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Benefits Report

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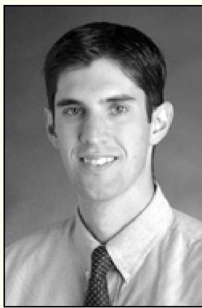

The Impact of Same-Sex Marriage on Employee Benefit Plans

MATTHEW L. GOUAUX

On May 15, 2008, the California Supreme Court issued a landmark decision, *In re Marriage Cases*, which invalidates the requirement under California law that only a man and a woman can enter into a valid marriage. By a 4–3 vote, the Court ruled that this requirement violates various provisions of the California Constitution and ordered state and local officials to start issuing marriage licenses to couples of the same sex. When the decision takes effect on June 14, 2008, California will join Massachusetts as the only states that recognize same-sex marriages.

This development raises the question of whether an employee benefit plan may, must or cannot recognize same-sex marriages in applying plan provisions that involve a participant's marital status. The answer is not as straightforward as one might think. It requires an analysis of not only how California state law defines marriage, but what the plan says about marriage and in what contexts, and also what the Federal Defense of Marriage Act ("DOMA"), enacted in 1996, has to say about marriage and how that affects plans governed by federal law.

Plan Provisions Regarding Marriage

Many plans use the terms "marriage" and "spouse" without defining them, presumably because until now those terms seemed to require no definition. Some plans, perhaps in response to developments in Massachusetts, specifically define marriage by reference to DOMA, which only recognizes a marriage between a man and a woman ("opposite-sex marriage"). Few plans, we suspect, explicitly recognize same-sex marriages, out of DOMA concerns if for no other reason. Now that California and Massachusetts authorize and recognize same-sex marriages, plans that do not explicitly exclude same-sex marriages from, or explicitly include them within, their marriage definition are faced with having to clarify, either by interpretation or by plan amendment, what has become an ambiguous plan term.

If the terms marriage and spouse are left undefined by a plan, what law governs whether a participant is married for plan purposes — state or federal? Given that domestic relations issues traditionally have been governed by state law, perhaps state law should govern, in which case at least in California and Massachusetts a participant in a same-sex marriage would be considered married for plan purposes. On the other hand, what if because of DOMA a plan would lose its tax-qualified status (for reasons discussed below) if it fully embraced that view? Perhaps then federal law should govern, in which case participants in same-sex marriages would be treated as not married for plan purposes. However, as discussed in greater detail below, treating a participant in a same-

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sex marriage as "married" will not always violate DOMA. Does that mean that participants in same-sex marriages should be treated as not married in any case where a contrary rule would disqualify the plan, but married in all other cases? Obviously, plan sponsors will need to provide guidance on these issues so that plan administrators can administer a plan without jeopardizing the plan's tax qualified status on the one hand, or exposing the plan to double liability for competing claims on the other. We suggest that this guidance be provided in the form of plan amendments that state explicitly under what circumstances same-sex marriages will be recognized, if at all, and under what circumstances they will not. An *ad hoc* approach that deals with these issues through plan interpretation as they arise, while tempting, ultimately may prove more costly.

Defense of Marriage Act

Congress adopted DOMA in 1996 in response to a ruling by the Hawaii Supreme Court that cast serious doubt on the constitutionality of a state law that limited marriage to couples of the opposite sex. One of DOMA's two principal provisions, and the one relevant here, reads as follows:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife (1 U.S.C. § 7).

All provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code ("Code"), and any regulations promulgated under those laws, which reference a person's marital status must be read in a manner consistent with DOMA's definition of marriage. Our initial assessment is that in the two states actually recognizing same-sex marriages, DOMA's biggest impact is on qualified plans under section 401(a) of the Code — pension plans in particular — with only minimal impact on health and welfare and deferred compensation plans. What follows is a discussion of what we believe are the more significant areas implicated.

What Qualified Plan Provisions Does DOMA Govern?

Qualified Joint and Survivor Annuities and Spousal Consent

ERISA and the Code require that defined benefit pension plans (and certain defined contribution plans, such as money purchase pension plans) pay a married participant's retirement benefit in the form of a qualified joint and survivor annuity ("QJSA") unless the participant elects another payment form and the participant's spouse consents to that election. The plan must pay an unmarried participant's retirement benefit in the form of a single life annuity, unless the participant elects some other payment form.

