



Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

November 14, 2012



Re: Appeal (Case No: 206371), Delphi Hourly-Rate Employees
Pension Plan (the "Delphi Plan" or the "Plan")

Dear Mr. :

The Appeals Board has reviewed your appeal of PBGC's August 2, 2010 determination concerning your October 8, 2009 Domestic Relations Order (the "DRO"). The terms of the DRO provide that the surviving spouse benefit of your ex-wife, , "shall terminate." PBGC determined that the DRO is not a Qualified Domestic Relations Order ("QDRO") under Section 206(d)(3)(B) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Your appeal asserts that PBGC should honor the terms of the DRO.

On June 27, 2012, the Appeals Board notified [\[your former spouse\]](#) that the Board "is considering changing PBGC's determination to allow the cancellation of her survivor benefit, as the terms of the DRO provide." The Board's letter provided [\[your former spouse\]](#) with the opportunity to file a response. [\[your former spouse\]](#) submitted a response that was received by the Board on August 20, 2012.

The Appeals Board, having completed its review of your appeal, decided that your appeal must be denied. Based on applicable law, PBGC's regulations and policy, and the facts of your case, we concluded that you are not entitled to change the form of your Delphi Plan benefit, which includes a 65% survivor benefit for [\[your former spouse\]](#)

As a result of our ruling: (1) PBGC will not increase your Delphi Plan benefit to a Straight Life Annuity ("SLA") based on the DRO; (2) PBGC will not provide your current wife (Ms.) with a survivor benefit; (3) [\[your former spouse\]](#) will remain as the beneficiary of the Delphi Plan survivor benefit that you and she elected; and (4) if [\[your former spouse\]](#) dies before you, PBGC will increase your benefit to the SLA amount after her death.

Background

Your retirement and your benefit commencement. You retired from Delphi Corporation ("Delphi") effective July 1, 2006. The records PBGC obtained from Delphi indicate that your retirement type is "Voluntary – 30-year Retirement." The Delphi Plan's "Pension Election Confirmation Statement," which was signed by you and by [\[your former spouse\]](#) on May 25, 2006,

shows that your retirement date is July 1, 2006, and your elected benefit form is the "Surviving Spouse Option." See Enclosure 1 to this decision.¹ The Delphi Plan started paying your pension benefit effective July 1, 2006.

Your divorce and your two domestic relations orders. On November 10, 2008, you and [your former spouse] became legally separated. Your divorce was finalized in early 2009. On February 9, 2009, an Ohio state judge approved the first of two domestic relations orders. We refer to the first Order as the "GM Plan DRO." The GM Plan DRO, which applied to benefits under the "GM Hourly-Rate Employees Pension Plan," did not mention the Delphi Plan. The GM Plan DRO provided that any "interest" of [your former spouse] in your pension, including the surviving spouse benefit, "shall terminate."² The GM Plan DRO is not the subject of this appeal.

It is unclear if you submitted the GM Plan DRO to the Delphi Plan for qualification before the Delphi Plan terminated effective July 31, 2009. We found no record that Delphi, then the Administrator of the Delphi Plan, took any action concerning the GM Plan DRO. Furthermore, we doubt that Delphi would have qualified the GM Plan DRO because the Delphi Plan was not mentioned in it.

The DRO, which is an amended domestic relations order, corrects the name of the pension plan to the "Delphi Hourly-Rate Employees Pension Plan." The DRO was approved on October 8, 2009, by the same Ohio state judge who approved the GM Plan DRO. The DRO was issued approximately two months after the Delphi Plan terminated. Sections 5 and 8 of the DRO, which refer to you as the "Participant" and to [your former spouse] as the "Alternate Payee," provide in pertinent part as follows:

5. As part of the Decree of Dissolution filed herein on February 9, 2009, the Alternate Payee released all claims or interests in the Participant's pension plan administered by Delphi Hourly-Rate Employees Pension Plan ("Plan"). Pursuant to this agreement, the Delphi Hourly-Rate Employees Pension Plan ("Plan") shall terminate any interest of the Alternate Payee, [your former spouse], aka [redacted], in said plan, including the post-retirement surviving spouse benefit. . . .

8. The parties agree that their mutual intent is to provide the Alternate Payee with a retirement payment that fairly represents what they have agreed to be the Alternate Payee's marital share of the Participant's accrued retirement benefit as defined in Paragraph 5. . . .

