IRS

Topics for Retirement Plans

- IRAs
- Types of Retirement Plans
- Required Minimum Distributions
- Retirement Plans FAQs
- Published Guidance
- Forms & Publications
- Correcting Plan Errors
- Newsletters
- Retirement Plans A-Z
- Retirement Plans Home

Answers to Frequently Asked Questions Regarding the Application of the Windsor Decision and Post-Windsor Published Guidance to Qualified Retirement Plans

The following questions and answers provide additional information regarding the application of the Supreme Court's decision in *United States v. Windsor* (June 26, 2013) and the holdings of Rev. Rul. 2013-17, 2013-38 IRB 201 (published in the Internal Revenue Bulletin on September 16, 2013) to qualified retirement plans and regarding Notice 2014-19, which will appear in IRB 2014-17.

FAQ-1. How does the outcome of *Windsor* affect beneficiary designations under qualified profit-sharing or stock bonus plans with respect to participants who die on or after June 26, 2013?

To the extent the § 401(a) qualification rules require a married participant's spouse to be the participant's beneficiary with respect to all or part of the participant's benefits (unless the spouse consents to the participant's designation of another beneficiary), profit-sharing and stock bonus plans must treat a participant who is lawfully married on the date of death to an individual of the same sex as married for purposes of applying those qualification rules with respect to a participant who dies on or after June 26, 2013. Thus, in the case of a participant who is married to a same-sex spouse and who dies on or after that date, to the extent the § 401(a) qualification rules would require benefits to be paid to the participant's surviving spouse absent consent of the spouse to the designation of another beneficiary, the benefits must be paid to the participant's same-sex spouse regardless of any conflicting plan terms and regardless of any prior beneficiary or other designation to which the participant's spouse has not consented that specifies an individual other than the participant's spouse to receive those benefits (except as provided in a qualified domestic relations order). However, pursuant to Q&A-2 of Notice 2014-19, a retirement plan will not be treated as failing to meet the § 401(a) qualification requirements merely because the plan administrator interpreted the *Windsor* decision prior to September 16, 2013, by recognizing the same-sex spouse of a participant only if the participant was domiciled in a state that recognized same-sex marriages.

FAQ-2. If a plan's terms designate a particular state's laws as applying to the plan, and that state does not recognize same-sex marriage for purposes of applying state law, is it permissible for the plan to be operated in a manner that does not recognize a participant's same-sex spouse with respect to the § 401(a) qualification requirements?

In general, no. A plan will fail to satisfy the § 401(a) qualification requirements that apply with respect to married participants if, for purposes of those requirements, the plan in operation does not recognize the same-sex spouse of a plan participant as of June 26, 2013. Thus, in accordance with Q&A-2 of Notice 2014-19, if a plan administrator does not recognize the participant's same-sex spouse for purposes of the plan provisions that are required under § 401(a) because a plan administrator interprets the terms of the plan by applying a designated state's laws (such as under a plan's choice of law provision) to identify a participant's marital status, then the plan would violate the qualification requirements of § 401(a). However, pursuant to Q&A-2 of Notice 2014-19, a retirement plan will not be treated as failing to meet the § 401(a) qualification requirements merely because the plan's operations for periods prior to September 16, 2013 recognized the same-sex spouse of a participant only if the participant was domiciled in a state that recognized same-sex marriages.

FAQ-3. If a plan sponsor amends a plan to be consistent with the *Windsor* decision, Rev. Rul. 2013-17, and Notice 2014-19, how should that amendment be implemented for periods before the amendment is adopted?

A plan that is amended to be consistent with the *Windsor* decision, Rev. Rul. 2013-17, and Notice 2014-19 will not fail to retain its qualified status if the retroactive amendment is implemented using principles similar to those in the Employee Plans Compliance Resolution System (EPCRS), as set forth in Rev. Proc. 2013-12, 2013-4 IRB 313.

For example, if the plan is retroactively amended to apply the spousal consent rules under §§ 401(a)(11) and 417 consistently with Windsor, Rev. Rul. 2013-17, and Notice 2014-19, a plan may obtain spousal consent to remedy a prior lack of spousal consent under the principles described in section 6.04(1) of Rev. Proc. 2013-12.

FAQ-4. May a qualified plan be amended in light of the *Windsor* decision to provide new rights or benefits with respect to participants with same-sex spouses?

Yes. In light of the *Windsor* decision, a plan sponsor may wish to amend a plan to provide new rights or benefits with respect to participants with same-sex spouses – such as an amendment that provides those participants with a new opportunity to elect a qualified joint and survivor annuity (QJSA) – to make up for benefits that were not previously available to those participants. Such an amendment must comply with the applicable qualification requirements (such as section 401(a)(4)).

FAQ-5. Do the *Windsor* decision, Rev. Rul. 2013-17, and Notice 2014-19 apply to § 403(b) plans?

The rules of Rev. Rul. 2013-17 apply for all Federal tax purposes, including for purposes of the Federal tax rules that apply to § 403(b) plans. The interpretation of the *Windsor* decision and Rev. Rul. 2013-17 in Q&A-1 through Q&A-3 of Notice 2014-19 applies with respect to § 403(b) plans. In the case of a § 403(b) plan to which Title I of ERISA does not apply, none of the special rules applicable to spouses in § 401(a)(11)(A) or (B) (and the parallel section of ERISA, § 205(a) and (b)) apply. However, such a plan is subject to the requirement to provide a direct rollover to another eligible employer retirement plan or IRA if requested by a distributee of an eligible rollover distribution (taking into account the different rules for surviving spouses and other beneficiaries under § 402(c)(9) and 402(c)(11), respectively). In all cases, § 403(b) plans are not subject to either the remedial amendment period in § 401(b) or Rev. Proc. 2007-44, 2007-28 IRB 54. Therefore, the deadline in Q&A-8 of Notice 2014-19 does not apply, and any plan amendments adopted pursuant to Notice 2014-19 must be adopted by the deadline in Section 21 of Rev. Proc. 2013-22, 2013-18 IRB 985.

FAQ-6. Is an amendment to a multiemployer defined benefit plan to conform with the *Windsor* decision, Rev. Rul. 2013-17, and Notice 2014-19 subject to the limitations on benefit increases under § 432?

An amendment to a multiemployer defined benefit plan subject to § 432 that increases liabilities through changes to benefits, benefit accruals, or vesting schedules generally cannot be made unless certain conditions are met. Sections 432(d)(1)(B) and 432(f)(4)(B), however, provided that such an amendment is permitted during the funding improvement adoption period or rehabilitation plan adoption period, respectively, if "the amendment is required as a condition of qualification under [the Code] or to comply with other applicable law." The same exception is applicable to similar limitations under § 432(d)(2)(C) and 432(f)(1)(B) during a multiemployer plan's funding improvement period or rehabilitation period with respect to a plan amendment described in Q&A-5 of Notice 2014-19 that takes effect as of June 26, 2013.

Additional resource:

- Treatment of Marriages of Same-Sex Couples for Retirement Plan Purposes

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