Under DOMA, a plan cannot treat a participant in a same-sex marriage as "married" for purposes of the QJSA rules. It must treat the participant as not married for that purpose. That does not prevent the plan from offering a joint and survivor annuity to that participant on the same terms as if he or she were in an opposite-sex marriage, since plans can offer joint and survivor annuities to all participants regardless of marital status. Also, it should not prevent a plan from requiring the consent of a participant's same-sex spouse to the participant's election of an optional form of benefit, such as a lump sum payment. In the case of a participant in a same-sex marriage, an optional form of benefit would be any form other than a single life annuity.

What DOMA does preclude is a plan requirement that a participant in a same-sex marriage must receive a joint and survivor annuity with the spouse as contingent annuitant unless the spouse consents to the participant's election of another form of payment. That requirement would violate the QJSA rule that an unmarried participant must receive a single life annuity unless the participant elects another form of payment.

Thus, at least for QJSA purposes, a plan must limit the terms "marriage," "married" and "spouse" to participants who are in an opposite-sex marriage, must treat participants who are in a same-sex marriage as "not married" and must not treat the other party to the same-sex marriage as the participant's "spouse."

Optional Joint and Survivor Annuities

As discussed above, plans may not treat participants in same-sex marriages as married for QJSA purposes. Because of DOMA, the newly mandated qualified optional survivor annuity ("QOSA") need

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not be offered to participants in same-sex marriages although, as is true with the QJSA, DOMA does not preclude a plan from doing so. Indeed, many plans already allow any participant, married or not, the option of electing a joint and survivor annuity with any non-spouse beneficiary.

Qualified Pre-Retirement Survivor Annuities

Defined benefit pension plans are required to provide the surviving spouse of a married participant with a qualified pre-retirement survivor annuity ("QPSA"). The annuity is equal to the survivor portion of the plan's qualified joint and survivor annuity. Plans are not required to provide a QPSA to a non-spouse beneficiary (which per DOMA includes spouses in same-sex marriages) and many plans do not. However, neither DOMA nor the QPSA rules would prevent a plan from doing so. Plan sponsors will need to decide whether to provide this benefit to participants in same-sex marriages or treat participants in same-sex marriages as not married for QPSA purposes. Either way, the plan should be clear whether "spouse" for QPSA purposes includes a participant's same-sex spouse.

Qualified Domestic Relations Orders

Although the answer is far from clear, DOMA may preclude qualified plans from recognizing as a qualified domestic relations order ("QDRO") a court order entered in a proceeding to dissolve a same-sex marriage. To be a QDRO, an order first must be a "domestic relations order" which is defined under ERISA and the Code as one relating to the provision of "child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant." Under DOMA, a spouse in a same-sex marriage cannot qualify as a spouse or former spouse for purposes of this definition. That person may be able to qualify as an "other dependent" of the participant although that term is not further defined in the QDRO rules. To further complicate the issue, it is not clear that payments to a participant's "dependent" could be treated as the provision of "alimony payments" or "marital property rights" for purposes of the QDRO rules. Thus, the determination of whether a court order is a QDRO, never a simple matter, will now in the case of a same-sex marriage dissolution require that a plan determine if the participant's spouse qualifies as his or her "dependent."

Incidental Death Benefit and Minimum Required Distribution Rules

Section 401(a)(9) of the Code says that tax-qualified pension plans can only provide "incidental death benefits." At its most basic level, the incidental death benefit rule is intended to preclude a plan, or a participant, from structuring benefit payments so that distribution of a significant portion of the value of the participant's total benefit package under the plan is postponed until the participant's death or even far beyond. Qualified joint and survivor annuities and qualified pre-retirement survivor annuities are essentially exempt from the incidental death benefit rule. However, annuities that provide a death or survivor benefit to non-spouse beneficiaries are not and, under DOMA, spouses in a same-sex marriage must be treated as non-spouse beneficiaries. Thus, a plan that provides survivor benefits to the surviving spouse of a participant in a same-sex marriage would have to adopt rules to ensure that the incidental death benefit rule is satisfied.

