

Application of the Windsor Decision and Rev. Rul. 2013-17 to Qualified Retirement Plans

Notice 2014-19

I. PURPOSE

The purpose of this notice is to provide guidance on the application (including the retroactive application) of the decision in United States v. Windsor, 570 U.S. ___, 133 S. Ct. 2675 (2013), and the holdings of Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (Sept. 16, 2013), to retirement plans qualified under section 401(a) of the Internal Revenue Code (Code).

II. BACKGROUND

01. Qualified Retirement Plan Rules Relating to Married Participants

Several Code sections provide special rules with respect to married participants in qualified retirement plans, including, but not limited to, the following:

- Under section 401(a)(11), certain qualified retirement plans must provide a qualified joint and survivor annuity (QJSA) upon retirement to married participants (and generally must provide a qualified preretirement survivor annuity (QPSA) to the surviving spouse of a married participant who dies before retirement). If a plan is subject to these rules, the QJSA (or QPSA) may be waived by a married participant only with spousal consent pursuant to section 417. If such a plan permits loans to participants, then section 417(a)(4) requires a plan to obtain the consent of the spouse of a married participant before making a loan to the participant.
- Under section 401(a)(11)(B)(iii), certain qualified defined contribution retirement plans are exempt from the QJSA and QPSA requirements provided that a married participant's benefit is payable in full, on the death of the participant, to the participant's surviving spouse, unless the surviving spouse consents to the designation of a different beneficiary.
- Under the required minimum distribution rules of section 401(a)(9) and the rollover rules of section 402(c), additional alternatives are provided for surviving spouses that are not available to non-spousal beneficiaries.
- Under section 1563(e)(5), generally a spouse is treated as owning shares owned by the other spouse for purposes of determining whether corporations are members of a controlled group under section 414(b).

- Under section 318(a)(1), generally a spouse is treated as owning shares owned by the other spouse for purposes of determining whether an employee is a key employee under section 416(i)(1), including whether an employee is considered a 5% owner.
- Under section 409(n), an employee stock ownership plan (ESOP) that acquires certain employer securities generally must prohibit the allocation or accrual of those securities for the benefit of certain individuals, including the spouse of the seller and the spouse of any individual who owns 25% or more of the securities.
- Under section 409(p), no portion of the assets of an ESOP attributable to employer securities consisting of S corporation stock may accrue during a nonallocation year for the benefit of any disqualified person or certain family members of the disqualified person (including the spouse) in certain circumstances.
- Under section 401(a)(13)(B), the anti-alienation rules do not apply to the creation, assignment, or recognition of an alternate payee's right to receive all or a portion of the benefits payable to a participant under a plan pursuant to a qualified domestic relations order (QDRO) described in section 414(p), and, under section 402(e)(1), an alternate payee who is a spouse or former spouse of the participant is treated as the distributee of a distribution under a QDRO.

02. Defense of Marriage Act

Until the decision of the Supreme Court in Windsor found it unconstitutional, section 3 of the Defense of Marriage Act (DOMA) prohibited the recognition of same-sex spouses for purposes of Federal tax law. Specifically, section 3 of DOMA provided that:

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. As a result, same-sex spouses were not recognized for purposes of the Code with respect to qualified retirement plans.

03. Effect of the Windsor Decision and Rev. Rul. 2013-17

In the Windsor decision, the Supreme Court held on June 26, 2013 that section 3 of DOMA is unconstitutional because it violates Fifth Amendment principles. Subsequent to the Windsor decision, Rev. Rul. 2013-17 held the following:

(1) For Federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" include an individual married to a person of the same sex if the individuals

are lawfully married under state law, and the term “marriage” includes such a marriage between individuals of the same sex.

(2) For Federal tax purposes, the Internal Revenue Service (Service) 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.

(3) For Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” do not include individuals (whether of the opposite sex or the same 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, and the term “marriage” does not include such formal relationships.

