

IRS Releases New Guidance on Application of Windsor to Qualified Retirement Plans

On April 4, 2014, the IRS published [Notice 2014-19](#), its highly anticipated guidance on how tax-qualified plans must treat same-sex marriages following the Supreme Court's decision in [United States v. Windsor](#) striking down section 3 of the Defense of Marriage Act. The IRS had previously issued [Revenue Ruling 2013-17](#) providing guidance as to how same-sex marriages would be treated for federal tax purposes. Notice 2014-19 and the accompanying set of [FAQs](#) provide further guidance on how qualified retirement plans must be changed with regard to treatment of same-sex spouses to comply with the qualified plan rules, examples of the applicable rules, when these changes become effective, and when plan amendments must be adopted that reflect these changes.

Notice 2014-19 provides the following key guidance in applying *Windsor* to qualified retirement plans:

- **Plan qualification requirements apply to same-sex spouses.** Any plan qualification requirement that applies because a participant is married must now be applied to a participant in a same-sex marriage. These include, for example: (1) the qualified joint and survivor annuity, qualified preretirement survivor annuity and spousal consent rules; (2) alternatives for surviving spouses under the required minimum distribution rules; (3) ownership attribution to spouses for various plan qualification requirements; and (4) the exception to the anti-alienation rule for qualified domestic relations orders.
- **Same-sex marriages must be recognized retroactively to June 26, 2013.** Plans must recognize same-sex marriages in accordance with *Windsor* for these purposes retroactively to June 26, 2013, the date of the Supreme Court's decision in that case. However, a plan will not be treated as failing to satisfy this requirement merely because it recognized a participant's same sex-spouse based only on the state in which the member was domiciled or resided, for the period between June 26, 2013, and September 16, 2013, the effective date of Revenue Ruling 2013-17, which established state of celebration of the marriage as determining marriage for federal law purposes. Plans may recognize same-sex marriages for some or all qualified plan purposes for periods before June 26, 2013, if the plan is amended to provide this.

by Judith W. Boyette & Edward M. Bernard



But the IRS cautions that this may trigger requirements, including for example the ownership attribution rules, that are difficult to implement retroactively, resulting in unintended consequences.

- **Amendments required only if plan previously defined marriage with reference to DOMA or as provided under DOMA.** A plan sponsor must amend its plan to reflect the *Windsor* decision only if it includes terms that define marriage by reference to section 3 of DOMA or are otherwise inconsistent with *Windsor* and Revenue Ruling 2013-17. Thus, for example, a plan that defines spouse by reference to spouse as defined under federal law, without distinction between same- or opposite-sex spouses, would not need to be amended. But, the IRS points out, a clarifying amendment might, nonetheless, be useful for purposes of plan administration.
- **Deadline for adopting amendments generally December 31, 2014.** Plans must adopt any amendment necessary to reflect *Windsor* by the later of (1) the end of the regular remedial amendment period for interim amendments – generally, the due date, including the extensions, for filing the employer's tax return for the employer's tax year in which the amendment becomes effective – or (2) December 31, 2014. A calendar year plan sponsor will, therefore, generally have until December 31, 2014 to amend their plan. Governmental plans must be amended to reflect these changes by the close of the first regular legislative session that ends after December 31, 2014.
- **Funding-based benefit amendment restrictions under Code section 436(c) do not apply.** The funding-based benefit restrictions on amendments under section 436(c) of the tax code, which generally prohibit an amendment that increases plan liabilities if the plan is, or would be after the amendment, less than 80% funded, do not apply to the adoption of an amendment required to reflect *Windsor* that is effective on June 26, 2013. This exception does not, however, apply to any amendment effective before that date.

Plan sponsors should review their plan documents and their operations to ensure that they comply with this new guidance and adopt any needed amendments by the applicable deadline. For questions about the new guidance, please contact the Hanson Bridgett Employee Benefits Group.

For more information, please contact:

Judith W. Boyette, Partner
415-995-5115
jboyette@hansonbridgett.com

Edward M. Bernard, Partner
415-995-5807
ebernard@hansonbridgett.com