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Windsor compliance dates clarified

By Stacy Crosnicker and Christian Hancey

The IRS just issued important guidance on the application of the *Windsor* same-sex marriage ruling to tax-qualified retirement plans. Here's what you need to know.

The Supreme Court's same-sex marriage ruling in *United States v. Windsor*, 133 S. Ct. 2675 (2013), raised many unanswered questions as to how the rights of same-sex spouses would be affected under pension plans, 401(k) plans and 403(b) plans. On Friday, April 5, the IRS published Notice 2014-19, which addresses the key issues of the retroactive application of *Windsor* and the deadline for any required plan amendments. (You can find Notice 2014-19 on the IRS website at this link: [Notice 2014-19](#))

The key *Windsor* rulings

In its *Windsor* decision, the Supreme Court declared unconstitutional Section 3 of the Defense of Marriage Act (DOMA), which prohibited recognition of same-sex spouses for purposes of federal tax law. (See *United States v. Windsor*, 133 S. Ct. 2675 (2013)) Shortly thereafter, the IRS issued Notice 2013-17 on September 16, 2013, stating that for purposes of federal tax law, the term "spouse" includes a same-sex spouse if the couple was lawfully married under state law. In applying this rule, the IRS recognized same-sex marriages entered into in a state that authorizes same-sex marriage, even if the couple is domiciled in a state that does not recognize same-sex marriage. Notice 2013-17 left several questions unanswered, however, including whether retirement plans would have to comply with *Windsor* retroactively and the due date for any plan amendments required to comply with the *Windsor* decision.

***Windsor* compliance dates clarified**

Under the new IRS guidance, qualified retirement plans must apply the *Windsor* decision as of June 26, 2013. A qualified retirement plan will not be treated as noncompliant if, prior to the September 16, 2013 issuance of Notice 2013-17, a plan sponsor recognized a participant's same-sex marriage only if the participant was domiciled in a state that recognized same-sex marriage. However, after September 16, 2013, a plan sponsor must recognize a participant's same-sex marriage, regardless of whether the participant was domiciled in the state of marriage.

Retroactive application permitted but not required

Plan sponsors may apply the *Windsor* decision prior to June 26, 2013. Plan sponsors also may choose which provisions will be administered retroactively, and for how long. For example, a plan sponsor may choose to apply the qualified joint and survivor annuity rules prior to June 26, 2013, only for those participants with annuity starting dates or dates of death after a certain date. However, retroactive application of the *Windsor* decision brings with it administrative complexity that may make it impractical, if not impossible, to administer. For example, if *Windsor* is applied retroactively, a same-sex spouse may be the rightful beneficiary of a death benefit, though the account balance may already have been paid to the participant's estate.

Plan amendment

If the terms of your qualified retirement plan are inconsistent with the *Windsor* decision or Notice 2013-17, the Plan must be amended to reflect the same-sex spousal rights required under *Windsor* and Notice 2013-17. In addition, if you apply the *Windsor* decision to a period prior to June 26, 2013, the Plan must be amended to reflect the terms of the retroactive application. For most employers, the deadline for adopting these amendments is December 31, 2014.

What to do now?

- Review your qualified retirement plan's definition of "spouse" and "marriage" to determine if your definition is consistent with *Windsor* and Notice 2013-17.
- Determine whether your qualified retirement plan will apply the *Windsor* decision to a period prior to June 26, 2013.
- Review the summary plan description and other plan materials to ensure that any description of spousal rights does not exclude same-sex spouses.
- Speak with your plan recordkeeper and plan vendors to confirm that the plan has been operated in compliance with *Windsor* beginning on June 26, 2013.
- Adopt any necessary amendments prior to December 31, 2014.

For more information on the content of this alert, please contact your regular Nixon Peabody attorney or:

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