The holdings of Rev. Rul. 2013-17 apply for all Federal tax purposes, including for purposes of the Federal tax rules that apply to qualified retirement plans under section 401(a). The ruling provides that the holdings will be applied prospectively as of September 16, 2013. The ruling also provides that taxpayers may rely on the holdings retroactively with respect to any employee benefit plan or arrangement (or any benefit provided thereunder) for limited purposes with respect to certain employer-provided health coverage and fringe benefits that are specified in the ruling. The ruling further states that:

The Service intends to issue further guidance on the retroactive application of the Supreme Court’s opinion in Windsor to other employee benefits and employee benefit plans and arrangements. Such guidance will take into account the potential consequences of retroactive application to all taxpayers involved, including the plan sponsor, the plan or arrangement, employers, affected employees and beneficiaries. The Service anticipates that the future guidance will provide sufficient time for plan amendments and any necessary corrections so that the plan and benefits will retain favorable tax treatment for which they otherwise qualify.

04. Authority under Section 7805(b)(8)

Under section 7805(b)(8), the Commissioner is authorized to prescribe the extent, if any, to which any judicial decision, or any administrative determination other than by regulation, relating to the internal revenue laws is to be applied without retroactive effect.

05. Remedial Amendment Period under Section 401(b)

Section 401(b) provides a period during which a plan may be amended retroactively to comply with the Code's qualification requirements. The deadline for amending a plan is generally the time prescribed by law for filing the return of the employer for its taxable year in which the amendment was adopted or such later time as the Secretary may designate.

Rev. Proc. 2007-44, 2007-28 I.R.B. 54, provides rules regarding the timing of amendments made to qualified retirement plans. Section 5.05 of Rev. Proc. 2007-44 provides that when there are changes to the plan qualification requirements that affect provisions of the written plan document, the adoption of an interim amendment generally is required by the later of the end of the plan year in which the change is first effective or the due date of the employer's tax return for the tax year that includes the date the change is first effective.

III. QUESTIONS AND ANSWERS

GENERAL RULES

Q-1. How does the Windsor decision affect the application of the Federal tax rules to qualified retirement plans?

A-1. In the Windsor decision, the Supreme Court held that section 3 of DOMA (which applied for purposes of determining an individual's marital status under Federal law) is unconstitutional. In the absence of section 3 of DOMA, any retirement plan qualification rule that applies because a participant is married must be applied with respect to a participant who is married to an individual of the same sex. For example, a participant in a plan subject to the rules of section 401(a)(11) who is married to a same-sex spouse cannot waive a QJSA without obtaining spousal consent pursuant to section 417.

Q-2. As of what date are qualified retirement plans required to be operated in a manner that reflects the outcome of Windsor and the guidance in Rev. Rul. 2013-17?

A-2. Qualified retirement plan operations must reflect the outcome of Windsor as of June 26, 2013. A retirement plan will not be treated as failing to meet the requirements of section 401(a) merely because it did not recognize the same-sex spouse of a participant as a spouse before June 26, 2013. For Federal tax purposes, effective as of September 16, 2013, Rev. Rul. 2013-17 (i) adopts a general rule recognizing a marriage of same-sex individuals that is validly entered into in a state whose laws authorize the marriage of two individuals of the same sex, even if the individuals are domiciled in a state that does not recognize the validity of same-sex marriages, and (ii) provides that individuals (whether part of an opposite-sex or same-sex couple) 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 are not treated as married. Accordingly, a retirement plan will not be treated as failing to meet the requirements of section 401(a) merely because the plan, prior to

September 16, 2013, recognized the same-sex spouse of a participant only if the participant was domiciled in a state that recognized same-sex marriages. See Q&A-8 for the deadline to adopt plan amendments pursuant to this notice.

Q-3. May a qualified retirement plan be amended to reflect the outcome of Windsor as of a date earlier than June 26, 2013, and, if so, may the amendment reflect the outcome of Windsor for only certain purposes?

A-3. A qualified retirement plan will not lose its qualified status due to an amendment to reflect the outcome of Windsor for some or all purposes as of a date prior to June 26, 2013, if the amendment complies with applicable qualification requirements (such as section 401(a)(4)). Recognizing same-sex spouses for all purposes under a plan prior to June 26, 2013, however, may trigger requirements that are difficult to implement retroactively (such as the ownership attribution rules) and may create unintended consequences. Provided that applicable qualification requirements are otherwise satisfied, a plan sponsor's choice of a date before June 26, 2013, and the purposes for which the plan amendments recognize same-sex spouses before June 26, 2013, do not affect the qualified status of the plan. For example, for the period before June 26, 2013, a plan sponsor may choose to amend its plan to reflect the outcome of Windsor solely with respect to the QJSA and QPSA requirements of section 401(a)(11) and, for those purposes, solely with respect to participants with annuity starting dates or dates of death on or after a specified date.