Section 401(a)(9) also contains minimum required distribution rules that mandate the commencement of distributions to a participant, or the participant's spouse or other beneficiaries by a certain age or within a certain period of time. In general, distributions to a participant or a participant's spouse must begin no later than April 1 following the year in which the participant attains (or would have attained) age 70 1/2. For non-spouse beneficiaries, their benefits generally must be fully distributed within five years after the participant's death, unless they are receiving benefits as part of a distribution form that began before the participant's death (*e.g.*, ten-year certain and life annuity). In any case, participants and spouses in same-sex marriages must be treated as not married in applying these rules.

Rollover Rules

Plans are required to permit a deceased participant's spouse to roll over an eligible rollover distribution to an eligible retirement plan. Because under DOMA a spouse in a same-sex marriage must be treated as a non-spouse beneficiary, plans must apply the rollover rules applicable to non-spouse beneficiaries to a participant's same-sex spouse. Plans currently may, but are not required to, permit non-spouse beneficiaries to roll over eligible rollover distributions to an inherited IRA, but not to any other type of eligible retirement plan. The Pension Protection Technical Corrections Act of 2007 (H.R. 3361), passed by the House of Representatives and pending before the Senate,

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would require plans to permit these non-spouse beneficiary rollovers.

Preference Beneficiary Rules

Many plans have preference beneficiary rules for determining who receives a participant's account balance or other death benefit in the event the participant fails to designate a beneficiary or the designated beneficiary dies before the participant. Most often, the participant's surviving spouse has first priority as preference beneficiary, followed by the participant's children, parents, siblings, etc. Plan sponsors will need to decide whether to recognize a surviving spouse of a same-sex marriage as a participant's preference beneficiary if the participant fails to designate that spouse as his or her plan beneficiary. DOMA plays essentially no part in this decision. Failure to clarify this may lead to competing claimants for a plan's death and survivor benefits when a participant in a same-sex marriage dies without naming a beneficiary.

Health and Welfare Plans

For sponsors of health and welfare plans, California's recognition of same-sex marriages presents essentially the same issues as did the California legislation providing for domestic partner registration which, for most purposes, treats California Family Code section 297 domestic partners as if they were married. Thus, the following sections present only a brief overview of the issues pertaining to same-sex marriages.

Medical Benefits

Medical benefits provided under an employer's group health plan to employees, retirees and their spouses and other dependents, or insurance premiums paid by an employer for such benefits, are excluded from the employee's taxable income under Code sections 105 and 106. Code section 125 permits an employee to elect under an employer's cafeteria plan to pay medical premiums for coverage of the employee and his or her spouse and other dependents on a pre-tax basis. Under DOMA, an employee's same-sex spouse cannot qualify as a spouse for purposes of these rules. As a result, medical benefits provided to an employee's same-sex spouse are subject to federal tax unless the same-sex spouse meets the requirements for being the employee's "Qualifying Relative" as defined under Code section 152. Thus, for federal tax purposes, the value of benefits provided to an employee's same-sex spouse will usually be taxable to the employee (just as employees are subject to imputed income for the value of benefits provided to a domestic partner).

Employers are not generally required to offer health coverage to employees or their spouses. California employers that choose to provide health coverage for employees' spouses should extend the same health coverage to California employees' same-sex spouses as they do to opposite sex spouses in order to avoid violating the California Fair Employment and Housing Act (FEHA). Among other things, FEHA prohibits discrimination on the basis of marital status or sexual orientation, which may arguably preclude an employer from treating same-sex spouses differently than opposite-sex spouses. Note that in many other states and under federal antidiscrimination law, these are not protected classes. Sponsors of self-funded health plans should review the plan's definition of spouse and make any changes necessary to make clear that "spouse" includes an employee's same-sex spouse. Since California's Domestic Partners Rights and Responsibilities Act took effect January 1, 2005, all types of insurance policies issued by a California insurer have been required to treat employees' spouses and California Family Code section 297 domestic partners equally with respect to insured benefits. Presumably these policies will now automatically cover same-sex spouses; however, employers with insured plans should confirm that the insurance policy will cover same-sex spouses. Insurance policies sitused in states other than California (many of which have enacted state laws similar to DOMA) may define spouse to include only opposite-sex spouses. If this is the case, and the insurance carrier will not agree to cover same-sex spouses as spouses, then the employer may need to ensure that the same-sex spouses may be covered under the carrier's definition of a domestic partner (if they have one) or find a new insurance carrier.