¹ The Delphi Plan's practice was to furnish a participant who was retiring with a "Pension Election Confirmation Statement" ("PES"), which lists the participant's "Benefit Payment Option." On your PES, the listed Benefit Payment Option is the "Surviving Spouse Option." The Delphi Plan's retirement forms also include a section titled "Your Pension Election Authorization," where the participant must acknowledge that the election listed on the PES is correct. You signed this section of the form on May 25, 2006. Your [former spouse] [redacted], signed this section of the form as a "Joint Depositor."

² The GM Plan DRO was signed by the [redacted], Ohio.

PBGC's determination concerning your DRO. On August 2, 2010, PBGC sent you a formal determination stating that the amended DRO dated October 8, 2009 is not a QDRO under Section 206(d)(3)(B) of ERISA. PBGC stated the following reason for this determination:

Under the Order, the alternate payee will not be treated as the participant's surviving spouse for the purpose of receiving survivor benefits after the participant's death. The participant has already begun receiving benefits in a form that does provide a survivor benefit to the alternate payee. Once a participant begins receiving benefits, the participant's form of benefit may not be changed. Because the Order requires that the participant's form of benefit be changed to nullify a surviving spouse benefit to the alternate payee, PBGC will not qualify the Order.

PBGC thus concluded: "Because PBGC has determined that the Order is not a qualified domestic relations order, PBGC is not bound by the Order."³

Your appeal. In your timely appeal, filed on August 6, 2010, you state that you believe that PBGC's determination is incorrect for the following reasons:

- The beneficiary listed in the DRO [your former spouse] is divorced from you, the participant;
- You have remarried, as is shown in the copy of your marriage certificate that you submitted; and
- The "QDRO waiver terminates the surviving spouse coverage of [your former spouse] [redacted]."

The Delphi Plan's termination and trusteeship by PBGC

PBGC provides pension insurance in accordance with Title IV of ERISA. The Delphi Plan terminated, effective July 31, 2009, without sufficient assets to provide all benefits PBGC guarantees under ERISA. On August 10, 2009, PBGC became the Delphi Plan's trustee.

PBGC pays benefits pursuant to the terms of the plan, subject to limitations and

³ PBGC's letter noted that the former Delphi Plan administrator "had permitted a change from the form of annuity elected at one's actual retirement date (ARD)" under the following circumstances: (1) divorce; (2) remarriage; and (3) receipt of a QDRO that specified a change to the elected form of annuity. PBGC concluded that it "will not honor" a benefit change request for those circumstances because "changes to one's elected form of annuity are not permitted after pension payments have commenced."

PBGC's letter also stated: "PBGC will honor your request if the change to your form of annuity was implemented by the plan administrator before the Date of Plan Termination (July 31, 2009). If you have confirmation that the change was made by a prior administrator, you may send a copy to PBGC for review." Your appeal, however, did not provide any confirmation of a benefit change. Furthermore, the Appeals Board found nothing in PBGC's records that would establish that the Delphi Plan's administrator implemented a benefit change for you before the Plan terminated.

requirements set by Congress under ERISA. As trustee, PBGC performs administrative functions that were the responsibility of the plan's Administrator prior to the pension plan's termination.

Relevant Delphi Plan Provisions

Section 5 of the Delphi Plan document effective December 3, 2003 ("2003 Plan") addresses pension benefits payable to a participant's spouse. In particular, Section 5(a) provides that, upon retirement, a married participant "shall be deemed to have elected automatically a reduced amount of monthly basic benefit" in order to provide "a survivor benefit" for his "designated spouse."⁴ Section 5(a) further provides that, if the designated spouse is living at the time of the participant's death, the spouse will receive the survivor benefit for the spouse's remaining lifetime.

The Delphi Plan also contains the following provisions that relate to survivor benefit coverage:

- The "automatic election" of the benefit described in Section 5(a) becomes effective on the later of (i) the commencement date of the employee's monthly benefit; (ii) the first day of the month following the month in which the employee attains age 55; or (iii) the one-year anniversary of the marriage;⁵
- A participant, with the consent of the spouse, may "prevent the automatic election" of the benefit provided in Section 5(a) by submitting a notarized election form to the Delphi Plan within the 90-day period prior to the effective date of the automatic election;⁶ and
- The amount of the surviving spouse benefit equals 65% of the reduced amount of the participant's basic monthly benefit.⁷

Additional language in Section 5(a), which is central to your appeal, permits the cancellation of the above-described survivor benefit under the following circumstances:

⁴ Although the 2003 Plan does not define "designated spouse," it states in Section 5(b): "The beneficiary of a survivor benefit election shall be only the person who is the employee's spouse at such time and who has been such spouse for at least one year immediately prior to the effective date of such election."

