

## LEGAL DEVELOPMENTS

### *Post-DOMA—A Look at the First Round of IRS and DOL Guidance and Their Impact on Qualified Plans*

On August 29, 2013, the IRS and Treasury issued their first round of guidance regarding the impact of United States v. Windsor—in which the Supreme Court declared Section 3 of the Defense of Marriage Act (DOMA) unconstitutional. Specifically, Revenue Ruling 2013-17 (the “Ruling,” Sept. 16 IRS Bulletin), along with two sets of “Frequently Asked Questions,” provide important guidance on two key open issues: the definition of “spouse,” and the effective date of the decision, for federal tax purposes.

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First, the Ruling defines “spouse” broadly to include all same-sex marriages that were performed in a domestic or foreign jurisdiction having the legal authority to sanction marriages—the “place of celebration” principle—without regard to the state law where the spouse is domiciled. (Note that 16 states and the District of Columbia have passed laws recognizing same-sex marriages.) This is welcomed guidance, as it avoids the administrative complexities of plan operations that would have resulted if a “place of residence” rule was adopted instead.

Second, the decision was effective on and after September 16, 2013. However, the Ruling provides for an optional retroactive effective date for payroll and tax refunds within the statute of limitations, but this provision does not extend to employee benefit plans, where the IRS is still considering if the *Windsor* decision will have any retroactive effect. Moreover, the Ruling indicates that additional guidance is pending to address employee benefit plans, along with a streamlined payroll refund process for employers.

A closer look at the Ruling and the DOL guidance to date, along with action steps for qualified plans, are set forth below.

#### Revenue Ruling 2013-17

The Ruling made the following three important holdings, effective prospectively as of September 16, 2013, for federal tax purposes:

- **“Spouse” includes those who have celebrated lawful same-sex marriages.** The term “spouse” (and husband/wife) includes an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term “marriage” includes a same-sex marriage. State law includes any domestic or foreign jurisdiction having the legal authority to sanction marriages.
- **“Place of celebration” controls the definition of “spouse.”** The IRS adopts a general rule recognizing a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex, even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages.
- **No impact on domestic partnerships.** The Ruling confirms that the term “spouse” (and husband/wife or marriage) does not include individuals (whether the same or opposite sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state.

The IRS focused the legal analysis on its long-standing position on common-law marriages first articulated in Revenue Ruling 58-66, which recognizes a valid common-law marriage even if the taxpayer later relocates to a state that does not, and emphasized the need for a uniform nationwide rule for efficient and fair tax administration, to support its holdings. Notably, in rejecting the “state of domicile” approach, the Ruling recognizes the massive administrative complexities of that position, stating that “plan administration would grow increasingly complex and certain rules, such as those governing required distributions under section 401(a)(9), would become especially challenging.”

Regarding employee benefit plans, the Ruling indicates that future guidance will address the retroactive application (if any) of the decision to other employee benefits (and related plans/arrangements). This guidance will consider the consequences of retroactive application to all impacted parties, the plan sponsor, the plan, the employer, and employees and beneficiaries. It will also provide sufficient time for plan amendments, and “any necessary corrections” so that the plan and benefits will retain favorable tax treatment.

## FAQs

The IRS issued two sets of informal Frequently Asked Questions (FAQs). One set is solely for same-sex marriages and the other set is for domestic partners/civil unions, making it very clear that different rules apply. Most of the same-sex marriage FAQs center around an individual’s federal income tax return refunds and related credits and filing status. However, there are a few helpful Q&As regarding “qualified retirement plans” (which is not defined) that provide some insight to the pending IRS guidance and on the need for plan sponsors to conform plan operations effective no later than September 16, 2013, to comply with this Ruling. They are summarized below:

- ***What rules apply to qualified retirement plans pursuant to Rev. Rul. 2013-17? (FAQ-16)***  
Qualified retirement plans (presumably, all tax-favored plans, *e.g.*, Code Sections 401(a), 403(b), 457(b) and IRAs) are required to treat a same-sex spouse (based on place of celebration) as a spouse for purposes of satisfying the federal tax laws relating to qualified retirement plans, regardless of the applicable state law in the state of domicile. As under prior law, a person who is in a registered

domestic partnership or civil union cannot be treated as a spouse for plan purposes.

