



Western States Pension Assistance Project  
California Senior Legal Hotline  
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March 23, 2011

**VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED**

Benefits Service Center  
P.O. Box 770003  
Cincinnati, OH 45277-0072

Re: Surviving Spouse Benefits for Jan Smith  
Altria Retirement Plan Participant John Smith

Dear Altria Retirement Plan Representatives:

The Western States Pension Assistance Project is a nonprofit law office that assists individuals with questions regarding their pensions and retirement savings plans. Our services are provided free of charge. I am writing on behalf of Jan Smith, the surviving spouse of former Altria Retirement Plan (“the Plan”) participant John Smith. Ms. Smith’s signed authorization is enclosed.

I am writing this letter in the hope that you will help us resolve a problem associated with Ms. Smith’s pension benefit. To date, the Plan has refused to pay Ms. Smith’s pension benefit in accordance with the election her late husband made prior to his death. This failure to pay her pension benefit in accordance with the timely election Mr. Smith made violates Internal Revenue Code (the Code) section 417(c)(1) and Treasury Regulation 1.401(a)-20 Q&A 18. Violation of these provisions can place a retirement plan’s qualified status at risk under the Code.

Factual Background

Mr. Smith worked as an accountant with Mission Viejo Company from 1979 through 1997. Before he passed away, he was a participant in the Plan. In August 2010, Mr. Smith contacted the Altria Benefits Center in order to receive a pension application. He filled out the retirement application, designating his wife, Jan Smith, as the beneficiary and selecting the 75 percent qualified joint & survivor annuity (QJSA) option. (See Exhibit A) This

application was signed and notarized on August 24, 2010 and mailed shortly thereafter. On September 26, 2010, Mr. Smith passed away.

According to the Fidelity Net Benefits website, the Plan received Mr. Smith's signed application on August 29, 2010, reviewed the application for accuracy on September 2, 2010, and calculated the benefit on September 3, 2010. (See Exhibit B) Mr. Smith also received an email from Altria Group Benefits Center on September 2, 2010, which stated that they had reviewed his pension forms and found them to be free of error or omissions. (See Exhibit C) Therefore, there should be no doubt that the Plan received and processed Mr. Smith's signed application requesting a 75 percent QJSA before his death.

However, to Ms. Smith's surprise, she received a letter dated November 11, 2010 indicating that she would receive only \$452.43 per month instead of the \$657.66 per month under the 75 percent QJSA option. (See Exhibit D) Ms. Smith called the Plan to discuss this and was told that she is due a qualified pre-retirement survivor annuity (QPSA) instead of the 75 percent QJSA that her husband elected.

#### Internal Revenue Code and Treasury Regulations

Treasury Regulation 1.401(a)-20 Q&A 18 spells out the requirement for a Qualified Pre-retirement Survivor Annuity (QPSA) in a qualified defined benefit plan such as the Altria Retirement Plan.

The regulation states in relevant part, **"If the participant elects before the annuity starting date a form of joint and survivor annuity that satisfies the requirements for a QJSA and dies before the annuity starting date, the elected form is treated as the QJSA and the QPSA must be based on such form."**

While the Plan is correct that Ms. Smith is entitled to a preretirement survivor annuity, they are not only incorrect to ignore Mr. Smith's election of a 75 percent QJSA, but have placed the Plan in contravention of the Internal Revenue Code's minimum qualification standards by doing so.

A QPSA is a preretirement annuity payable to the surviving spouse that is based on a fiction – *if the individual had retired with the QJSA on the day immediately preceding his death*. In other words, the survivor benefit assumes that the individual actually retired with a Joint and Survivor Annuity and died the next day. (IRC §417(c)) However, the cited regulation makes clear that – as in our precise situation – where a participant has elected a 75 percent survivor annuity (an annuity that would meet ERISA's minimum qualification standards for a QJSA) and dies before the annuity start date, the resulting QPSA must be based on the *elected* benefit, not the plan's default QJSA benefit. Contrary to statements made by representatives from the Plan, the fact that Mr. Smith died before the actual annuity start date is irrelevant. Treasury Regulation 1.401(a)-20 requires the Plan to pay Ms. Smith the 75 percent survivor annuity in accordance with Mr. Smith's timely election.

## Conclusion

The Internal Revenue Code and Treasury Regulations clearly dictate that Mr. Smith's election of a 75 percent QJSA must be honored. We kindly request that the Altria Retirement Plan begin making payments to Ms. Smith in accordance with the 75 percent QJSA her husband timely elected before his death. Commencement of benefits in the correct amount will alleviate the necessity of my having to confirm these Plan failures with the Internal Revenue Service.

I look forward to hearing from you. You can contact me at (916) 930-4923. You may also direct your written response to me at: Western States Pension Assistance Project, California Senior Legal Hotline, 444 N. 3rd Street, Suite 312, Sacramento, CA 95811. Thank you in advance for your attention to this matter.

Sincerely,

Justin Freeborn  
Staff Attorney

cc: Ms. Jan Smith