⁵ 2003 Plan, Section 5(a).

⁶ 2003 Plan, Section 5(a). The Pension Protection Act of 2006 (Pub. L. No. 109-280) increased the "applicable election period" for benefit elections from 90 days to 180 days, with this change taking effect for plan years beginning after December 31, 2006. This legislative change thus took effect after you retired. Before the Delphi Plan terminated, Delphi amended the 2003 Plan to incorporate the changes required by the Pension Protection Act of 2006.

⁷ 2003 Plan, Section 5(f)(1). Since the "designated spouse" is provided with a 65% annuity for the spouse's remaining lifetime, this form of benefit is referred to as a "joint-and-65%-survivor annuity," or "J&65%SA."

In the event (1) such spouse predeceases such employee, or (2) they are divorced by court decree and (i) a Qualified Domestic Relations Order within the meaning of I.R.C. Section 414(p) so provides, or (ii) written consent of the former spouse which acknowledges the effect of the cancellation and is witnessed by a notary public is obtained, such employee may cancel the survivor benefit election and have the monthly basic pension benefit restored to the amount payable without such election. . . .

Thus, the Delphi Plan allows a divorced participant to cancel survivor benefit coverage through either a (1) "QDRO", or (2) submission of a notarized form in which the former spouse consents to the survivor benefit cancellation ("notarized waiver"). Since the impact of the survivor benefit cancellation is that the participant's benefit "pops up" to his larger SLA amount, we will refer to this Delphi Plan provision as the "divorce pop-up."

Section 8(g) of the 2003 Plan, which sets forth surviving spouse coverage for a participant who marries or remarries after retirement, states as follows:

[E]ffective October 1, 2003, a retiree who marries or remarries and adds such retiree's spouse to health care or life insurance coverage within 12 months of such marriage or remarriage will be deemed to have automatically elected surviving spouse coverage, effective with the one year anniversary of such marriage or remarriage and the applicable reduction in the retiree's benefit will commence, provided eligibility is met. In no event, shall such election be effective if the retiree previously rejected survivor coverage.

Section 8(g) further provides that a participant, with his spouse's consent, may revoke the automatic survivor benefit coverage provided under Section 8(g) by submitting a notarized form to the Delphi Plan within 18 months of the marriage date. Section 8(g) also states that, after 18 months, the automatic election of the survivor benefit "is irrevocable except for death of a spouse or divorce as provided in . . . Section 5(a)."

In Enclosure 2, we provide copies of the 2003 Plan provisions that relate to survivor benefits. The terms of the Delphi Plan's Summary Plan Description dated September 18, 2003 (excerpts provided in Enclosure 3) are consistent with the 2003 Plan provisions that are discussed above.

Relevant ERISA Provisions

ERISA § 205 requires that every defined-benefit pension plan provide a benefit "in the form of a qualified joint and survivor annuity" ("QJSA").⁸ ERISA § 205(d)(1) defines QJSA as follows:

⁸ ERISA § 205(a)(1) states: "in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity."

(d)(1) **“Qualified Joint and Survivor Annuity” Defined.**—For purposes of this section, the term “qualified joint and survivor annuity” means an annuity—

(A) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse, and

(B) which is the actuarial equivalent of a single annuity for the life of the participant.

Such term also includes any annuity in a form having the effect of an annuity described in the preceding sentence.

In addition, ERISA’s QJSA provisions specifically require that each pension plan:

- offer the QJSA as the plan’s automatic benefit form, in the case of a vested participant who does not die before the annuity starting date;⁹
- provide each participant the opportunity during “the applicable election period” to waive (with spousal consent) the QJSA form and elect another benefit form.¹⁰ The “applicable election period” for purposes of waiving the QJSA is defined as “the 180-day period ending on the annuity starting date;”¹¹
- provide each participant, within a reasonable period of time before the annuity starting date, a written explanation of (i) the terms and conditions of the QJSA, (ii) the participant’s right to make, and the effect of, an election to waive the QJSA; and (iii) the right of the participant’s spouse to waive the QJSA, and the effect of such an election;¹² and
- disallow a benefit waiver from taking effect unless “the spouse of the participant consents in writing to such an election, . . . and . . . the spouse’s consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.”¹³

⁹ ERISA § 205(a)(1). ERISA § 205(h)(2) provides that the term “annuity starting date” means “the first day of the first period for which an amount is payable as an annuity,” with certain exceptions that are not relevant to this decision. The term “annuity start date” commonly is used to refer to the “annuity starting date,” and we use these terms interchangeably in this decision.

