

IRS ISSUES SAME GENDER MARRIAGE GUIDANCE – RETROACTIVE IMPACT FOR RETIREMENT PLANS

The IRS issued much anticipated guidance concerning whether, and to what extent, tax qualified retirement plans must retroactively operate in accordance with the June 26, 2013 *United States v. Windsor* decision. For the most part, Notice 2014-19, issued April 4, 2014, was positively received by the retirement plan and business community. Because the Supreme Court decision means that section 3 of the Defense of Marriage Act (“DOMA”) was not valid from its inception, a number of individuals feared that the IRS would force retirement plans to go back for many years to “correct” situations where spouses of legally married same sex couples failed to receive ERISA mandated survivor benefits. The Notice contains two key dates: June 26, 2013 and September 16, 2013.

Significance of June 26, 2013

No later than June 26, 2013, qualified retirement plans (including Code 403(b) plans) must recognize legally married same-sex spouses who reside in the state in which they were married. Plans may be amended to voluntarily ignore DOMA on a date earlier than June 26, 2013. More significantly for Plan Administrators, retirement plans that operated in accordance with DOMA before June 26, 2013 are not required to make administrative corrections for transactions that occurred prior to the *Windsor* decision. Thus, for example, suppose a plan participant died in 2010 and the plan paid the participant’s benefit to his/her estate because no beneficiary was designated, even though the participant had a same-sex spouse who did not waive survivor benefits. Since death occurred prior to June 26, 2013, the plan is permitted to operate in accordance with DOMA

and no correction is needed. Note that under the same fact pattern, had the participant died in November 2013, the plan must pay the participant’s spouse unless the spouse waived his/her survivor benefits.

Significance of September 16, 2013

On September 16, 2013, the IRS issued Revenue Ruling 2013-17 addressing the issue of same-sex married couples who do not reside in the state in which they were married. The Ruling states that couples legally married in one state must be treated for Federal tax purposes as being legally married without regard for the state in which they currently reside. The Ruling makes it clear that even if a same-sex legally married couple now resides in a state that does not recognize same-sex marriages, retirement plans must treat them as married for determining benefits. In recognition of this Ruling, the new Notice 2014-19 requires retirement plans to operate under this rule starting September 16, 2013. During the period from June 26, 2013 through September 15, 2013, retirement plans may operate by either ignoring or recognizing out of state same-sex marriages.

Plan Amendments to Reflect *Windsor*:

Generally speaking, unless a retirement plan has a definition of spouse that reflects the “opposite sex language” of DOMA, a plan amendment to reflect the *Windsor* decision is not necessary. For example, retirement plan documents drafted by NRS for its clients require no amendment. If an amendment is necessary, it is normally required to be adopted no later than December 31, 2014.

Windsor Plan Correction Methodology:

Failure to operate a plan in accordance with the *Windsor* decision may be corrected using the same correction rules as those provided under the

Employee Plans Compliance Resolution System (EPCRS). This System is currently documented in Revenue Procedure 2013-12 and is regularly used by employers and their advisors, including NRS.

In short, unless a qualified retirement plan has not been operating in accordance with *Windsor* since last June 26, there is no need to amend or correct plan operations. It is likely that employee communications, such as the Summary Plan Description will require revisions, but these should be minor. If an employer has not already done so, it would be a good idea to review all retirement plan death benefits paid after June 25, 2013 to be sure there are no unpaid same-sex spouses. Also, current beneficiary designations need review and employees need to be encouraged to update spousal information that is kept on file with their employer.

EMPLOYERS SHOULD PAY ATTENTION TO PLAN DOCUMENTS

For the past 40 or more years, one of the requirements for a tax qualified employee retirement plan is that the terms of the plan must be in writing. Furthermore, the employer and others responsible for plan administration must operate the plan per its terms. Failure to do so can result in loss of the plan's tax favored status. Care should be exercised to be sure that plan operations are consistent with the written plan terms. For example, if a plan is completely restated, it is a good idea to compare old and new documents to find and resolve any discrepancies. Periodically, employers that are administering a plan differently from what the document says will simply point out "That's not the way we intended the document to read." Neither U.S. Government agencies nor the courts accept this argument. If there is a material difference between what is written and what is done, or if the document calls for one or more committees that have never been formed, the employer is well advised to take prompt corrective

action. With the upcoming Pension Protection Act ("PPA") Defined Contribution Plan Document Restatement starting later this year, it is highly suggested that employers be more familiar and involved with this process.

REMINDERS FOR MAY

May 15 - Calendar year defined contribution plans that permit participant investment selection must issue first quarter plan participant benefit statements.

May 15 - Defined contribution plan employer contributions are due for employer tax returns due May 15 covering the fiscal year ending 02/28/2014 and for the fiscal year ending 08/31/2013 tax returns that are on extension to May 15.

May 15 - Form 5500/8955-SSA – Forms due for Plan Year Ending ("PYE") 07/31/2013 that are on extension.

May 31 - Form 5500/8955-SSA – Forms due for 10/31/2013 PYE that have not been placed on extension.

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