order has no effect until it is received by the Plan. From a practical perspective, this outcome is a necessity for proper plan administration. If a new domestic relations order can be submitted at any time after a participant's death and take precedence over rights of subsequent spouses and designated beneficiaries, Plan's will be unable to administer death or survivor benefits without risk that all or a portion of a death benefit paid might be subsequently

assigned to a former spouse pursuant to a domestic relations order not submitted to the plan at the time the death or survivor benefits are distributed.

DoL

Answer 16: Staff declines to comment on this question in the absence of coordination with the Treasury and IRS and due to an open rulemaking on QDRO timing issues. (See 72 FED. REG. 10070 (Mar. 7, 2007)). Staff notes, however, that, on petition for writ of certiorari, the government filed an amicus brief in *McGowan v. NJR Service Corp.*, in which the government recommended against granting certiorari. The question presented in *McGowan* was whether a federal common law rule should be fashioned that requires the plan administrator to recognize a post-retirement waiver by the petitioner's former spouse of her right to the survivor annuity. The brief is available at www.usdoj.gov/osg/briefs/2006/2pet/6invit/2005-0853.pet.ami.inv.html.

A discussion ensued between Staff and the JCEB participants concerning the type of QDRO issues plans deal with on a day-to-day basis. The practitioners suggest that DOL Staff have an informed dialogue with the family law and estate planning sections of the Bar. Staff generally indicates its intention for further outreach to continue to strategize and determine what additional regulatory guidance on QDROs will be helpful.

Question 17: Participant and Spouse divorce, and their divorce decree provides that the parties will prepare a domestic relations order assigning 50% of the Participant's benefits received from Defined Benefit Plan to Spouse as a shared interest for Participant's lifetime. The decree is silent on the issue of survivor benefits. The order is prepared and submitted to the plan administrator of Defined Benefit Plan who determines that the order is a QDRO.

Shortly thereafter, Participant dies while actively employed. After the parties divorced, Participant designated the parties' daughter as Beneficiary for purposes of a lump sum death benefit payable to beneficiaries when no QJSA or QPSA is paid. In the event Participant of Defined Benefit Plan has a spouse at the time of Participant's death, the only benefit available under Defined Benefit Plan is a QJSA or QPSA (as applicable) and no lump sum death benefit is paid.

After Participant's death, Spouse first submits to Defined Benefit Plan a revised domestic relations order that, instead of the 50% shared interest in Participant's benefits for Participant's lifetime provided in the original order, provides Spouse with a QPSA based on Participant's accrued benefit.

Is the revised domestic relations order a QDRO? Would the answer be different if the initial order was determined not to be a QDRO by the plan administrator and it was amended after Participant's death to give the QPSA entitlement to Spouse for the first time?

Proposed

Answer 17: The revised domestic relations order is not a QDRO and Participant's daughter, as Participant's designated beneficiary, is entitled to a lump sum death benefit. ERISA §206(d)(3)(B)(i) provides that a "qualified domestic relations order" is a domestic relations order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under the plan." ERISA §206(d)(3)(F)(i) provides that, "to the extent provided in any qualified domestic relations order, the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 205. . . [i.e. for purposes of the plan's QJSA and QPSA]." ERISA §206(d)(3). ERISA §206(d)(3)(D)(i) and (ii) provide that a domestic relations order will be deemed a QDRO only if such order—

- (i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
- (ii) does not require a plan to provide increased benefits (determined on the basis of actuarial value). . .

Had a domestic relations order been submitted to Defined Benefit Plan prior to Participant's death that recognized Spouse's right to be treated as Participant's surviving spouse for all or a portion of the QPSA, the domestic relations order would be a QDRO, Spouse would be entitled to a QPSA based on the portion of Participant's accrued benefit stated in the order, and the daughter would be entitled to a lump sum death benefit based on 50% of the actuarial present value of any portion of Participant's accrued benefit not awarded to the former spouse (i.e., Participant's total accrued benefit minus Spouse's portion of Participant's accrued benefit).