¹⁰ ERISA § 205(c)(1).

¹¹ ERISA § 205(d)(7)(A).

¹² ERISA § 205(c)(3)(A).

¹³ ERISA § 205(c)(2)(A). ERISA § 205(c)(2)(B) provides a limited exception, not applicable here, that includes the situation where the spouse cannot be located.

PBGC Regulations

A PBGC regulation addresses the circumstances under which a participant or surviving beneficiary may qualify for a PBGC-guaranteed benefit.¹⁴ Among other things, the regulation provides that a participant or beneficiary is “entitled to a benefit if under the provisions of the plan . . . [t]he benefit was in pay status on the termination date of the plan.”¹⁵

Another PBGC regulation, titled “Form of payment,” addresses the benefit forms that PBGC provides if a participant’s benefit is not in pay status on the termination date.¹⁶ Subsections (a) through (c) of this regulation set forth the “automatic PBGC forms” and the “optional PBGC forms” that PBGC offers to participants and beneficiaries. Subsection 4022.8(d) of this regulation states:

(d) *Change in benefit form.* Once payment of a benefit starts, the benefit form cannot be changed.

Discussion

PBGC decided that it would not permit a survivor benefit to be cancelled if a participant whose benefit is in “pay status” requested the change after the Delphi Plan terminated. For this reason, PBGC determined that the DRO you submitted could not be qualified as a QDRO. PBGC has applied this rule uniformly to participants who were receiving a Delphi Plan benefit on the termination date and who have submitted domestic relations orders similar to yours.¹⁷

Your appeal asserts that: (1) the DRO should be qualified because the Delphi Plan’s terms permit a “pop-up” to the SLA form following divorce; and (2) PBGC should provide a survivor benefit to your current wife. For the reasons that follow, we concluded that your appeal must be denied with respect to both of these issues.

1. *PBGC correctly concluded that the DRO’s cancellation of [your former spouse’s] surviving spouse benefit would cause a change to your benefit form.*

PBGC determined that the DRO could not be qualified based on subsection 4022.8(d) of

¹⁴ 29 Code of Federal Regulations (“C.F.R.”) § 4022.4. This provision is located within *Part 4022—Benefits Payable in Terminated Single Employer Plans*. Within Part 4022 is section 4022.4, which is titled “Entitlement to a benefit.”

¹⁵ 29 C.F.R. § 4022.4(a). Section 4022.4 also identifies other circumstances under which a participant or beneficiary may be entitled to a PBGC-guaranteed benefit.

¹⁶ 29 C.F.R. § 4022.8.

¹⁷ PBGC notified Delphi Plan participants about PBGC’s rules regarding benefit changes shortly after it became the Plan’s trustee. In Enclosure 4, we provide a copy of the explanation that PBGC has provided on its website. This explanation also may be accessed at <http://www.pbgc.gov/wr/large/delphi/delphifaq.html>.

its regulations, which states that “[o]nce payment of a benefit starts, the benefit form cannot be changed.” Thus, a central issue presented by your appeal is whether the cancellation of your former spouse's surviving spouse benefit, as is provided in the DRO, is a change in the form of your benefit.

In analyzing this issue, we start with the Delphi Plan’s language in Section 5(a). Section 5(a) describes procedures under which a divorced participant, through either a domestic relations order or a notarized waiver, may obtain a modification to the “automatic” form of benefit that was elected at retirement. The end result has the usual attributes of a change in benefit form, since the divorced participant obtains a different benefit form – a SLA, rather than a J&65%SA – with a new effective date.¹⁸ Thus, the Delphi Plan’s terms are fully consistent with PBGC’s view that a cancellation of the surviving spouse benefit after divorce is a change in benefit form.