- ***What are some examples of the consequences of these rules for qualified retirement plans? (FAQ-17)***

For a defined benefit plan or other pension plan, even if the employer operates in a state that does not recognize same-sex marriages, the participant is treated as married to a same-sex spouse if the place of celebration rule applies. Therefore, the spouse would be entitled to the qualified preretirement survivor annuity (QPSA) upon the death of the participant, and the form of benefit would need to be the qualified joint and survivor annuity (QJSA) unless the participant elects another form and obtains spousal consent.

For a 401(k) or other defined contribution plan that comes under the “profit-sharing plan” exception (*i.e.*, provides for payment of account balance to spouse with no annuity option), upon the death of an employee, the same-sex spouse must be paid the employee’s account balance unless the spouse has consented to another beneficiary under the applicable rules. The plan can provide that the default beneficiary of an unmarried participant is the registered domestic partner (unless the participant elects otherwise).

- ***When does Rev. Rul. 2013-17 apply to qualified retirement plans? (FAQ-18)***

Qualified retirement plans must comply with these rules as of September 16, 2013, and future guidance will address the rules prior to such date. (Note that the optional retroactive effective date noted above does not extend to matters relating to qualified retirement plans.)

- ***What will future guidance on qualified retirement plans address? (FAQ-19)***

The IRS intends to issue further guidance on how qualified retirement plans and other tax-favored retirement arrangements must comply with the *Windsor* decision and Revenue Ruling 2013-17, including plan amendment requirements and timing, and “any necessary corrections” relating to plan operations for prior periods.

## DOL Guidance

On September 18, 2013, the DOL (Employee Benefits Security Administration) issued its first wave of guidance set forth in Technical Release No. 2013-04, adopting the “place of celebration” principle for same-sex marriages for employee benefit plans. This

consistent approach between the agencies promotes uniformity of employee benefit plans, and avoids administrative complexities. The Release also indicated that future guidance addressing specific provisions of ERISA and its regulations will follow. (Note that for the Family and Medical Leave Act (FMLA) purposes, the “state of domicile” approach was previously adopted. It is unknown at this time if the prior FMLA guidance will stand or the DOL will modify it to match its new position for employee benefit plan purposes.)

### Conclusion

By the September 16, 2013, effective date, employers and plan administrators should take the following steps.

- *Plan operations.* Regardless of the plan document terms, beginning September 16, 2013, treat all same-sex spouses as “spouses” for plan purposes. This is particularly important for beneficiary designations (obtaining proper spousal consent) and paying plan benefits particularly in the event of death, to ensure that same-sex spouses are entitled to spousal rights and protections.
  - *Participant communication.* Consider sending a participant communication to notify participants of the *Windsor* decision and the IRS and DOL guidance, and recommend they update participant records (*e.g.*, their beneficiary designation forms), indicate marital status on the distribution forms, and provide spousal consent, when required. This
- may be particularly important for participants who have been provided distribution paperwork that has not been processed by the September 16, 2013 effective date.
- *Distribution of forms and processes.* Review and update plan distribution forms and administrative procedures to make sure they reflect the new law, generally treating a same-sex spouse as a spouse for plan purposes. This includes a review of the domestic partner/same-sex marriage procedures, and procedures for minimum required distributions, Code Section 415(b) limits, QDROs, loans, hardships, rollovers, and, of course, QJSA/QPSA benefits.
  - *Plan amendment.* As the effective date (*i.e.*, retroactive date possible) has not been determined by the IRS (or DOL), we recommend waiting for express plan amendment guidance to address post-DOMA. This approach is consistent with the IRS indication that as of September 9, 2013, IRS determination letters will include a caveat that we have not made any determination about plan language (including any amendments) related to Section 3 of DOMA or *U.S. v. Windsor* [133 S. Ct. 2675 (2013)], which invalidated that section.
  - *Corrective measures.* As we await guidance, plan sponsors are advised to be mindful of claims raised by same-sex spouses, but no final action should be taken until we receive guidance from the IRS regarding the effective date of the change, and the appropriate corrective measures to preserve the tax-qualified status of the plans. ■