However, because Participant died prior to Defined Benefit Plan's receipt of the revised domestic relations order relating to Spouse's designation as surviving spouse for purposes of the QPSA, Participant's daughter vested in the entire lump sum death benefit provided under Defined Benefit Plan's plan of benefits. It would not matter whether the initial order was determined to be a QDRO by the Plan administrator.

From a practical perspective, this outcome is a necessity for proper plan administration. If a new domestic relations order can be submitted at any time after a participant's death and take precedence over rights of subsequent spouses and designated beneficiaries, Plan's will be unable to distribute death or survivor benefits without risk that they must be reclaimed.

DoL

Answer 17: Staff declines to comment on this question in the absence of coordination with the Treasury and IRS and due to an open rulemaking on QDRO timing issues. (See 72 FED. REG. 10070 (Mar. 7, 2007)). Staff notes, however, that, on petition

for writ of certiorari, the government filed an amicus brief in *McGowan v. NJR Service Corp.*, in which the government recommended against granting certiorari. The question presented in *McGowan* was whether a federal common law rule should be fashioned that requires the plan administrator to recognize a post-retirement waiver by the petitioner's former spouse of her right to the survivor annuity. The brief is available at www.usdoj.gov/osg/briefs/2006/2pet/6invt/2005-0853.pet.ami.inv.html.

A discussion ensued between Staff and the JCEB participants concerning the type of issues plans deal with on a day-to-day basis. The practitioners suggest that DOL Staff have an informed dialogue with the family law and estate planning sections of the Bar. Staff generally indicates its intention for further outreach to continue to strategize and determine what additional regulatory guidance on QDROs will be helpful.

Question 18: Participant and Spouse are married when Participant retires from Defined Benefit Plan with a qualified joint and survivor annuity form of benefit with Spouse. Shortly after Participant retires, the parties divorce. The party's property settlement agreement provides that Spouse waives any portion of Participant's pension benefits from Defined Benefit Plan including survivor benefits. This order is submitted to the Plan Administrator of Defined Benefit Plan. Is the order a QDRO? Does the order have any effect on the Spouse's status as the spouse of Participant for purposes of the QJSA? Does it matter if the Plan has a provision permitting a waiver of the spouse's right to the survivor portion of the joint and survivor annuity after Participant's retirement?

Proposed

Answer 18: The order is not a QDRO. ERISA §206(d)(3)(B)(i) provides that a "qualified domestic relations order" is a domestic relations order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a Participant under the plan." The Plan of benefits of Defined Benefit Plan, ERISA and the Code provide that the spouse as of Participant's annuity starting date is the spouse for purposes of the qualified joint and survivor annuity (QJSA) unless the QJSA is waived by the spouse. Therefore, an order eliminating Spouse's status as a spouse for purposes of the QJSA does not meet the definition of a QDRO. There is no basis for a plan provision permitting the spouse to waive survivor benefits after Participant's annuity starting date.

DoL

Answer 18: Staff declines to comment on this question in the absence of coordination with the Treasury and IRS and due to an open rulemaking on QDRO timing issues. (See 72 FED. REG. 10070 (Mar. 7, 2007)). Staff notes, however, that, on petition for writ of certiorari, the government filed an amicus brief in *McGowan v. NJR*

Service Corp., in which the government recommended against granting certiorari. The question presented in *McGowan* was whether a federal common law rule should be fashioned that requires the plan administrator to recognize a post-retirement waiver by the petitioner's former spouse of her right to the survivor annuity. The brief is available at www.usdoj.gov/osg/briefs/2006/2pet/6invit/2005-0853.pet.ami.inv.html.

A discussion ensued between Staff and the JCEB participants concerning the type of issues plans deal with on a day-to-day basis. The practitioners suggest that DOL Staff have an informed dialogue with the family law and estate planning sections of the Bar. Staff generally indicates its intention for further outreach to continue to strategize and determine what additional regulatory guidance on QDROs will be helpful.