PBGC’s position that the DRO’s cancellation of your former spouse's survivor benefit is a change to your benefit form also flows from the statutory QJSA rules. The benefit form that you and your former spouse elected is the Delphi Plan’s automatic form for married participants, and it is clearly intended to be the Delphi Plan’s QJSA.¹⁹ Because, by its definition, the QJSA includes a “survivor annuity for the life of the spouse,”²⁰ the cancellation of the survivor benefit election upon divorce changes the QJSA to a different benefit form.

We considered the alternative viewpoint that the divorce pop-up is, in effect, a “built-in” feature of the benefit form elected at retirement, rather than a subsequent change in benefit form. In this regard, we took into account that the Delphi Plan’s provisions include a second circumstance – the death of the participant’s spouse – under which the automatic form is “cancelled” and pops up to the SLA amount.²¹ PBGC does not consider this type of “pop-up” to

¹⁸ Section 5(a) of the 2003 Plan provides that the “restoration” of the benefit to the SLA amount is effective on “the first day of the third month following the month in which the Corporation receives such employee’s written revocation of the election because of divorce.” Thus, under the Delphi Plan’s terms, a divorced participant who provides the Delphi Plan with a QDRO or notarized waiver that cancels the survivor benefit obtains, in effect, a new “annuity starting date.” See ERISA § 205(h)(2) (definition of “annuity starting date”). Stated another way, the Delphi Plan’s procedure permits the automatic (J&65%SA) benefit that began as of the participant’s retirement date to be replaced with a SLA benefit that begins three months after the divorced participant provides the Delphi Plan with the required paperwork.

¹⁹ Section 5(a) of the Delphi Plan provides that a married participant “shall be deemed to have elected automatically” a reduced benefit that provides a survivor benefit to the spouse during the spouse’s lifetime. An employee “may prevent the automatic election” during the 90-day period prior to its effective date by executing a “written rejection of such election” with written consent by the spouse acknowledging the effect of the rejection and witnessed by a notary public. Hourly Plan § 5(a). These provisions, which mirror ERISA’s QJSA requirements, are indicative that the benefit described in Section 5(a) is intended to be the Delphi Plan’s QJSA. Furthermore, the Delphi Plan’s provisions do not describe any other benefit form that has the attributes of a QJSA.

²⁰ ERISA § 205(d)(1).

²¹ A benefit pop-up upon the spouse’s death, which is referred to a “Joint and Survivor Annuity with Pop-up,” is a fairly-common type of pension plan provision. Some pension plans, like the Delphi Plan, provide the pop-up feature as part of the QJSA required by ERISA § 205. More commonly, however, the pop-up benefit is provided as

be a change in benefit form, since the increased payment to the participant occurs automatically upon the spouse's death.

We concluded that the pop-up benefit the Delphi Plan provides upon the spouse's death is distinguishable from the divorce pop-up for two reasons. First, the pop-up that occurs if the spouse dies before the participant can be part of a QJSA since, unlike the divorce pop-up, the spouse is never (while still living) divested of the survivor benefit that was elected at retirement.

Moreover, in contrast to the Delphi Plan's pop-up upon the spouse's death, the divorce pop-up does not occur automatically. Rather, the Delphi Plan provisions require that the divorced participant take affirmative steps, which ordinarily will require the consent of the former spouse, before the benefit form elected at retirement is cancelled. Thus, the divorced participant must obtain a document – either a domestic relations order or a notarized waiver – and present it to the Delphi Plan to effectuate the cancellation. The divorced participant further has the option of taking no action, or the former spouse may successfully oppose a domestic relations order or not agree to sign a notarized waiver, which would result in no change to the prior benefit election.

The impact of Section 5(a) of the Delphi Plan is that, after divorce, the participant and former spouse are provided with a second opportunity to either accept or reject survivor benefit coverage. In your case, the first opportunity occurred at retirement, when you and [your former spouse] decided not to exercise the Delphi Plan's option of waiving the "automatic" benefit form. Under the Delphi Plan's terms, you and [your former spouse] essentially were provided with a second opportunity to elect or reject the coverage after your divorce. In contrast, if [your former spouse] should die before you, your benefit would pop-up automatically to the SLA, without your need to make any post-retirement "choice" concerning survivor benefit coverage.

The Appeals Board concluded that, since the Delphi Plan's divorce pop-up is optional in that it may only occur after specific steps are taken (i.e., a domestic relations order is obtained or a notarized waiver is executed), it is a change in benefit form, rather than a built-in feature of the elected benefit.