Life and Accidental Death and Dismemberment Insurance

California employers that offer life insurance and accidental death and dismemberment insurance (AD&D) coverage to employees' spouses should extend such coverage to same-sex spouses to avoid violating FEHA. This coverage is often voluntary and purchased by the employee on an after-tax basis. Under Code section 132(e), up to $2,000 of group term life insurance coverage on an employee's spouse may be provided as a *de minimis* fringe benefit and is, therefore, excludable from the employee's gross income. However, since a same-sex spouse would not be recognized as a spouse for purposes of

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Code section 132(e), if the employer provides any life insurance coverage on a same-sex spouse, the value of such coverage would be taxable income to the employee. As with health insurance, employers should confirm with their life and/or accidental death and dismemberment insurance carriers that same-sex spouses may be covered under the policies.

Voluntary Employee Beneficiary Association

A Voluntary Employee Beneficiary Association ("VEBA") under Code section 501(c)(9) may provide only *de minimis* benefits to an employee's non-spouse, non-dependent beneficiary without losing its tax-exempt status. Under DOMA, a spouse in a same-sex marriage cannot be considered a spouse for purposes of a VEBA. In at least one Private Letter Ruling, the IRS found that benefits provided to employees' domestic partners were *de minimis* and thus did not jeopardize the VEBA's tax exempt status where the cost of covering domestic partners was projected to be approximately two to three percent of the VEBA's total annual benefit expenditures. Most likely, the same reasoning would apply to an employee's same-sex spouse. An employer who provides benefits through a VEBA should periodically monitor the number of domestic partners and same-sex spouses who are included to ensure the *de minimis* rules are met.

State v. Federally Mandated Leaves of Absence

The federal Family and Medical Leave Act (FMLA) permits employees to take up to 12 weeks of unpaid leave to care for a child, spouse or parent with a serious health condition. The California Family Rights Act (CFRA) also permits employees to take up to 12 weeks of leave for these purposes. California employers must treat an employee's California Family Code section 297 domestic partner, and now an employee's same-sex spouse, as the employee's spouse for CFRA purposes. Thus, under CFRA, a California employer must grant an employee 12 weeks of leave to care for his or her California Family Code section 297 domestic partner or same-sex spouse. However, because FMLA is a federal law and thus subject to DOMA, leave taken by an employee to care for a same-sex spouse would not be recognized for FMLA purposes. Therefore, if a California employer grants an employee 12 weeks of CFRA leave to care for his or her same-sex spouse and then the employee's child or parent becomes seriously ill, the employee would still be entitled under FMLA to their 12 weeks of leave to care for that child or parent.

Non-Qualified Deferred Compensation Plans

The impact of same-sex marriage on nonqualified deferred compensation plans is more straightforward because federal law does not address in any meaningful way the benefits available to a participant's spouse under such plans and, as a result, DOMA does not apply under most circumstances. Code section 409A severely restricts the extent to which an employee may elect to change the time and form of payment under a nonqualified deferred compensation plan. The final regulations issued under Code section 409A provide exceptions to restrictions on distributions made to a person other than the employee pursuant to a "domestic relations order" (as defined in the Code). As discussed above, under DOMA a spouse in a same-sex marriage cannot qualify as a spouse or former spouse for purposes of this definition. As a result, the determination of whether a court order is a "domestic relations order" may in the case of a same-sex marriage dissolution require that a plan determine if the employee's spouse qualifies as his or her "dependent."

For administrative ease and to avoid situations that may result in violating Code section 409A, many plans do not permit participants to elect the time or form of benefit payments, or they provide for a default time and form of payment if an election is determined to be invalid or incomplete. In both instances, the plan may provide a nonelective distribution or default provision under which all married participants receive a joint and survivor annuity and all unmarried participants receive a single life annuity. Into which category participants in same-sex marriages fall is a decision that may be governed by state antidiscrimination law. (See the discussion of FEHA above, in the section on Health & Welfare Plans.)