Question 19: Section 508 of the PPA requires that individual account plans furnish a pension benefit statement at least once each calendar quarter to a participant or beneficiary who has the right to direct investments in his or her account under the plan. It goes on to say that the information on the statement shall be "on the basis of the latest available information." In the case of a plan that offers participant direction but currently values plan assets less frequently than quarterly, (assume semi-annual for purposes of the question) is the PPA requirement met by giving participants a quarterly statement whose values only change twice a year, or, in order to meet the PPA requirements, must the plan's valuation frequency also be moved to at least quarterly in order for the statement to provide meaningful information each quarter?

Proposed

Answer 19: This issue is not addressed in FAB 2006-03. A literal reading of Section 508 indicates that the statement is the only thing that must be provided quarterly. However, in the case of a plan with semi-annual valuations, statements for the periods ending 3/31 and 9/30 would show no change from the 12/31 and 6/30 statements respectively. The focus of this section of the PPA seems to be on providing investment related information to participants. If that is true, then the only way participants will get additional information is to value the plan using the same frequency as the statements. The downside of this is plans will incur substantial additional costs. Nevertheless, to comply with the PPA, plans must provide quarterly statements, and must at least value the assets over which participants can exercise investment discretion no less frequently than quarterly.

DoL

Answer 19: Section 105(a)(1)(A)(i) of ERISA provides that the administrator of an individual account plan shall furnish a pension benefit statement at least once each calendar quarter to a participant who has the right to direct the investment of assets in his or her account under the plan. Section 105(a)(2) provides that the statement shall

be based on the “latest available information” and “determined as of the most recent valuation date under the plan....” Staff does not believe these provisions require asset valuations more frequently than annually or otherwise provided under the plan. A primary focus of the new pension benefit statement provision may be to provide participants with investment-related information, but other reasons for the statement exist even if the assets have not been revalued since the last statement, such as to reflect intervening participant contributions or loans.

Question 20: In many circumstances employers permit employees to retain coverage under their Health Plans while they are on leave, or even on strike. Assuming an employee on leave or on strike goes from paying only an employee portion to paying both the employee portion and the employer subsidy has a COBRA event occurred? For the purpose of this question, the COBRA premium is assessed at 102 percent of the applicable premium but the cost of coverage during the leave or while the employee is on strike is 100% of the cost of coverage.

Proposed

Answer 20: No. ERISA Section 603 requires a loss of coverage as a condition for a qualifying event and the employee lost only the employer subsidy not the coverage which continues to cost less than coverage under COBRA. If the employee terminated employment prior to the end of the leave or as a result of the work stoppage, coverage would be lost and the COBRA event would be triggered at that point.

DoL

Answer 20: Staff notes that the authority to interpret the meaning of the term "Qualified Event" resides with the Treasury and declines to answer. Although without authority to interpret the Treasury Regulations regarding the COBRA provisions, Staff points to Treasury Regulation section 54.4980B-4 Q&A 1(c) that provides “[a]ny increase in the premium or contribution that must be paid by a covered employee (or the spouse or dependent child of a covered employee) for coverage under a group health plan that results from the occurrence of one of the events listed in paragraph (b) of this Q&A-1 is a loss of coverage.” Paragraph (b)(3) of Q&A-1 provides that an event that is a “reduction in hours of a covered employee’s employment” may be a qualifying event.

Question 21: Assume that an employer (that is also the plan administrator) sends the notice of the right to elect COBRA coverage to a former employee, but the notice comes back to the employer as undeliverable. Is the employer relieved of any further obligation to deliver the notice, even though it has actual knowledge that the notice was not received?

Proposed

Answer 21: Where the employer has actual knowledge that the notice was not received, it must undertake additional actions. The COBRA notice regulations state that the notice must be furnished in a manner consistent with the general ERISA notice requirements. 29 C.F.R. § 2590.606-4(f). Those rules require that the plan provide the notice in a manner reasonably calculated to ensure actual receipt. 29 C.F.R. § 2520.104b-1(b)(1). Failing to take further action when the employer knows that the notice was not delivered is not a procedure reasonably designed to ensure actual receipt.