2. PBGC correctly determined that the DRO cannot be qualified.

On April 8, 2002, PBGC issued its "PBGC Benefit Payments" regulation that, among other things, increased the types of benefits that PBGC offers.²² As part of the regulatory changes it made in 2002, PBGC added a new subsection 4022.8(d) to clarify that a participant could not change an elected benefit form after payments begin. PBGC has uniformly applied the

an optional benefit form. We further note that PBGC offers, as an optional benefit form, a "joint-and-50%-survivor-'pop-up' annuity." 29 C.F.R. § 4022.8(c)(5)(ii).

²² PBGC's 2002 benefit payment regulation, among other things, created two new sections within Part 4022 that address the benefits PBGC pays: (1) § 4022.8 (Form of Payment); and (2) § 4022.9 (Time of payment; benefit applications).

rule in subsection 4022.8(d) to: (1) participants who went into pay status after PBGC became trustee; and (2) participants who were in pay status on their pension plan's termination date and who requested a benefit form change from PBGC after the termination date.²³

PBGC's general rule that a benefit form cannot be changed after benefit commencement is in harmony with the way that benefits under defined-benefit pension plans traditionally have been structured and administered. In almost all PBGC-trusted pension plans, changes in the form of benefit after benefit commencement – which could occur, for example, through the addition or elimination of a survivor benefit or through the substitution of one beneficiary for another – are not permitted.²⁴

The Delphi Plan differs from the usual PBGC-trusted plan in that its written provisions allow benefit form changes after benefit commencement in limited circumstances, such as through the divorce pop-up.²⁵ PBGC applies the “no benefit form change” rule in 29 C.F.R. § 4022.8(d) to you and to other Delphi Plan participants in your situation – in the same manner as it applies the provision to participants in other PBGC-trusted plans – for the reasons explained below.

PBGC has applied the “no benefit form change” rule to the divorce pop-up under the Delphi Plan because the rule facilitates the protection of spousal benefits, within the meaning and the intent of ERISA's QJSA provisions. ERISA § 205(c) and the parallel provision in the Internal Revenue Code (“IRC”)²⁶ establish detailed requirements that govern a participant's election of a benefit, with spousal consent, within the 180-day period before the annuity starting date. As trustee, PBGC is responsible for administering the plan consistent with the legal

²³ The Appeals Board recognizes that the scope of section 4022.8 is arguably limited to benefits that are not in pay status on the termination date. Your benefit was in pay status when the Plan terminated. Section 4022.4 of PBGC's regulation, which generally covers your entitlement to a PBGC benefit, provides that a participant is entitled to a benefit if the benefit was “in pay status” on the plan termination date.

Section 4022.4 is silent, however, regarding whether a benefit form can be changed after the termination date. PBGC has a longstanding practice of applying the rule in subsection 4022.8(d) to all participants in PBGC-trusted plans, including those whose benefits were in pay status on the termination date. With respect to the issues raised in this appeal, the Appeals Board concluded that PBGC application of its “no benefit change rule” to participants who were in pay status on the termination date is reasonable and, accordingly, should be upheld. PBGC's rule further is supported by section 4022.9 of PBGC's regulation, which is discussed later in this decision.

²⁴ Pension plans generally prohibit changes to a benefit form after benefit commencement because the allowance of such changes could result in increased costs to the plan. Such increased costs could occur, for example, if a plan allowed a participant (at his option) to replace a beneficiary with a below-average life expectancy (such as a beneficiary who is diagnosed with a terminal illness) with a beneficiary with average or above-average life expectancy.

²⁵ The Appeals Board notes that divorce pop-up provisions like those in the Delphi Plan, although generally infrequent, exist in some ongoing pension plans, particularly in the automobile industry.

²⁶ IRC § 417.

requirements in ERISA, including its spousal benefit protections.²⁷

ERISA permits a spouse to waive the statutorily-required QJSA benefit, but only if strict requirements are met before the annuity start date. As courts have recognized, the statutory scheme for QJSAs “establishes the importance of the annuity start date, which is often the participant’s retirement date,” in determining the benefit form that the participant and his spouse will receive.²⁸ In your case, you and your former spouse elected the Delphi Plan’s QJSA prior to your annuity start date.

