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**Via E-Mail (paperwork.comments@pbgc.gov)
and U.S. Mail**

Legislative and Regulatory Department
Pension Benefit Guaranty Corporation
1200 K Street, NW
Washington, DC 20005-4026

Re: Comments on PBGC Booklet Pertaining to Qualified Domestic Relations Orders

Dear Sir or Madam:

The following are comments pertaining to the Pension Benefit Guaranty Corporation ("PBGC") booklet, *Qualified Domestic Relations Orders & PBGC* (the "Booklet").

I. Summary of Comments

The PBGC should revise the Booklet by amending sections of the Model Separate Interest Qualified Domestic Relations Order ("Model Separate Interest QDRO") and its corresponding instructions ("Instructions"), as described in detail in Section III below, to:

- (1) Preclude an alternate payee from receiving a separate interest benefit if the participant dies prior to the earliest retirement age and prior to the alternate payee's commencement of payments, and
- (2) Clarify that the only benefit payable to the alternate payee in the event of the participant's death prior to the earliest retirement age and prior to the alternate payee's benefit commencement date is a qualified pre-retirement survivor annuity ("QPSA") death benefit, which the alternate payee may receive only if married to the participant for at least one year and designated in the domestic relations order ("DRO") as the spouse for the purposes of death benefits under the plan.

Under the Internal Revenue Code of 1986, as amended (the "Code"), and the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), an alternate payee is entitled to benefits under a separate interest DRO only if the participant dies *after* the earliest retirement age, except in the following two circumstances:

- When the alternate payee begins receiving payments prior to the earliest retirement age if the plan so permits, or

- When the alternate payee is designated as the current spouse for the purposes of a QPSA or other death benefit.

Other than those two circumstances, allowing an alternate payee to receive full benefits when the participant dies prior to the earliest retirement age would result in the alternate payee receiving benefits greater than otherwise payable under the plan in violation of Section 414(p)(3) of the Code and Section 206(d) of ERISA.

II. Comments

The only benefit payable from the PBGC after a participant's death prior to benefit commencement is a QPSA for the surviving spouse. If the participant dies prior to the earliest retirement age, a separate interest DRO should not permit payments to an alternate payee, other than the QPSA.

The Senate Finance Committee Report under the Retirement Equity Act states the following:

The bill provides that a domestic relations order is not treated as failing the requirement for a qualified domestic relations order merely because the order provides that payments must begin to the alternate payee on or after the date on which the participant attains the earliest retirement age under the plan whether or not the participant actually retires on that date. ***If the participant dies before [the earliest retirement age], the alternate payee is entitled to benefits only if the qualified domestic relation order requires survivor benefits to be paid.*** In the case of an order providing for the payment of benefits after the earliest retirement age, the payments to the alternate payee at that time are computed as if the participant had retired on the date on which benefit payments commence under the order.

S. Rep. No. 98-575 at 20-21 (1984) (emphasis added).

Thus, Congress intended to limit the benefits payable to an alternate payee at the participant's death prior to the earliest retirement age to the available death benefit if the alternate payee is designated the spouse for death benefit purposes.

A separate interest DRO is intended to allow an alternate payee to receive payments as a separate benefit over the alternate payee's lifetime and to be unaffected by the death of the participant after payments begin. Entitlement to a separate interest does not create vesting in the awarded benefit or dictate the time when payments should commence to the alternate payee.

Commencement of the separate interest after the participant's death prior to earliest retirement age results in the Plan paying more than would be otherwise payable. This is distinguished from "vesting" the separate interest at earliest retirement age which, while on its face, appears to provide a greater benefit than required, is permitted because the alternate payee has a statutory right to commence payments at the earliest retirement age if permitted under the DRO. The separate interest could be paid prior to the earliest retirement age if the Plan

permits, but the Model Separate Interest QDRO clearly states that the alternate payee cannot commence payments prior to the earliest retirement age. See *PBGC Model QDRO Instructions* Section 5 (page 18) in the Booklet.