Practical Implications of this Ruling

Plan sponsors who have employees in California or Massachusetts should review their plan documents and insurance polices to determine whether same-sex spouses are covered. As indicated above, it may be necessary to specify that certain plan provisions do or do not apply to a same-sex spouse. Any plan amendments should be timely communicated to participants via a new Summary Plan Description or a Summary of Material Modifications.

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The Department of Labor Amends and Supplements Qualified Default Investment Alternative Regulation

CLARISSA A. KANG

In April, plan fiduciaries received further guidance from the Department of Labor (the "Department") regarding the administration of Qualified Default Investment Alternatives ("QDIAs") — investments made by plan fiduciaries on behalf of participants or beneficiaries in individual account plans who fail to direct the investment of assets. The Department's Field Assistance Bulletin No. 2008–03 ("FAB"), published on April 29, 2008, supplements the Department's October 24, 2007 final Regulation ("Final Regulation") by providing guidance on the:

- scope of the regulation;
- notice requirements;
- 90-day limitation on fees and restrictions;
- management and asset allocation of QDIAs;
- capital preservation investment option; and
- grandfather relief for stable value funds.

In addition, the Department issued technical corrections to the Final Regulation on April 30, 2008 which:

- clarifies the circumstances in which plan sponsors can limit reinvestment in a QDIA;
- permits a committee consisting primarily of employees of the plan sponsor, and that is a named fiduciary of the plan, to manage a QDIA; and
- further explains the grandfather relief for stable value funds.

The Department Published the QDIA Regulation as a Final Rule on October 24, 2007

Effective December 24, 2007, the Final Regulation provides, if certain conditions are satisfied, relief for fiduciaries who invest assets of an individual account plan (generally, a defined contribution plan) in a QDIA from some of the liability for losses that may result from:

- investing all or part of a participant's or beneficiary's plan account in a QDIA; or
- investment decisions by a manager of the QDIA.

The types of QDIAs allowed under the Final Regulation include funds with a mix of equity and fixed income investments (*i.e.*, life-cycle funds or targeted-retirement date funds), a balanced fund, and a professionally managed account. A capital preservation fund (such as a stable value fund) may only be used as a QDIA for the first 120 days after a participant's first elective contribution under an eligible automatic contribution arrangement ("EACA"). The Final Regulation also requires that a special form of advance notice be provided to participants and beneficiaries and sets forth additional requirements for the QDIA. For a more detailed explanation of the October 24, 2007 Final Regulation, please see our November 2007 issue.

Field Assistance Bulletin 2008–03 Offers Further Guidance and Explains the Technical Corrections

In a series of questions and answers, the FAB addresses some of the most common questions raised by the benefits community regarding the Final Regulation. The technical corrections mirror three of the issues covered by the FAB, and therefore this article addresses both the technical corrections and the FAB together.

Scope of the Final Regulation

In the FAB, the Department has clarified several points regarding the scope of the Final Regulation:

- Plan sponsors who are named fiduciaries of their plans and who choose to create and manage a QDIA based on a mix of investments currently offered in the plan are relieved of liability for decisions to invest all or part of a participant's or beneficiary's account in a QDIA. Such plan sponsors, though, are not relieved of liability for the management of the QDIA and selection and monitoring of the QDIA.
- Fiduciaries may avail themselves of relief under the Final Regulation with regard to assets that

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were invested in a QDIA prior to the effective date of the regulation, provided all conditions of the Final Regulation (*i.e.,* notice and other requirements) are satisfied. However, fiduciaries are not relieved of liability for any fiduciary decisions that were made prior to the effective date of the regulation.

