



## The Post-*Windsor* World: Plan Administration and Same-Sex Marriages

BY TED RICE

In the wake of the Supreme Court's *Windsor* decision, difficult issues may arise in states where same-sex marriages are not permitted or where the retroactive effect of *Windsor* is at issue. Here's a closer look at where things stand.

**B**y a narrow 5-4 margin, the U.S. Supreme Court on June 26, 2013, overturned Section 3 of the federal Defense of Marriage Act (DOMA) in the case, *United States v.*

*Windsor*.<sup>1</sup> Section 3 of DOMA had provided that only individuals in opposite-sex marriages were recognized as “spouses” and “married” for purposes of federal law. This provision marked a substantial change to federal law, affecting the retirement plan rules under ERISA and the Internal Revenue Code.

Why did the Supreme Court overturn Section 3 of DOMA? In the *Windsor* decision, Justice Kennedy summarizes the majority's view:<sup>2</sup>

The class to which DOMA directs its restrictions and restraints are those persons who are joined in same-sex marriages made lawful by the State. DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.

Let's step back and highlight the part of DOMA that was overturned and the part that remains law:

- Section 3 of DOMA was overturned. It had defined marriage for federal law purposes as opposite-sex marriages only.
- Section 2 of DOMA was not overturned. It asserts that no state is required to recognize same-sex marriages performed in other states.

Since the *Windsor* decision did not overturn Section 2 of DOMA, retirement plan administrative questions remained, such as how same-sex couples who were married in a state recognizing same-sex marriage would be treated if they moved to a state that does not recognize same-sex marriage.

As of Nov. 30, 2013, 16 states plus

Washington, DC, allow same-sex marriages: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont and Washington. In New Mexico, state law is silent on same-sex marriages, and some counties are issuing marriage licenses either voluntarily or by court order. Several other states permit domestic partnerships or civil unions.

Against this backdrop of differing state laws and the fact that the *Windsor* decision did not change Section 2 of DOMA, regulatory guidance (and perhaps future court decisions) is needed to address certain benefit plan administrative issues. To help clarify the treatment of same-sex marriages under employee benefit plans, the Internal Revenue Service and Department of Labor have issued guidance to help clarify the treatment of same-sex marriages under benefit plans, specifically IRS Revenue Ruling 2013-17 and DOL Technical Release 2013-04. At the time of this writing, however, certain issues remain unresolved and are expected to be addressed in additional regulatory guidance.

#### **IRS REV. RUL. 2013-17: INCOME TAX TREATMENT**

After the *Windsor* decision, a key plan administrative issue that needed to be addressed was how a participant's state of residency would affect the treatment of a same-sex marriage since only <sup>14</sup> states recognize same-sex marriages. Regulatory guidance was needed to clarify administrative rules for determining whether a same-sex marriage is valid in other states that do not recognize same-sex marriage. The IRS especially needed to clarify whether from a plan administrative standpoint a so-called "state-of-celebration" rule

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or "state-of-residency" rule would apply.

A state-of-celebration rule looks to whether a marriage is validly recognized where it was performed. For example, Minnesota now allows same-sex marriages and therefore same-sex couples marrying in Minnesota are entering into valid, legal marriages under Minnesota law. Under a state-of-celebration rule, these same-sex marriages would be recognized for federal law purposes even if the married couple moved from Minnesota to another state that does not recognize same-sex marriages.

A state-of-residency rule looks to whether same-sex marriage is recognized in the state in which a couple lives. For example, Wisconsin does not recognize same-sex marriages. A same-sex couple could be married in Minnesota and work in Minnesota but live in Wisconsin. If

1 *United States v. Windsor*, 570 U.S. \_\_\_\_, 133 S.Ct. 2675 (2013).

2 As noted in the paragraph included from Justice Kennedy's opinion, the majority relied on the Fifth Amendment to the Constitution. The Fifth Amendment, ratified in 1791, includes, among other provisions, the prohibition that no person shall be deprived of liberty without due process of law.

## Examples of the State-of-Celebration Rule

- XYZ, LLC Pension Plan, a qualified DB plan, is maintained by XYZ, LLC, which operates only in Wisconsin, a state that does not recognize same-sex marriages. Nonetheless, the plan must treat a participant who is married to a spouse of the same sex under the laws of Minnesota, a state that recognizes same-sex marriages, as married for purposes of applying the plan and federal tax requirements that relate to spouses.
- XYZ, LLC 401(k) Plan, a qualified DC plan, provides that a participant's account must be paid to the participant's spouse upon the participant's death unless the spouse consents to a different beneficiary. The plan does not provide for any annuity forms of distribution. The plan must pay this death benefit to the same-sex surviving spouse of any deceased participant. The plan is not required to provide this death benefit to a surviving registered domestic partner of a deceased participant. However, the plan is permitted to adopt plan language that makes a participant's registered domestic partner the default beneficiary who will receive the death benefit unless the participant chooses a different beneficiary.

a state-of-residency rule was applied for plan administration purposes, the couple would not be deemed to be married since the state of their residency does not recognize same-sex marriage.

