Client Alert

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IRS Releases Further Guidance for Retirement Plans on Treatment of Same-Sex Spouses

By Susan P. Serota, Peter J. Hunt, Christine L. Richardson and Kathleen D. Bardunias

In IRS Notice 2014-19 and accompanying FAQs, the Internal Revenue Service ("IRS") issued long-awaited guidance addressing the treatment of same-sex spouses under qualified retirement plans such as 401(k) and defined benefit plans. Employers that sponsor qualified retirement plans should review this guidance now and determine whether further action, including plan amendments or corrective action, is required.

On June 26, 2013, the U.S. Supreme Court in *United States v. Windsor* held that Section 3 of the Defense of Marriage Act—which limited the definition of "marriage" to marriage between a man and a woman for all purposes under Federal law—was unconstitutional. In response to that decision, the IRS released Revenue Ruling 2013-17 indicating that, effective as of September 16, 2013, same-sex spouses would be treated as married for all Federal tax purposes as long as the marriage was validly entered into in a state or country whose laws authorize same-sex marriage (generally referred to as the "state of celebration" rule). For further information about IRS Revenue Ruling 2013-17 please see our prior Client Alert.

The *Windsor* decision affects several rules under the Internal Revenue Code with respect to married participants in qualified retirement plans, including rules that relate to qualified joint and survivor annuities (QJSA), qualified pre-retirement survivor annuities (QPSA), spousal rollovers and required minimum distributions, qualified domestic relations orders (QDROs), and stock ownership attribution rules. While both the *Windsor* decision and Revenue Ruling 2013-17 clearly affected employee benefit plans prospectively, they did not address the extent to which the *Windsor* decision needed to be applied retroactively.

IRS Notice 2014-19

On April 4, 2014, the IRS issued Notice 2014-19, providing much-anticipated guidance on the treatment of same-sex spouses in qualified retirement plans, such as 401(k) and defined benefit plans. In particular, Notice 2014-19 provided the following:

1. **The *Windsor* decision does not require qualified retirement plans to recognize same-sex spouses for purposes under Federal law prior to June 26, 2013.**

- A qualified retirement plan must recognize a plan participant's same-sex spouse for all purposes under Federal law as of June 26, 2013, but is not required to apply such recognition before that date.

- Prior to the IRS's adoption of the "state of celebration" rule on September 16, 2013, a qualified retirement plan sponsor may have interpreted the plan to recognize a plan participant's same-sex spouse only if the participant was residing in a state that recognized same-sex marriage. IRS Notice 2014-19 clarifies that a qualified retirement plan will not be treated as failing to meet IRS qualification requirements if such interpretation was not inconsistent with the plan for the period from the date of the *Windsor* decision until the IRS guidance was released, that is from June 26, 2013 to September 16, 2013.

2. Qualified retirement plans may need to be amended to take into account the *Windsor* decision and related IRS guidance.

- If a qualified retirement plan's terms are inconsistent with the *Windsor* decision and related IRS guidance, a plan amendment must be adopted by the later of (i) December 31, 2014 or (ii) the employer's tax return deadline (including extensions) for the fiscal year that included June 26, 2013, to be effective on June 26, 2013. For example, if the plan defines spouse by reference to the Defense of Marriage Act or specifically distinguishes between same-sex and opposite-sex spouses, a plan amendment is required. The Notice provides an extended deadline for governmental plans adopting amendments pursuant to the Notice to 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.

  - In a "Frequently Asked Questions" page on the IRS website, the IRS indicates that a plan sponsor that implements such an amendment using principles consistent with the Employee Plans Compliance Resolution System (EPCRS), as set forth in Revenue Procedure 2013-12, will not fail to retain its qualified status. For example, the IRS's FAQs specifically provide that if a plan is retroactively amended to apply these spousal consent rules consistent with *Windsor* and this recent IRS guidance, then the plan may obtain spousal consent to remedy the prior lack of spousal consent in accordance with EPCRS principles.

  - For single-employer defined benefit plans, Notice 2014-19 provides that any required plan amendment will not be treated as an amendment to which the rules under Code Section 436(c) will apply. This rule limits the ability of a plan sponsor to amend a plan to increase plan liabilities unless certain conditions are satisfied.