- Relief under the Final Regulation may be obtained even with respect to assets that a participant or beneficiary affirmatively elected to invest in a QDIA prior to the effective date of the Final Regulation, as long as the participant or beneficiary fails to give investment direction on or after the effective date of the regulation, after having been provided the required QDIA notice.
- If non-elective contributions such as a qualified non-elective contribution (QNEC) or the proceeds from litigation or settlement are invested in a QDIA, it may be possible to obtain relief under the Final Regulation, but only to the extent that the participant or beneficiary is given the opportunity to direct the investment of such contributions.
- The Final Regulation may apply to Internal Revenue Code section 403(b) plans provided the plan is a "pension plan" within the meaning of Section 3(2) of the Employee Retirement Income Security Act of 1974 ("ERISA") and covered by Title I of ERISA.

QDIA Notice Requirement

The FAB also explains the QDIA notice requirements. The information provided in the required notice to participants and beneficiaries regarding a QDIA must include a description of the fees and expenses related to the QDIA. The FAB clarifies that participants and beneficiaries must be provided with information regarding the amount and description of any shareholder-type fees and, for investments whose performance may vary over the term of the investment, the total annual operating expenses of the investment expressed as a percentage (*i.e.*, an expense ratio). A prospectus or profile prospectus of a QDIA, along with the other information required by the QDIA notice rules, can satisfy the notice requirements with respect to the fees and expenses of the QDIA. The notice required under the Final Regulation may be in the form of separate documents provided simultaneously and may be provided through electronic means in compliance with electronic media guidance issued by the Department or the Department of Treasury ("Treasury") and the Internal Revenue Service ("IRS"). (Incidentally, the Department states that its views on using electronic media to meet the QDIA notice requirement pertains only to the QDIA notice and not to any pass-through of investment materials and that it is working on a separate regulatory initiative regarding broader application of disclosure by electronic means.) In addition, plan sponsors are not required to combine the QDIA notice with any notices issued with respect to any automatic contribution arrangement, although the model notice provided by Treasury and the IRS may be of assistance to those plan sponsors who wish to combine these notices. The FAB notes that the required timing of the notices under Treasury's proposed regulations on EACAs and qualified automatic contribution arrangements ("QACAs") are not identical to the timing of the QDIA notice, but states that plan sponsors may choose to satisfy the two different sets of notice requirements at the same time (for example, the annual notices for both the automatic contribution arrangement and the QDIA may be provided at least 30, and not more than 90, days before the beginning of each plan year).

90-Day Limitation on Fees and Restrictions

The Final Regulation prohibits the imposition of any restrictions, fees, or expenses on any transfer or withdrawal of assets from a QDIA by a participant or beneficiary for the 90-day period following the first investment in a QDIA for that participant or beneficiary. The FAB explains that the limitation on fees and restrictions during this 90-day period would be satisfied if a plan sponsor or a service provider paid such a fee in lieu of assessing the fee to the participant or beneficiary. The 90-day limitation on fees and restrictions affects only funds placed in a QDIA after the effective date of the Final Regulation and is not imposed upon assets already existing in a plan as of the effective date of the regulation. The Department also retracted the reference in the preamble to the Final Regulation to "round-trip" restrictions as impermissible restrictions. Both the technical correction published on April 30, 2008 and the FAB clarify that plan sponsors may place restrictions on the ability to reinvest in the QDIA for a limited period of time (so-called "round-trip" restrictions), but only to the extent they do not restrict the right to liquidate or transfer from a QDIA in order to invest in another investment alternative available under the plan.

Management and Asset Allocation

The Final Regulation requires a QDIA to be diversified so as to minimize the risk of large losses, and to be

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designed to provide a mix of equity and fixed income exposure. The FAB explains that a permanent, long-term QDIA (as opposed to the short-term use of stable value funds, permitted only for the first 120 days after the first elective contribution) must have some fixed income exposure and some equity exposure, but the Department expressly declines to state what quantum of either fixed income or equity must exist. The Department also explains that participants who fail to direct their investments and who are then defaulted into the QDIA must be provided with the same amount of documentation as participants who direct their own investments in an ERISA section 404(c) plan and that the disclosure rules of the Final Regulation are meant to operate in the same manner as the disclosure rules under the ERISA section 404(c) regulations. The FAB states that a plan sponsor can have more than one QDIA, as long as each meets all of the requirements of a QDIA. Furthermore, the Department explained that the Final Regulation was intended to accommodate employers that manage their plan investments in-house by allowing plan sponsors to serve as managers of a QDIA and, in order to clarify that intent, the Department amended the Final Regulation to allow a committee comprised mainly of employees of the plan sponsor (and which is a named fiduciary to the plan) to manage a QDIA, in addition to the plan sponsor.