The requirement to allow commencement of payments at the earliest retirement age should not be interpreted as vesting in the alternate payee the right to the separate benefit even if the participant dies prior to the alternate payee's commencement of payments. See Treasury Regulation § 1.401(a)-13(g)(4)(iii)(A) (stating that "[a] plan is not required to provide additional vesting or benefits because of a QDRO").

If the participant dies prior to the earliest retirement age, the alternate payee's interest can be protected by the DRO naming the alternate payee as the surviving spouse for the purposes of the QPSA.

A state court's issuance of a DRO characterizing an alternate payee's award as a separate interest should not change the benefits payable under the plan. The only circumstances in which a plan is required to pay more because of a separate interest DRO are: (i) when the alternate payee begins payments at or after the earliest retirement age and before the participant commences payments, or (ii) if the alternate payee former spouse is designated as the current spouse for the purposes of the QPSA, both of which are statutorily imposed protections. Otherwise, interpretation of the QDRO provisions of the Code and ERISA should not result in a plan being required to provide greater benefits than it would pay otherwise.

III. Proposed Revisions to Model Separate Interest QDRO and Instructions

To eliminate these issues, the following statements in the Booklet should be revised as follows (proposed additions are in **bold** and proposed deletions are shown as a ~~strikethrough~~):

- (1) *PBGC Model Separate Interest QDRO* Section 5 (page 6) – Restate the first sentence as follows:

"Payments to the alternate payee shall be payable as of [such future date as the alternate payee elects/a future specified date], **unless the participant dies prior to the earliest retirement age.**"

- (2) *PBGC Model Separate Interest QDRO* Section 8 (page 7) – Restate as follows:

"The Participant's death shall not affect payments under the alternate payee's separate interest **unless the participant dies prior to the earliest retirement age, in which case the alternate payee shall not be entitled to any payments unless the alternate payee is designated as the spouse under Section 10(b) with respect to the QPSA.**"

- (3) *PBGC Model QDRO Instructions* Section 5 (page 18) – Restate the second sentence of the second paragraph as follows:

“The Order can be written to allow the alternate payee to begin receiving payments independently of when the participant begins receiving benefits, but payments to the alternate payee may not begin before the participant’s ‘earliest PBGC retirement date’ **and no payments to the alternate payee may be made if the participant dies prior to the earliest retirement age unless the alternate payee is designated in Section 10(b) as the spouse with respect to the QPSA.**”

- (4) *PBGC Model QDRO Instructions* Section 8 (page 21) – Restate the second paragraph as follows:

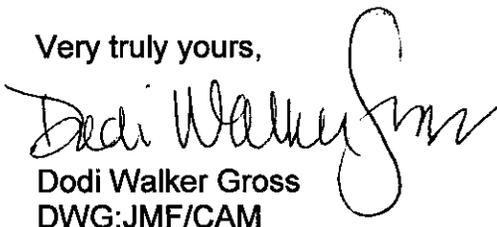
“The PBGC Model Separate Interest QDRO provides that PBGC will pay the separate interest to the alternate payee regardless of when the participant dies, **unless the participant dies prior to the earliest retirement age.** (The alternate payee will receive additional monthly payment amounts to the extent the alternate payee is to be treated as the surviving spouse **for purposes of the QPSA** under Section 10.)”

- (5) *PBGC Model QDRO Instructions* Example 10 (page 23) – Restate as follows:

“Continuing with the Separate Interest QDRO in Example 1, Carol dies at age 41. **Mark receives no pension benefits because Carol died prior to her earliest retirement age. Mark’s separate interest in Carol’s pension benefit is unaffected by her death, but PBGC will not pay benefits to him before Carol would have reached her “earliest PBGC retirement date.”** Also, if the QDRO is silent as to survivor benefits, because Carol and Mark were not married at the time of Carol’s death, Mark is not treated as Carol’s spouse and will not receive a QPSA.”

Thank you for your consideration. I would be glad to discuss this further if you have any questions.

Very truly yours,


Dodi Walker Gross
DWG:JMF/CAM

Appreciation is extended to Jeffrey Friedrich who contributed to these comments while a summer intern.