From an administrative standpoint, the state-of-celebration rule is easier to apply. Following the *Windsor* decision, some industry groups appealed to the IRS to issue guidance that the state-of-celebration rule should be used for administrative convenience. On Aug. 29, 2013, the

IRS issued Rev. Rul. 2013-17,<sup>3</sup> along with FAQs for same-sex married couples<sup>4</sup> and for registered domestic partners and individuals in civil unions.<sup>5</sup> In this guidance, the IRS adopted the state-of-celebration rule instead of the state-of-residency rule.

Rev. Rul. 2013-17 specified that for federal tax purposes, the IRS will look to state or foreign law to determine whether individuals are married. In recognizing the marriages of same-sex spouses validly entered into a domestic or foreign jurisdiction, the IRS relied on a long-standing general rule<sup>6</sup> that if a couple is married validly under state or foreign law, the IRS will recognize the marriage for federal income tax purposes.

Rev. Rul. 2013-17 provided the following rules for qualified retirement plans, effective Sept. 16, 2013.

- **Definition of "spouse"** — a plan must trust a same-sex spouse as a spouse for federal tax purposes relating to qualified plans.
- **State-of-celebration rule** — a qualified retirement plan must recognize a same-sex marriage that was validly entered into in a jurisdiction whose laws authorize the marriage, even if the married couple lives in a domestic or foreign jurisdiction that does not recognize same-sex marriages.
- **Domestic partnerships and civil unions are not marriages** — a person who is in a registered domestic partnership or civil union is not considered to be a spouse under a qualified retirement plan, regardless of whether that person's partner is the same or opposite sex.

### DOL TECH. REL. 2013-04: ERISA PLAN CONSIDERATIONS

On Sept. 18, 2013, the DOL issued Tech. Rel. 2013-04,<sup>7</sup> which applied the state-of-celebration rule

to plans subject to ERISA. The DOL stated the rule this way:

*... the term "spouse" will be read to refer to any individuals who are lawfully married under any state law, including individuals married to a person of the same sex who were legally married under any state law, including individuals married to a person of the same sex who were legally married in a state that recognizes such marriages, but who are domiciled in a state that does not recognize such marriages. Similarly, the term "marriage" will be read to include a same-sex marriage that is legally recognized as a marriage under any state law.*

### PLAN ADMINISTRATIVE RULES

Based on the recent regulatory guidance, the following administrative rules can be summarized:

- For defined contribution plans, death benefits will be paid to a participant's same-sex spouse unless waived by the spouse (that is, the same-sex spouse must consent to the participant's designation of a non-spouse beneficiary). As a practical matter and to help avoid discrimination concerns, plans should require the same documentation of marriage for same-sex couples as for opposite-sex couples.
- For plans subject to annuity requirements, including all pension plans, a qualified joint and survivor annuity must be provided to the participant's same-sex spouse unless the spouse waives the right to the benefit. Such plans also must require spousal consent for plan loans.
- Same-sex spouses are permitted spousal distribution and rollover options upon a participant's death. Included are permissible hardships under the safe harbor definition for 401(k) and 403(b)

3 IRS Rev. Rul. 2013-17, 2013-38 IRB 201, is found at this link: [http://www.irs.gov/irb/2013-38\\_IRB/ar07.html](http://www.irs.gov/irb/2013-38_IRB/ar07.html) (last visited on Dec. 16, 2013).

4 These FAQs may be found at this link: <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples> (last visited on Dec. 16, 2013).

5 These FAQs may be found at this link: <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Registered-Domestic-Partners-and-Individuals-in-Civil-Unions> (last visited on Dec. 16, 2013).

6 IRS Revenue Ruling 58-66, 1958-1 C.B. 60.

7 DOL Technical Release 2013-04 may be found at this link: <http://www.dol.gov/ebsa/newsroom/tr13-04.html> (last visited on Dec. 16, 2013).

plans, which include medical care, tuition expenses and burial or funeral expenses for a participant's spouse. Also, under the facts-and-circumstances test, resources reasonably available to determine financial need include assets of a spouse. Applicable spousal benefits for survivors of qualified military service members are also available. Lastly, same-sex spouses are eligible for more favorable treatment under the required minimum distribution rules.