As discussed previously, Section 5(a) of the Delphi Plan essentially allows a divorced participant to change a benefit election after his annuity start date in the circumstance where he submits a “QDRO” that provides for the cancellation of a survivor benefit. The Supreme Court has concluded, however, that a QDRO is not an appropriate mechanism for waiving a survivor benefit, stating:

[A] beneficiary seeking only to relinquish her right to benefits cannot do this by a QDRO, for a QDRO by definition requires that it be the “creat[ion] or recogni[tion of] the existence of an alternate payee’s right to, or assign[ment] to an alternate payee [of] the right to, receive all or a portion of the benefits payable with respect to a participant under a plan.” 29 U.S.C. § 1056(d)(3)(B)(i)(I). There is no QDRO for a simple waiver; there must be some succeeding designation of an alternate payee.

Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 296-97.²⁹ Thus, ERISA’s QDRO provisions do not provide for the waiver of a spousal survivor benefit through a domestic relations order.

²⁷ ERISA’s QJSA protections were enacted as part of the Retirement Equity Act of 1984 (“REA”), Pub. L. No. 98-397, 98 Stat. 1426. The stated Congressional purpose of REA is “to improve the delivery of retirement benefits and to provide for greater equity under private pension plans for workers and their spouses and dependents by taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home.” *Id.*

The purposes of ERISA’s QJSA provisions are examined in detail in *Boggs v. Boggs*, 520 U.S. 833, 843, 117 S.Ct. 1754, 1761 (1997) (purpose of the QJSA protections is “to ensure a stream of income to surviving spouses”); *Carmona v. Carmona*, 603 F.3d 1041, 1058 (9th Cir. 2008); and *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153, 156 (4th Cir. 1997).

²⁸ *Carmona*, 603 F.3d at 1057; *Hopkins*, 105 F.3d at 156-57.

²⁹ In *Kennedy*, at 555 U.S. 297 n. 8, the Supreme Court also stated the following with respect to the alternate payee’s (Liv’s) waiver in a divorce decree of any rights to her former husband’s (William’s) pension:

Even if one understands Liv’s waiver to have resulted somehow in her interest reverting to William, he does not qualify as an “alternate payee,” which is defined by statute 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 such participant.” 29 U.S.C. § 1056(d)(3)(K).

The statutory QJSA rules further establish that, if a participant and his spouse do not waive the QJSA within the 180-day election period, the individual who is the participant's spouse on the annuity start date will be entitled to receive a survivor benefit if the participant should die first. This conclusion is evident from ERISA's definition of the QJSA as an annuity "for the life of the participant with a survivor annuity for the life of the spouse."³⁰ There is nothing in ERISA's QJSA rules that provides for a new benefit election after the annuity start date or that specifically authorizes the cancellation of the survivor benefit coverage under certain circumstances.³¹

In addition to protecting spousal benefits, PBGC's decision to apply the rule in 29 C.F.R. § 4022.8(d) to the Delphi Plan is based on administrative considerations. Upon plan termination, responsibility for the plan's administrative functions – which include determining benefit entitlements, processing pension applications, and paying benefits – is transferred to PBGC. PBGC accordingly must establish rules and procedures for processing benefits in the numerous pension plans it trustees.³²

PBGC has concluded that performance of its administrative functions is facilitated by applying uniform rules to terminated pension plans. This is evident from section 4022.9 of PBGC's regulations, which provides:

§ 4022.9 Time and payment; benefit applications.

* * *

(b) *Elections and consents.* The PBGC may prescribe the time and manner for benefit elections to be made and spousal consents to be provided.

(c) *Benefit applications.* The PBGC is not required to accept any applications for benefits not made in accordance with its forms and instructions.

Thus, section 4022.9 provides that PBGC will exercise its own discretion and will establish its own procedures regarding benefit applications and elections in PBGC-terminated plans.

By establishing a "no change in benefit form" rule in its regulations, PBGC makes it clear that PBGC will not honor requests by pension plan participants and beneficiaries to receive a different benefit form after benefit commencement. This rule thus simplifies PBGC administration of the benefits that it pays after plan termination.

³⁰ ERISA § 205(d)(1).

³¹ ERISA § 205(c)(8) permits pension plans to provide written explanations of benefits after the annuity start date, in which case the applicable election period must be extended until at least 30 days after the written explanation is provided. The Delphi Plan, however, did not postpone written benefit explanations and benefit elections to dates that were after an annuity start date.