DoL

Answer 21: As discussed in the Preamble to the Final Regulation, the Department believes that COBRA election notices must be furnished using a method that is reasonably calculated to ensure actual receipt. 69 Fed. Reg. 30084, 30091 (May 26, 2004). This standard focuses on the reasonableness of the procedures used to furnish COBRA notices and does not require guaranteed delivery. Whether the method of delivery complies with the standard depends on specific facts and circumstances. Without expressing an opinion on correctness of the decision, Staff notes that in *DeGruise v. Sprint Corp.*, 279 F.3d 333 (5th Cir. 2003), the 5th Circuit rejected the notion that the employer in that case had an affirmative duty to resend COBRA mailings that were returned by the postal service.

Question 22: Can the plan administrator refuse to provide a COBRA notice to the estranged spouse of an employee unless the employee consents to his or her estranged spouse receiving the notice?

Proposed

Answer 22: No. That approach effectively conditions the right of the estranged spouse to elect COBRA upon obtaining the consent of the employee-spouse, which violates the rule that each qualified beneficiary has the right to make a separate election as to whether he or she wants COBRA coverage. See Code § 4980B(f)(5)(B).

DoL

Answer 22: Where the estranged spouse meets the definition of “qualified beneficiary,” Staff agrees that requiring the covered employee’s consent to provide a COBRA notice to such qualified beneficiary is not required. Staff notes, however, that the determination of who is a qualified beneficiary entitled to receive a COBRA continuation notice is under the jurisdiction of the Treasury Department.

Question 23: Can the notice of the right to elect COBRA coverage be given months in advance of the occurrence of the Qualifying Event?

Proposed

Answer 23: No. For example, the notice from the employer to the plan administrator is required to provide the date of the Qualifying Event, which cannot be predicted months in advance. 29 C.F.R. § 2590.606-2(c). Similarly, the notice of the right to elect COBRA coverage must contain the date on which coverage under the plan would terminate (absent an election of COBRA coverage), which also cannot be predicted in advance. 29 C.F.R. § 2590.606-4(b)(4)(iii).

DoL

Answer 23: Staff does not believe the question includes sufficient information. While ERISA and the COBRA notice regulations do not specifically preclude notice in advance of a qualifying event, in many instances the information necessary to comply with the various notice provisions may not be available weeks or months in advance of a qualifying event.

Question 24: An employer maintains an ERISA covered health reimbursement arrangement (HRA) and an ERISA covered health flexible spending account (health FSA), both of which are group health plans. As permitted under the Tax Relief and Health Care Act of 2006, *see* Pub. L. 109-432, § 302(a) (2006) (adding Code § 106(e)), the employer amends the HRA and health FSA to permit employees to voluntarily elect to rollover the amounts they have in these plans to health savings arrangements (HSAs). Does the ability to rollover amounts to HSAs result in the HSAs being subject to ERISA? If the employer required the rollover of the amounts to HSAs, does this result in the HSAs being subject to ERISA? Do either voluntary or mandatory rollovers violate ERISA's exclusive benefit rule?

Proposed

Answer 24: The ability to voluntarily rollover amounts to HSAs does not result in the HSAs being subject to ERISA. The mandatory rollover of amounts to HSAs, however, does result in the HSAs being subject to ERISA. Neither voluntary nor mandatory rollovers violate ERISA's exclusive benefit rule.

DoL

Answer 24: The Department addressed Health Savings Accounts (HSAs) in Field Assistance Bulletins (FAB) 2004-1 and 2006-2. FAB 2004-1 provides that employer contributions to an employee's HSA would not result in the HSA being covered by ERISA, as long as the HSA meets the other conditions established in the FAB. (Staff notes that, depending on the circumstances, HSAs that do not satisfy the requirements in the FAB may present ERISA coverage issues.) Accordingly, regardless of whether the HRA or FSA amounts are characterized as employee or employer contributions, the voluntary rollover of those amounts would not result in the HSA being covered by ERISA. With regard to mandatory rollovers of HRA and FSA amounts into an HSA, one of the conditions in the FAB is that employee participation in the HSA be completely voluntary, which the

Department interprets to mean employee contributions must be voluntary. A provision mandating that employees roll over FSA amounts, which are oftentimes attributable to employee contributions, would violate the condition that employee participation be completely voluntary.