- If a qualified retirement plan's terms are not inconsistent with the *Windsor* decision and related IRS guidance, then a plan amendment is not required. For example, if the plan uses the term "spouse" or "spouse under Federal law" without any distinction between a same-sex and opposite-sex spouse, a plan amendment is not required. The IRS did note that plan sponsors may nevertheless want to consider adopting a clarifying amendment on this issue for ease of plan administration.

- If a plan sponsor chooses to apply the outcome of *Windsor* to the plan for a period before June 26, 2013, a plan amendment is required and must be adopted in the timeframe specified above. While a plan is not required to apply the outcome of *Windsor* for any period prior to June 26, 2013, a plan sponsor may choose to do so. Before a plan sponsor implements any retroactive

application of the *Windsor* decision, it should carefully consider any implementation and correction issues that could result from such a retroactive application.

- For example, the IRS specifically indicates that this could be problematic in the context of the ownership attribution rules under the Internal Revenue Code.
- Unlike plan amendments required by Notice 2014-19, any voluntary retroactive amendment to a single-employer defined benefit plan is an amendment to which Code Section 436(c) applies.

Note: In all cases, a qualified retirement plan's operations must comply with the *Windsor* decision as of June 26, 2013 and the "state of celebration" rule as of September 16, 2013. For example, as described in the IRS FAQs noted above, if a 401(k) plan participant with a same-sex spouse dies on or after June 26, 2013, the plan must distribute benefits to the same-sex spouse in accordance with the rules under the Internal Revenue Code unless that spouse has consented in writing to the participant's designation of another beneficiary.

Actions Employers Should Take Now

Employers that sponsor qualified retirement plans should take the following steps now:

1. Determine whether a plan amendment is either required in light of IRS Notice 2014-19 or appropriate to clarify the plan terms addressing spousal rights and benefits. A plan sponsor may also wish to consider whether an amendment to provide any new rights or benefits with respect to participants with same-sex spouses, or to clarify the rights or benefits of domestic partners, is appropriate given the current terms of the plan.

2. Analyze plan operations since June 26, 2013 and determine whether any corrective action is required to bring the plan's operations into compliance with the *Windsor* decision and related IRS guidance.

3. Review any participant communications, including the plan's summary plan description, to determine whether updates to these documents are necessary. Particular focus should be given to beneficiary designations and related default rules, as well as distribution options.

If you have any questions, please contact the Pillsbury attorney with whom you regularly work or one of the following members of the Executive Compensation & Benefits practice section:

New York

Susan P. Serota (bio)
+1.212.858.1125
susan.serota@pillsburylaw.com

Peter J. Hunt (bio)
+1.212.858.1139
peter.hunt@pillsburylaw.com

Scott E. Landau (bio)
+1.212.858.1598
scott.landau@pillsburylaw.com

Kathleen D. Bardunias (bio)
+1.212.858.1905
kathleen.bardunias@pillsburylaw.com

James P. Klein (bio)
+1.212.858.1447
james.klein@pillsburylaw.com

Bradley A. Benedict (bio)
+1.212.858.1523
bradley.benedict@pillsburylaw.com

Matthew C. Ryan (bio)
+1.212.858.1184
matthew.ryan@pillsburylaw.com

Washington, DC / North Virginia

Howard L. Clemons (bio)
+1.703.770.7997
howard.clemons@pillsburylaw.com

Justin Krawitz (bio)
+1.703.770.7517
justin.krawitz@pillsburylaw.com

Los Angeles

Mark C. Jones (bio)
+1.213.488.7337
mark.jones@pillsburylaw.com

San Francisco

Christine L. Richardson (bio)
+1.415.983.1826
crichardson@pillsburylaw.com

Marta K. Porwit (bio)
+1.415.983.1808
marta.porwit@pillsburylaw.com

Amber Ward (bio)
+1.415.983.1048
amber.ward@pillsburylaw.com

San Diego—North County

Lori Partrick (bio)
+1.858.509.4087
lori.partrick@pillsburylaw.com

Marcus Wu (bio)
+1.858.509.4030
marcus.wu@pillsburylaw.com

Silicon Valley

Cindy V. Schlaefer (bio)
+1.650.233.4023
cindy.schlaefer@pillsburylaw.com