

April 9, 2014

Treasury Department Issues Guidance on Application of Same-Sex Marriage Ruling to Retirement Plans

By Susan Hoffman

On April 4, 2014, the Department of the Treasury issued its long-awaited supplemental guidance on when and how tax-qualified retirement plans (including 401(k) plans) must comply with *Windsor v. United States*, in which the Supreme Court held that federal laws must recognize valid same-sex marriages. In Rev. Rul. 2013-17, the Department interpreted *Windsor* to require recognition (for purposes of the Internal Revenue Code) of same-sex spouses who were legally married where the marriage took place, effective Sept. 16, 2013. In the new guidance (Notice 2014-19), the Department expands upon that prior guidance with respect to qualified retirement plans and whether (and how) same-sex spouse recognition can be applied retroactively.

First, the Notice lists the provisions in qualified plans that affect married participants:

- Defined benefit plans and money purchase plans (and profit sharing plans that do not take advantage of the profit-sharing plan exception, described in the next bullet point) must provide qualified joint and survivor annuities (QJSAs) to married participants who commence benefits (absent notice to and consent from the participant's spouse). If a married, vested participant dies prior to commencement of benefits, a qualified preretirement survivor annuity (QPSA) must be provided to the participant's surviving spouse. These plans must also obtain spousal consent for loans.
- A profit sharing plan or 401(k) plan that offers non-annuity benefits as the normal form of benefits is exempt from the QJSA and QPSA requirements described above, if the spouse is the default beneficiary (absent notice to and consent from the participant's spouse to the designation of a non-spouse beneficiary).
- Surviving spouses are entitled to more options under the rollover rules and required minimum distribution rules.
- In determining whether there is a controlled group of corporations and in identifying key employees, an individual is treated as owning shares held by his or her spouse.
- Spouses of a seller or a 25% owner, or certain disqualified persons in an S corporation, are subject to limitations on the allocation of shares under an employee stock ownership plan (ESOP).

- Spouses can receive an assignment of rights or benefits under a qualified domestic relations order (QDRO) without a violation of the anti-alienation rule (which normally prohibits diversion of a participant's benefit to another person).

The Notice reiterates that the IRS will recognize a marriage of same-sex individuals that was validly entered into in a state that recognizes such marriages, regardless of state of residency, but that the IRS will not recognize as a marriage any other relationship recognized by a state that is "denominated" as something other than a marriage (such as registered domestic partnerships or civil unions). The Notice sets out the following principles for application of these same-sex marriage recognition rules to qualified retirement plans:

- Effective June 26, 2013, plans must be administered to recognize same-sex spouses residing in states that recognize their marriage.
- Effective Sept. 16, 2013, plans must be administered to recognize same-sex spouses based on state of celebration.
- If a plan simply refers to "spouse", an amendment is not required if the Notice's effective dates are used for plan administration.
- Plans *may* use an earlier effective date for recognizing same-sex spouses (for all relevant provisions or for one or more specific relevant provisions) if plan qualification rules are otherwise not violated. If so, the plan *must* be amended to reflect the actual effective date of the recognition of same-sex spouses for each specific provision [the amendment should be adopted this year].¹ For example, the ownership attribution rules could be difficult or impossible to implement retroactively, but the plan sponsor may wish to recognize same-sex spouses retroactively for purposes of the QJSA and QPSA and QDRO rules.
- If a plan defined "spouse" with reference to the Defense of Marriage Act (DOMA) or as an opposite-sex spouse, the plan must be amended by the later of the end of the plan's remedial amendment period or Dec. 31, 2014.
- If a defined benefit plan is restricted under Internal Revenue Code §436 (so that it cannot improve benefits because of funded status), the required amendment can be adopted but an amendment to adopt an optional retroactive effective date is subject to the restrictions of Code §436(c).

Note that the guidance is limited to tax qualification. If a benefit was denied to a same-sex spouse before the effective dates in this Notice, a plan participant can still attempt to pursue the benefit under ERISA, on a theory that *Windsor's* holding should be applied retroactively. If a plan simply used the term "spouse," but did not provide a benefit to a same-sex spouse prior to *Windsor*, a participant might attempt to claim the benefit based entirely on the language of the plan (without regard to whether *Windsor* had a retroactive application).

Next Steps

Employers should ensure that plan administration complies with the effective dates in the Notice, and should decide whether to apply same-sex spouse recognition retroactively (before the effective dates in the Notice), in which case the plan should be amended this year. Employers should review their retirement plan documents to determine if an amendment is needed to correct the definition of "spouse."

[Susan Katz Hoffman](#) is a Shareholder in Littler's Philadelphia office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. Hoffman at shoffman@littler.com.

¹ The general rule is that an optional plan amendment adopted to reflect new guidance must be adopted in the plan year of its effective date. In this case, the effective date is going to be prior to 2014 (if the employer chooses a retroactive effective date) so it's not possible to apply that general rule as written. The safest course is to have the amendment adopted in 2014.