³² We note that PBGC-trusted pension plans cover employees in many industries. Such terminated plans vary significantly in their benefit formulas, in the types of benefits that are provided, and in how they were administered prior to PBGC trusteeship.

PBGC's "no change in benefit form" rule also facilitates its administration of QDROs because it does not require the agency to make findings as to whether, under the facts of a particular case, a domestic relations order should be accepted as a voluntary benefit waiver. We note that it is not uncommon for disputes to arise between participants and former spouses concerning entitlement to survivor benefits, and PBGC's disallowance of the divorce pop-up under the Delphi Plan avoids such disputes.

In summary, PBGC decided it would not qualify domestic relation orders that cancel spousal survivor benefits because this rule ensures that PBGC, in performing its functions as trustee, will be able to safeguard the intended protections under ERISA's QJSA rules. PBGC further decided not to allow divorce pop-ups under the Delphi Plan for administrative reasons. The Appeals Board, having concluded that PBGC's positions on these matters are reasonable and supported by PBGC regulations, decided that your appeal must be denied.³³

The Delphi Plan's provisions establish an alternative procedure to the QDRO under which a divorced participant may obtain the cancellation of a survivor benefit. Section 5(a) of the Delphi Plan provides that, if a notarized waiver with the written consent of the former spouse is submitted to the Delphi Plan, the participant "may cancel the survivor benefit election and have the monthly basic pension benefit restored to the amount payable without such election."

PBGC does not allow a survivor benefit to be cancelled through a notarized waiver if the benefit in pay status on the Delphi Plan's termination date included the survivor benefit. Thus, PBGC would apply the same "no change in benefit form" rule to a notarized waiver that it applies to a domestic relation order. The Appeals Board finds that both instances the participant is seeking to change the form of his benefit after the annuity start date. We accordingly decided that you may not obtain the cancellation of the survivor benefit payable to [your former spouse] through the submission of a notarized waiver.³⁴

3. *PBGC is unable to provide your current wife with a survivor benefit.*

Your appeal requests that PBGC provide your current wife, [redacted] with a survivor benefit.

Based on our above ruling, PBGC cannot honor this request. The survivor benefit you

³³ The Appeals Board's holdings in this decision apply only to the actions that PBGC has taken under Title IV of ERISA as the trustee of a terminated pension plan. The Board specifically has not decided how ERISA's QDRO and QJSA provisions should be applied to an ongoing pension plan that has adopted a divorce pop-up provision. Such matters do not fall within PBGC's jurisdiction, but rather are the responsibility of the U.S. Department of Labor and Treasury Department.

³⁴ There is no record that you presented either the Delphi Plan or PBGC with a notarized waiver. We have addressed the notarized waiver issue, however, because the possibility exists that you, or some other similarly-situated Delphi Plan participant, could present a notarized waiver to PBGC at some future date.

elected at retirement remains payable to your former spouse, [redacted], upon your death. The Delphi Plan's provisions do not provide for the surviving spouse benefit to be payable to more than one "spouse," and ERISA does not require a plan to provide a surviving spouse benefit to a participant who marries or remarries after the annuity start date.

Decision

For the above-stated reasons, we found no basis presented in your appeal for changing PBGC's August 2, 2010 determination that your October 8, 2009 Domestic Relations Order cannot be qualified as a QDRO. This is the Agency's final decision with respect to that determination for you and for [your former spouse]. Either of you may, if you wish, seek U.S. District Court review of this decision.

PBGC has not yet issued a formal determination to you with respect to other aspects of your PBGC benefits, including the type of benefit you are entitled to receive and its amount. When you receive a formal determination from PBGC, you will have the opportunity to appeal it on any grounds that were not resolved by this Appeals Board decision.

Meanwhile, if you have questions, please call PBGC's Customer Contact Center at 1-800-400-7242.

Sincerely,



Charles Vernon
Appeals Board Chair

Enclosures:

- 1) Excerpts from Your Pension Election Confirmation Statement (5 pages)
- 2) Excerpts from the 2003 Delphi Plan document (15 pages)
- 3) Excerpts from the 2003 Summary Plan Description for the Delphi Plan (6 pages)
- 4) PBGC website explanation concerning benefit changes in the Delphi Plan (1 page)

Copy Furnished: [your former spouse], with your address on page one redacted and the first name of your current spouse redacted