



To Our Clients and Friends:

December 10, 2013

Employee Benefit Plan Compliance With The Recent DOMA Supreme Court Decision

The Defense of Marriage Act (DOMA), which became law in 1996, provided that no state shall be required to respect another state's recognition of a same-sex marriage (Section 2) and limited the definition of "spouse" and "marriage" to persons of the opposite-sex for Federal law purposes (Section 3).

The Supreme Court in *United States v. Windsor*, 133 S. Ct. 2675 (June 26, 2013), struck down Section 3 of DOMA as unconstitutional. The Court upheld a claim for a refund of estate tax for a same-sex surviving spouse married in Ontario, Canada on the grounds that Section 3 of DOMA is unconstitutional as a deprivation of equal liberty under the Fifth Amendment. Accordingly, the Federal government cannot fail to recognize an otherwise legal union between same-sex couples for purposes of interpreting and applying Federal law.

Currently, sixteen states and the District of Columbia, as well as a number of foreign countries recognize same-sex marriages. Because Section 2 of DOMA was not affected by *Windsor*, it became necessary to determine the Federal tax treatment of same-sex couples who were legally married in a state that recognizes same-sex marriages but who reside in a state that does not recognize such marriages. This has been resolved in Revenue Ruling 2013-17, where the IRS has ruled that a same-sex marriage will be recognized for Federal tax purposes, provided that the marriage was legally valid in the state of ceremony, regardless of the same-sex couple's state of residence. In its "Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law" (August 29, 2013), the IRS provided several examples regarding compliance with the ruling of Rev. Rul. 2013-17. (The Department of Labor issued similar guidance with respect to ERISA in ERISA Technical Release 2013-04.) Rev. Rul. 2013-17 is to be applied prospectively as of September 16, 2013, although taxpayers on or after September 16, 2013 may amend prior open returns or request a refund.

Implications of Windsor for Retirement Plans. *Effective as of September 16, 2013, Windsor and Rev. Rul. 2013-17 have significant effects on the operation of retirement plans with respect to same-sex spouses. For example:*

(i) *Pre-Retirement and Joint and Survivor Annuity Rules.* With respect to defined benefit plans, money purchase plans, and other defined contribution plans that offer pre-retirement and joint and survivor annuities, a survivor annuity benefit must be provided to the participant's legally married same-sex spouse unless the spouse waives the right to the benefit.

(ii) *Spousal Death Benefits for Defined Contribution Plans.* Defined contribution plans that do not offer survivor annuities must still provide that pre-retirement death benefits under the

plan will be paid to the participant's legally married same-sex surviving spouse unless waived by the spouse.

(iii) *Designation of Non-Spouse Beneficiary.* Consent of a legally married same-sex spouse is now required for a participant to designate a non-spouse beneficiary.

(iv) *Same-Sex Spousal Consent for Loans.* Defined benefit plans or other plans subject to survivor annuity rules that permit participant loans requiring the pledge of the participant's accrued benefit to secure the loan must obtain the consent of the legally married same-sex spouse to secure the loan.

(v) *Updating of Forms.* In cases where spousal consent is required for participant action, applicable forms should be updated to include legally married same-sex spouses.

(vi) *Required Minimum Distributions.* Legally married same-sex spouses should be treated in the same manner as opposite-sex spouses for purposes of applying the required minimum distribution rules.

(vii) *Rollover of Benefits by Spouse.* In connection with a distribution of plan benefits following the death of a participant, the participant's legally married same-sex spouse can roll over the benefits in the same manner the participant could have if living.

(viii) *QDRO for Same-Sex Spouses.* A legally married same-sex spouse or ex-spouse of a participant is entitled to receive benefits pursuant to a Qualified Domestic Relations Order.

(ix) *Hardship Events of Same-Sex Spouses.* Hardship distribution rules must include hardship events of same-sex spouses.

Open Issues for Qualified Plan Compliance. There are several open issues regarding *Windsor* and qualified plan compliance, including (i) the status of non-spouse beneficiary designation forms executed prior to September 16, 2013; and (ii) the treatment of participant deaths prior to September 16, 2013 where benefits have not yet been distributed. The IRS intends to issue more detailed guidelines on the retroactive application of *Windsor* to employee benefit plans, and the IRS will provide sufficient time for any plan amendments and necessary corrections so that the plan will retain favorable tax treatment.

Guidance to Participants. Employers should provide participants with information on the effects of the *Windsor* decision and should specifically note that participants should carefully review any beneficiary designations.

Consequences of Windsor for Health Plans. The potential consequences to health plans from *Windsor* and Rev. Rul. 2013-17 include the following: (i) one no longer has to impute as taxable income to an employee the value of the legally married same-sex spouse benefit from the health plan effective September 16, 2013 (and the retroactive amendment of tax returns for open years is permitted); (ii) employees are able to pay premiums for legally married same-sex spouse benefits on a pre-tax basis under a cafeteria plan; and (iii) COBRA rights would apply for legally married same-sex spouses.

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For guidance on complying with the above rules or for more information, please contact Norman J. Misher at (212) 903-8733; Allen J. Erreich at (212) 903-8769; Charles C. Shulman at (212) 903-8687; Judy M. Hensley at (212) 903-8737; or Chase B. Steinlauf at (212) 903-8736.

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