Question 25: Assume that a PBGC-covered single-employer plan is terminated in a distress termination under ERISA section 4041(c) or an involuntary termination under ERISA section 4042, and that the PBGC has become the statutory trustee of the plan pursuant to ERISA section 4042(c). Assume further that the deadline for issuance of a Summary Annual Report (“SAR”) for the plan is after the date the PBGC became statutory trustee. Is the former plan administrator required to issue such an SAR?

Proposed

Answer 25: The plan administrator of a plan that the PBGC has become statutory trustee of under ERISA section 4042(c) is not required to issue an SAR whose deadline is after the date the PBGC became trustee, even if the SAR is for the plan year in which the plan’s termination date falls or for an earlier plan year.

**Rationale
for Proposed**

Answer 25: ERISA Opinion Letter 82-66A provides that the plan administrator is not required to issue an SAR for any plan year following the plan year “in which the termination under section 4042 is deemed to have occurred.” Although not entirely clear, this appears to be a reference to the plan year in which the plan’s termination date (under ERISA section 4048) falls. In this opinion letter, it is not stated when the PBGC became statutory trustee. Nonetheless, the opinion letter may imply that an SAR *is* required to be issued for the plan year in which the plan’s termination date falls or for an earlier plan year, even if the deadline for that SAR is after the PBGC has become statutory trustee.

Such an interpretation arguably would serve little purpose and may lead to participant confusion, since the SAR would be issued at about (or after) the same time PBGC is communicating with participants about the effect of the plan termination on their entitlements. Moreover, in the analogous context of issuance of the Title IV Participant Notice (ERISA section 4011) — which has a regulatory deadline structure designed to facilitate its issuance together with the SAR for the prior plan year — PBGC’s informal guidance, as reflected in Q&A 17 of the 1998 PBGC Blue Book (available at <http://pbgc.gov/docs/1998bluebook.pdf>), is that the plan administrator is not required to issue a Participant Notice whose deadline is after the date of PBGC trusteeship. In the interest of consistency with this PBGC guidance and to eliminate unnecessary and potentially confusing notices, a DOL clarification as proposed in this Q&A would be helpful.

DoL

Answer 25: The Department has not issued guidance that would support the proposed answer. Advisory Opinion 82-66A provides that a summary annual report (SAR) must be issued for the plan year in which the plan's termination date falls even if the deadline for that SAR is after the PBGC has become a statutory trustee. Regulation section 2520.104b-10(c) provides that the SAR must generally be furnished to plan participants and beneficiaries within nine months after the close of the plan year. If filing under an extension in accordance with instructions for Form 5500 Annual Return/Report (Form 5500), the SAR is required to be furnished within two months after the close of the period for which the extension was granted. Instructions for the Form 5500 provide that if a trustee is appointed for a terminated defined benefit plan pursuant to ERISA section 4042, the last plan year for which Form 5500 must be filed is the year in which the trustee is appointed.

Regulation section 2520.104b-10(d) provides that the information contained in the SAR shall be based upon information contained in the most recent Form 5500. Regulation section 2520.104b-10(d) also includes a provision for a right to additional information. Under this provision, a plan administrator may include a statement clarifying the status of the plan and that further communication will come from the PBGC.

Staff notes that pursuant to section 503(c)(1) of the Pension Protection Act of 2006, the SAR requirement for defined benefit plans for which ERISA section 101(f) requirements apply is eliminated beginning with the 2008 plan year. ERISA section 101(f) requires plan administrators of defined benefit plans subject to title IV of ERISA to provide annual plan funding notices to PBGC, participants, and beneficiaries.