- Same-sex spouses may obtain a qualified domestic relations order upon divorce from a participant.
- Stock ownership attribution rules apply to same-sex spouses and may affect HCE status, key employee status and controlled group status.
- A same-sex spouse is considered a "family member" with respect to parties-in-interest and disqualified persons. As a result, a plan could experience a prohibited transaction.

## OTHER PLANS

Because governmental and non-electing church plans are not governed by ERISA, rules may apply that limit or replace the state-of-celebration rule. Governing plan provisions should be reviewed to address situations that arise under these plans. Note, however, that surviving same-sex spouses would still have the ability to roll over accounts under applicable Internal Revenue Code provisions.

Individual retirement accounts, which are creatures of the Internal Revenue Code,<sup>8</sup> will need to be administered to recognize federal tax rules applicable to same-sex spouses under the state-of-celebration rule of Rev. Rul. 2013-17.

Though this article is not

focused on health and welfare plans, it is worth noting that the *Windsor* decision dramatically affected the administration of these plans with respect to same-sex married couples. Health and welfare benefits may now be provided to same-sex spouses on the same tax-favored basis as to opposite sex spouses (though state tax treatment will vary depending on applicable state law<sup>9</sup>). See IRS Notice 2013-17 and IRS Notice 2013-61<sup>10</sup> for more information. COBRA and change-in-status rules now apply comparably to same-sex spouses as they apply to opposite-sex spouses.

## PLAN AMENDMENTS AND RETROACTIVE EFFECT ARE OPEN ISSUES

The IRS noted in Rev. Rul. 2013-17 that it will issue additional guidance detailing plan amendment requirements (including the timing of any required amendments) and any necessary corrections relating to plan operations for periods before future guidance is issued (including the retroactive effect of new guidance). As of this writing in December 2013, this additional guidance has not yet been issued.

Though the state-of-celebration rule seems pretty clear, difficult issues may arise in states where same-sex marriages are not permitted and/or where the retroactive effect of the *Windsor* decision is at issue. For example, inheritance of a deceased participant's plan accounts could become contested in a state that does not recognize same-sex marriage.<sup>11</sup>

In an Oct. 4, 2013, comment letter to the IRS, ASPPA asked that the following matters be clarified via additional guidance:<sup>12</sup>

- As a general rule, a definition of

"spouse" should not be required in plan documents.

- Any plan document amendment required to correct a gender-specific spousal definition should not be required before the end of the plan's next remedial amendment cycle.
- Plan distributions under pre-*Windsor* decision rules should be deemed to be in compliance.
- Pre-*Windsor* actuarial valuations should not be required to be revised.
- New participant and spouse notifications regarding the new same-sex marriage rules should not be required beyond any necessary changes to existing forms, notices or documents.
- No changes should be required to testing results for prior plan years.

Ideally, these recommendations will be considered by the IRS — but their adoption is not a certainty.

## CONCLUSION

The important administrative changes required by the *Windsor* decision and related regulatory guidance must be addressed by all plans, including the plans of employers whose employees work exclusively in a state that does not recognize same-sex marriage. Plan sponsors and service providers should monitor the issuance of additional regulatory guidance for clarifications of amendment requirements and potential retroactive effects of the new rules involving same-sex marriage. **PC**



*Ted Rice is an attorney/shareholder with Kelly, Hannaford & Battles P.A., in Minneapolis. He has practiced employee benefits law since 1984. Ted's clients include financial services companies and plan sponsors.*

<sup>8</sup> IRAs are established pursuant to Internal Code Section 408 and, for Roth IRAs, Section 408A.

<sup>9</sup> Refer to a state's department of revenue for specific guidance on that state's law in this area. For example, Minnesota rules are summarized at this link: <http://www.revenue.state.mn.us/businesses/withholding/Pages/Same-SexMarriage.aspx> (last visited on Dec. 16, 2013).

<sup>10</sup> On Sept. 23, 2013, the IRS issued Notice 2013-61 providing guidance for employers and employees to claim refunds or adjust overpayments of FICA taxes and employment taxes with respect to certain benefits and remunerations provided to same-sex spouses. IRS Notice 2013-61 may be found at this link: <http://www.irs.gov/pub/irs-drop/n-13-61.pdf> (last visited on Dec. 16, 2013).

<sup>11</sup> At least one such case has already been decided after the *Windsor* decision. In *Cozen O'Connor, P.C. v. Jennifer J. Tobits, et. al*, No. 11-0045 (E.D. Pa. 2013), a federal court in Pennsylvania recognized a same-sex marriage as valid in a plan beneficiary dispute.

<sup>12</sup> The ASPPA comment letter provides detailed information about open issues and is recommended reading. It may be found at this link: <http://www.asppa.org/Document-Vault/PDFs/GAC/2013/100413comm.aspx> (last visited on Dec. 16, 2013).