
Guidance Issued on Treatment of Same-Sex Spouses Under Qualified Retirement Plans

By Stephanie L. Hicks / Apr 25, 2014

The IRS recently issued Notice 2014-19 (the "Notice"), which provides additional guidance on how qualified retirement plans should treat the marriages of same-sex couples following the U.S. Supreme Court's decision in *United States v. Windsor*.

Background

The *Windsor* decision invalidated Section 3 of the Defense of Marriage Act ("DOMA"), which barred married same-sex couples from being treated as married under federal law. In light of the *Windsor* ruling, the IRS issued Rev. Rul. 2013-17, where the IRS adopted a "state of celebration" rule, holding that same-sex marriages will be recognized for federal tax purposes if the same-sex couple was legally married under any state law, even if the couple resides in a state that does not recognize same-sex marriages. However, Rev. Rul. 2013-17 left open various additional questions about the effect of the *Windsor* ruling on qualified retirement plans.

Questions Answered or Clarified by Notice 2014-19

1. References to "Spouse" and "Marriage" in Plan Qualification Requirements Include Same Sex Spouses

The IRS clarified in the Notice that 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, 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). This means that a participant's legal same-sex spouse will be deemed the participant's "surviving spouse" for purposes of the QJSA and QPSA requirements.

2. Limited Retroactive Effect

The Notice clarified that qualified retirement plans must be operated in a manner consistent with the *Windsor* ruling as of June 26, 2013 (i.e., the date of the *Windsor* ruling). However, a retirement plan will not be treated as failing to meet qualification requirements merely because, prior to September 16, 2013 (i.e., the date of Rev. Rul. 2013-17), the plan recognized the same-sex spouse of a participant only if the participant was domiciled in a state that recognized same-sex marriages.

While the Notice provides additional guidance related to the retroactive effect of the *Windsor* ruling, some administrative questions do remain unanswered. For example:

- If a qualified plan participant who had a legal same-sex spouse as of June 26, 2013 retired and received a distribution from a plan with a QJSA requirement, is the plan administrator required to re-issue a benefit election that includes the QJSA and/or obtain retroactive spousal consent to the distribution? The Notice does not provide any further administrative guidance to plan administrators regarding this scenario.
- Are plan administrators required to proactively determine whether a participant has a same-sex spouse? For example, for those participants who received plan distributions on and after June 26, 2013, must the plan administrator determine whether such participants had same-sex spouses? The Notice does not provide any guidance on whether plan administrators are required to undertake such a duty.

3. Plan Amendments

If a qualified plan's terms are inconsistent with *Windsor* or Revenue Ruling 2013-17, a retirement plan must be amended to comply with *Windsor* and Revenue Ruling 2013-17. For example, a plan must be amended if it defines "spouse" by reference to section 3 of DOMA, or only as a person of the opposite sex. Required amendments must be adopted by the later of December 31, 2014, or the applicable date under the IRS' general amendment guidance for qualified retirement plans under Rev. Proc. 2007-44.

In addition, a qualified retirement plan is permitted to be amended to reflect the outcome of *Windsor* as of a date earlier than June 26, 2013. Such a voluntary amendment is also permitted to reflect the outcome of *Windsor* for only certain purposes.

A copy of Notice 2014-19 can be found at: <http://www.irs.gov/pub/irs-drop/n-14-19.pdf>

If you have any questions about the Notice 2014-19 or about the *Windsor* ruling in general, please contact Ed Hammond at ehammond@clarkhill.com or (248) 988-1821; Doug Ellis at dellis@clarkhill.com or (412) 394-2367; Kristi Gauthier at kgauthier@clarkhill.com or (248) 988-5854; or Stephanie Hicks at shicks@clarkhill.com or (248) 988-5893.