PLAN AMENDMENTS

Q-4. For purposes of satisfying the Federal tax rules relating to qualified retirement plans, must a qualified retirement plan be amended to reflect the outcome of Windsor and the guidance in Rev. Rul. 2013-17 and this notice?

A-4. Whether a plan must be amended to reflect the outcome of Windsor and the guidance in Rev. Rul. 2013-17 and this notice depends on the terms of the specific plan, as described in Q&A-5 through Q&A-7 of this notice.

Q-5. Must a plan sponsor amend a qualified retirement plan if its terms with respect to the requirements of section 401(a) define a marital relationship by reference to section 3 of DOMA or if the plan's terms are otherwise inconsistent with the outcome of Windsor or the guidance in Rev. Rul. 2013-17 or this notice?

A-5. If a plan's terms with respect to the requirements of section 401(a) define a marital relationship by reference to section 3 of DOMA or are otherwise inconsistent with the outcome of Windsor or the guidance in Rev. Rul. 2013-17 or this notice, then an amendment to the plan that reflects the outcome of Windsor and the guidance in Rev. Rul. 2013-17 and this notice is required by the date specified in Q&A-8 of this notice.

Q-6. If a qualified retirement plan's terms are not inconsistent with the outcome of Windsor and the guidance in Rev. Rul. 2013-17 and this notice (for example, the term

“spouse,” “legally married spouse” or “spouse under Federal law” is used in the plan without any distinction between a same-sex spouse and an opposite-sex spouse), must the plan be amended to reflect the change in meaning or interpretation of those terms to include same-sex spouses?

A-6. If a plan’s terms are not inconsistent with the outcome of Windsor and the guidance in Rev. Rul. 2013-17 and this notice, an amendment generally would not be required. If no amendment to such a plan is made, the plan nonetheless must be operated in accordance with the provisions of Q&A-2 of this notice. (Though not required, a clarifying amendment may be useful for purposes of plan administration.)

Q-7. If a plan sponsor chooses to apply the rules with respect to married participants in qualified retirement plans in a manner that reflects the outcome of Windsor for a period before June 26, 2013, is an amendment to the plan required?

A-7. Yes, if a plan sponsor chooses to apply the rules in a manner that reflects the outcome of Windsor for a period before June 26, 2013, an amendment to the plan that specifies the date as of which, and the purposes for which, the rules are applied in this manner is required. The deadline for this amendment is the date specified in Q&A-8 of this notice.

Q-8. What is the deadline to adopt a plan amendment pursuant to this notice?

A-8. The deadline to adopt a plan amendment pursuant to this notice is the later of (i) the otherwise applicable deadline under section 5.05 of Rev. Proc. 2007-44, or its successor, or (ii) December 31, 2014. Moreover, in the case of a governmental plan, any amendment made pursuant to this notice need not be adopted before the close of the first regular legislative session of the legislative body with the authority to amend the plan that ends after December 31, 2014.

Q-9. Is an amendment to a single-employer defined benefit plan that implements the outcome of Windsor and the guidance in Rev. Rul. 2013-17 and this notice subject to the requirements of section 436(c)?

A-9. In general, under section 436(c), an amendment to a single-employer defined benefit plan that increases the liabilities of the plan cannot take effect unless the plan’s adjusted funding target attainment percentage is sufficient or the employer makes the additional contribution specified under section 436(c)(2). However, this notice provides a special rule pursuant to § 1.436-1(c)(4)(iii). Under this special rule, a plan amendment that is described in Q&A-5 of this notice and that takes effect on June 26, 2013, is not treated as an amendment to which section 436(c) applies. In contrast, a plan amendment that is described in Q&A-7 of this notice is an amendment to which section 436(c) applies.

IV. EFFECT ON OTHER DOCUMENTS

Rev. Rul. 2013-17 is amplified by providing further guidance on the effect of the Windsor decision with respect to qualified retirement plans under section 401(a).

V. DRAFTING INFORMATION

The principal authors of this notice are Angelique Carrington of the Employee Plans, Tax Exempt and Government Entities Division, and Jeremy Lamb of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Ms. Carrington at *RetirementPlanQuestions@irs.gov* or Mr. Lamb at (202) 317-6700 (not a toll-free call).