

Date: April 29, 2014

TCRS 2014-01: Additional guidance for retirement plans regarding application of the Supreme Court's decision on the Defense of Marriage Act (the Windsor decision).

Background:

On April 4, 2014, the Internal Revenue Service ("IRS") issued Notice 2014-19, providing guidance for retirement plans on the application of the Supreme Court's decision (*United States v. Windsor*, also referenced as the Windsor decision). The Windsor decision, decided on June 26, 2013, struck down section 3 of the Defense of Marriage Act ("DOMA"), which had defined "marriage" as the legal union between one man and one woman as husband and wife, and "spouse" as a person of the opposite sex who is a husband or wife.

In addition to Notice 2014-19 (click [here](#) for a link), the IRS posted *Answers to Frequently Asked Questions* on its website (click [here](#) for a link) as additional guidance regarding the application of the Windsor decision.

We previously issued two TCRS releases about the Windsor decision, as follows:

- TCRS 2013-02 (click [here](#) for a link), which summarized the Windsor decision, and
- TCRS 2013-04 (click [here](#) for a link), which summarized Revenue Ruling 2013-17, initial guidance from the U.S. Department of the Treasury and IRS about the Windsor decision, which included the definition of what is, and what is not, marriage for same-sex couples.

Below is a summary of Notice 2014-19 and the *Answers to Frequently Asked Questions*.

Summary for qualified retirement plans:

Effective Date:

A plan must be operated in accordance with the Windsor decision and Revenue Ruling 2013-17 as of June 26, 2013. Otherwise, the plan will fail to meet the qualification requirements of Internal Revenue Code ("Code") §401(a).

- An exception to the above: If, prior to September 16, 2013, the plan administrator interpreted the Windsor decision to recognize the same-sex spouse of a participant only if the participant was domiciled in a state that recognized same-sex marriages, a plan will not be treated as failing to meet the Code §401(a) requirements. This exception does not apply if the plan administrator's interpretation was based upon a designated state's law due to a plan's choice-of-law clause.
- Earlier retroactive effective date is allowed – but may not be advisable.
 - A plan may be amended to provide an effective date earlier than June 26, 2013 (by which to operate the plan in accordance with the Windsor decision), so long as the amendment complies with Code §401(a).
 - Allowing an earlier effective date for all plan purposes may have unintended negative consequences, such as causing a retroactive failure of nondiscrimination tests due to ownership attribution rules of spouses. To avoid unintended consequences, a plan may provide an earlier effective date for only certain plan purposes, such as for only Qualified Joint and Survivor Annuity ("QJSA") and Qualified Pre-Retirement Survivor Annuity ("QPSA") requirements.
 - For a single-employer defined benefit plan, amending the plan using an effective date earlier than June 26, 2013 for any purpose must comply with Code §436(c) (if no earlier effective date is used, the requirements of Code §436(c) do not apply). Under Code §436(c), an amendment that increases the plan's liabilities cannot take effect unless the plan's adjusted funding target attainment percentage is sufficient, or the employer makes an additional contribution as specified in Code §436(c)(2).
 - Similar to the above, for a multiemployer defined benefit plan, amending the plan using an effective date earlier than June 26, 2013 for any purpose must comply with Code §432 (if no earlier effective date is used, the requirements of Code §432 do not apply).

Plan Operational Compliance:

As of the Effective Date, any plan qualification rule that applies because a participant is married, applies to participants in a same-sex marriage.

- Examples of plan qualification rules that may apply include spousal consent requirements for plans subject to the QJSA rules, and for plans not subject to the QJSA rules, the requirement that death benefits must be paid to a surviving spouse unless the surviving spouse otherwise waived such right and consented to the naming of another beneficiary.
- The answer to FAQ-1 in the *Answers to Frequently Asked Questions* gave an example of a participant in a same-sex marriage who died on or after June 26, 2013. In such a situation, the surviving spouse must consent to the designation of another beneficiary. What is not clear from the guidance is how retroactive application may apply in other circumstances, such as where a participant in a same-sex marriage severed employment and elected a distribution prior to June 26, 2013 without the spouse's consent, but where the actual benefit payment from the plan was made after June 26, 2013. Until further clarification is issued (if any), plan sponsors should consult with their ERISA counsel on what action to take, if any, should the plan sponsor be unsure how to proceed.
- If the plan's operation needs to be retroactively implemented, principles similar to those in Revenue Procedure 2013-12, the Employee Plans Compliance Resolution System, should be used.
 - An example includes spousal consent that was not obtained at the time a distribution was made after June 26, 2013 to a participant in a same-sex marriage under a plan requiring spousal consent. Because spousal consent was necessary due to the retroactive implementation of the Windsor decision, the plan should obtain spousal consent now (to consent to what actually happened). If spousal consent cannot be obtained, the plan would need to correct in accordance with procedures similar to section 6.04(1) of Revenue Procedure 2013-12, which might have a financial impact to the plan and/or to the plan sponsor.

Plan Amendment Requirements:

- A plan amendment is not necessary if the terms of the plan already comply with the Windsor decision, Revenue Ruling 2013-17, and Notice 2014-19.
 - Even if a plan amendment is not necessary, the plan must still have operated in accordance with the Windsor decision as of the Effective Date.
- A plan amendment is required if:
 - the plan defines terms of a marital relationship, such as "marriage" or "spouse," by reference to section 3 of DOMA, or if the plan's terms are otherwise inconsistent with the Windsor decision, Revenue Ruling 2013-17, and Notice 2014-19; and/or
 - the amendment is retroactive to a date earlier than June 26, 2013.
- If an amendment is required, the amendment must be retroactive to at least June 26, 2013 (assuming the plan was in effect at that time).

Plan Amendment Deadline: The date by which an amendment must be adopted is generally December 31, 2014 (except see below for a governmental plan).

- Notice 2014-19 provides that the adoption of the amendment is the later of (i) an otherwise applicable deadline under section 5.05 of Revenue Procedure 2007-44 or its successor, or (ii) December 31, 2014.
- Section 5.05 of Revenue Procedure 2007-44 provides that a required amendment to a plan must be adopted by the later of (a) the end of the plan year in which the change is first effective, or (b) the due date of the employer's tax return for the tax year that includes the date the change is first effective.
- As a result of the above, off-calendar plans first effective in 2013, or plans first effective in 2014 (that require amendment) are possible examples of plans that might have an adoption date later than December 31, 2014.
- For a governmental plan, the adoption deadline is 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.

Summary for 403(b) Plans:

Effective Date: A plan must be operated in accordance with the Windsor decision and Revenue Ruling 2013-17 as of June 26, 2013.

- However, if, prior to September 16, 2013, the plan recognized the same-sex spouse of a participant only if the participant was domiciled in a state that recognized same-sex marriages, a plan will not be treated as failing to meet the operational requirements.

- An earlier effective date is allowed. To avoid unintended consequences of an earlier effective date for all plan purposes, a plan may provide an earlier effective date for only certain plan purposes

Plan Operational Compliance: As of the Effective Date, any plan rule that applies because a participant is married, must be applied to participants in a same-sex marriage.

Plan Amendment Deadline: The date by which an amendment must be adopted is by the last day of the remedial amendment period referenced in section 21 of Revenue Procedure 2013-22. The IRS has not yet announced the end date of the remedial amendment period, but the end date is expected to be more than a year after such announcement.

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