Question 26: PPA repealed the Participant Notice requirement under ERISA section 4011 for post-2006 plan years. Assume that a plan administrator nonetheless voluntarily issues a Participant Notice for the 2007 plan year and satisfies all requirements that would apply absent the PPA repeal. May an employer rely on the plan administrator's inclusion of a notice of a missed contribution in such a Participant Notice to satisfy the employer's requirement to provide notice of the missed contribution under ERISA section 101(d)? Assume that the 2007 Participant Notice is the first Participant Notice in which the missed contribution would be subject to reporting (disregarding the PPA repeal of the Participant Notice requirement for post-2006 plan years).

Proposed

Answer 26: Yes.

Rationale

for Proposed

Answer 26: Although DOL has not issued regulations implementing the notice requirements of ERISA section 101(d), it has issued guidance stating that such notice must nonetheless be issued within a “reasonable” time (see EBSA’s Reporting and Disclosure Guide for Employee Benefit Plans at p. 6, available at <http://www.dol.gov/ebsa/pdf/rdguide.pdf>). PBGC stated in the preamble to its final rule implementing the Participant Notice requirement under ERISA section 4011 (60 Fed. Reg. 34411, 34412 (June 30, 1995)) that DOL had “advised PBGC that, in the absence of final regulations implementing section 101(d) of ERISA (requiring notice of failure to meet minimum funding standards), it will treat a plan administrator that provides a Participant Notice as having satisfied section 101(d) with respect to any missed contributions identified in the Participant Notice.” Later, in informal guidance, PBGC clarified in Q&A 19 of the 1998 PBGC Blue Book (available at <http://pbgc.gov/docs/1998bluebook.pdf>) that this guidance applies where a plan is subject to the Participant Notice requirement for a plan year and that is the first Participant Notice in which the missed contribution would be subject to reporting, and suggested that DOL be consulted where a plan is not subject to the Participant Notice requirement “until quite some time . . . after the missed contribution.”

The ability to satisfy DOL’s “reasonable” time standard for ERISA section 101(d) notices by including notice of a missed contribution in the next required Participant Notice has been a significant aid in compliance with ERISA section 101(d) in that it provides a specific deadline and eliminates the need for repeated notices in the common situation where an employer routinely “misses” quarterly contributions and makes them up, with interest, as part of the annual “catch-up” contribution. (In PBGC Technical Update 97-6, PBGC has waived reporting of missed quarterly contributions for many small plans under its reportable events regulation.) With the repeal of the Participant Notice requirement for post-2006 plan years, compliance with ERISA section 101(d) may become more burdensome, particularly given the absence of specific regulatory guidance. DOL’s extension of the ability to use the Participant Notice as a means of satisfying ERISA section 101(d) for at least one more plan year will be helpful to employers and will maintain the same level of information to participants as in the past.

DoL

Answer 26: Staff agrees that, absent other guidance on the form and content requirements for the notice required under 101(d) of ERISA, use of the PBGC’s model Participant Notice language, revised to reflect the repeal of section 4011 of ERISA, would continue to satisfy the form and content requirements under 101(d) of ERISA. Staff notes that the 101(d) notice must be furnished within a reasonable period of time after the section 101(d) failure. In the situation where an employer routinely “misses” quarterly contributions and makes them up, with interest, as part of the annual “catch-up” contribution, Staff believes, absent guidance to the contrary,

that giving a notice annually at the time that a section 4011 notice would have been due and covering the missed quarterly contributions would continue to constitute providing the section 101(d) notice for each missed quarterly contribution in a reasonable period of time.

Question 27: Firms have sprung up that purport to provide direct investment advice to 401(k) plan participants regarding the deployment of their account balances among investment options. The participant generally directly pays the fee for this service and neither the plan or the employer is involved. However, as part of this process the participant is asked by the firm to provide their PIN number to facilitate the firm's direction of plan assets. These firms then actually access the participant's account and invest funds in the various available options. Based on recent DOL guidance it appears the "advisory" firms are plan fiduciaries. What obligations do the plan administrator and other named fiduciaries have to monitor this type of activity and does the plan have an obligation under ERISA Section 409 to take any action with respect to an "advisory firms'" activities if it suspects wrongdoing or malfeasance on the part of the "advisory" firm? Do the Plan Administrator and other named fiduciaries have an obligation to notify participants that either the plan or the plan sponsors endorses or approves of the "advisory" firm's activities?