Stable Value Fund 120-Day Limited QDIA and Grandfather Relief

The FAB clarifies that a stable value fund or capital preservation type investment may only be used as a QDIA for a 120-day period following a participant's first elective contribution under an EACA. Plans are not required to provide a 120-day capital preservation QDIA or, for that matter, any of the QDIAs described in the Final Regulation. The 120-day capital preservation QDIA generally cannot be managed by the plan sponsor; it must be offered by a state or federally regulated financial institution.

Grandfather relief is available under the Final Regulation only as to assets that are invested in the stable value fund on or before the effective date of the Final Regulation (December 24, 2007) and may begin only thirty days after a plan sponsor has provided the initial notice to participants and beneficiaries required under the Final Regulation.

Both the FAB and the technical corrections clarify that grandfather relief is available to stable value or capital preservation type investments only where:

- no surrender charges or fees are imposed on a participant's or beneficiary's withdrawals from the fund; and
- the QDIA invests primarily in investment products that are backed by state or federally regulated financial institutions. In other words, the QDIA must invest primarily in investment products that are either issued by state or federally regulated financial institutions, or are guaranteed by contracts issued by state or federally regulated financial institutions (both as to the principal and accrued interest).

The Department Signals Additional Guidance for the Future

In addition to providing user-friendly explanations and examples, the FAB also foreshadows the issuance of additional Department guidance which will round out the current guidance regarding QDIAs. The Department has signaled that it is in the process of developing a proposed regulation that will establish disclosure requirements for participant directed individual account plans, including requirements regarding disclosure of plan and investment fee and expense information. The Department states that it envisions that compliance with the proposed regulation will satisfy the investment-related fee and expense disclosures required by the Final Regulation. The Department has unofficially stated that these proposed regulations are just weeks away from issuance. As plans implement plan design choices regarding QDIAs, EACAs, and QACAs, it is likely that we will receive further guidance from the Department on the administration of these new plan features.

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FIRM NEWS

Kevin Nolt will speak at CAPLAW's National Training Conference on June 20th in Denver on *Retirement Benefits for Nonprofits*.

Ellen Sueda and **Christian Hofstadte**r will be participating in an encore presentation for the National Association of Stock Plan Professionals (NASPP) on legal aspects and administration of equity compensation in connection with employees who die or divorce. The presentation, entitled *Death and Divorce: The Lighter Side of Equity Compensation*, will be a webcast on June 25, from 1 p.m. to 2:30 p.m. PST.

Julie Burbank was interviewed for and quoted in an article in the May 16 edition of BNA's Pension & Benefits Daily entitled *Domestic Partners: California Court Strikes Down Ban on Same-Sex Marriages*. In addition, Julie spoke on *Domestic Partner Benefit Issues Facing Retirement and Health & Welfare Plans* at the May 14 meeting of the San Francisco chapter of the Western Pension & Benefits Conference.

Ronald Triche spoke on May 6 for the Spring Conference of the Portland chapter of the Western Pension & Benefits Conference on *Alphabet Soup: Understanding QDIA, QACA, and EACA*.

Attorney Profile: Michelle L. Schuller

Michelle L. Schuller recently joined Trucker ✦ Huss, where she will focus on qualified retirement plans and health and welfare plans. Prior to joining Trucker ✦ Huss, Michelle worked for the Department of Labor's Employee Benefits Security Administration and for Great-West Life & Annuity Insurance Company. Michelle received her undergraduate degree, with honors and distinction, from the University of Colorado at Boulder and her JD from the University of San Francisco School of Law, where she was a member of the Moot Court Board.

Michelle is a member of the State Bar of California, the San Francisco Barristers Club (where she serves as vice-chair of the pre-practice committee) and the Western Pension & Benefits Conference.

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The **Trucker ✦ Huss *Benefits Report*** is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits.
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