Proposed

Answer 27: Both the group I received the mailing from and a couple of nationally known brokerage firms that regularly solicit our plan participants at work (and occasionally mislead them) using our internal phone books are a major pain for us. At least one of the brokerage firms have not informed participants about sales charges in an effort to get them to roll money into brokerage account IRAs. In fact, the brokerage firms are one of the reasons we use a mutual fund window.

DoL

Answer 27: Staff states that the question seems similar to that posed in Advisory Opinion 2005-23A. According to that opinion, a plan fiduciary who does not appoint a second fiduciary has no duty to monitor the second fiduciary's functions or to report on what it is doing. However, if the plan fiduciary is aware of a breach by the second fiduciary, then under ERISA section 405(a)(3), the first fiduciary must make reasonable efforts to remedy such breach.

Question 28: If an entity owns real property upon which a business, such as a hotel or airport is located, and the entity is responsible for both (i) maintaining, improving and perhaps leasing certain portions of the real property and (ii) running the related business, the hotel or airport respectively, is the entity an "operating company" or a "real estate operating company" or both an operating company and real estate operating company?

Proposed

Answer 28: The entity would be both a REOC and an operating company. According to DOL Reg. Section 2510.3-101(e), the requirements for a “real estate operating company” (“REOC”) are that (i) the entity has at least 50% of its assets, valued at cost, invested in real estate which is managed or developed and with respect to which such entity has the right to substantially participate directly in the management or development activities, and (ii) that during 12-month period, such entity in the ordinary course of its business is engaged directly in real estate management or development activities. According to DOL Reg. Section 2510.3-101(c) an “operating company” is entity that is primarily engaged, directly or through a majority owned subsidiary or subsidiaries, in the production or sale of a product or service other than the investment of capital. In addition, the term “operating company” includes a “real estate operating company.” Based on the definitions in the DOL Regulation, an entity can be both an “operating company” and a REOC, if (i) at least half of its assets valued at cost are invested in real estate which is managed or developed, (ii) such entity at least annually participates in the management and development activities with respect to the real estate, and (iii) the entity is primarily engaged in the production of goods or services. In the case of an entity which owns a hotel or airport (including the real estate upon which the hotel is located and structures thereon) where the real estate has from the date of the entity’s first investment constituted at least 50% of the value (at cost) of the entity’s assets, but the entity’s primary business activity is to provide the hotel or airport services, the entity will be both an operating company and a REOC (assuming that the entity is also directly involved each year in some management of the real estate such as leasing concessions, maintain parking areas, building new structures, etc.).

DoL

Answer 28: The Plan Asset regulation provides an exception for operating companies. If the entity meets the definition of operating company, the analysis ends. If it does not meet that definition, then analyze whether the entity is a REOC or a VCOC. Staff notes that the entity cannot be both.

THE PRECEDING QUESTIONS AND ANSWERS ARE BASED ON INFORMAL DISCUSSIONS BETWEEN PRIVATE-SECTOR REPRESENTATIVES OF THE JCEB AND DEPARTMENT OF LABOR STAFF. THE QUESTIONS WERE SUBMITTED BY ABA MEMBERS AND THE RESPONSES WERE GIVEN AT A MAY 7, 2007, MEETING OF JCEB AND GOVERNMENT REPRESENTATIVES. THE RESPONSES REFLECT ONLY UNOFFICIAL, NONBINDING STAFF VIEWS AS OF THE TIME OF THE DISCUSSION, AND DO NOT NECESSARILY REPRESENT THE OFFICIAL POSITION OF THE DEPARTMENT OF LABOR. FURTHER, THIS REPORT ON THE DISCUSSIONS WAS PREPARED BY

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These are only unofficial staff comments

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JCEB REPRESENTATIVES, BASED ON THEIR NOTES AND RECOLLECTIONS OF THE MEETING.