



Employee Benefits & Executive Compensation ADVISORY ■

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IRS Clarifies Retroactive Impact of *Windsor* Same-Sex Marriage Decision on Retirement Plans

On April 4, 2014, the IRS released [Notice 2014-19](#), which clarifies the retroactive implications of the Supreme Court's *United States v. Windsor* decision on qualified retirement plans. The Notice generally requires qualified retirement plans to be operated and administered in accordance with the *Windsor* decision effective as of June 26, 2013 (the date the *Windsor* decision was issued), but does not require retroactive application of *Windsor* prior to that date. Additionally, Notice 2014-19 clarifies important questions regarding the need for and the timing of specific *Windsor*-related plan amendments.

Background

The *Windsor* decision declared unconstitutional Section 3 of the Defense of Marriage Act (DOMA), which had prohibited recognition of same-sex marriages for purposes of federal law. As a result of the *Windsor* decision, employee benefit plans must treat same-sex married couples as married for federal benefits law purposes. For more information on various aspects of employee benefit plans impacted by the *Windsor* decision, please see our previous [advisory](#). The *Windsor* decision specifically does not apply to civil unions or domestic partnerships—only to legally valid marriages.

Prior to the recent issuance of Notice 2014-19, the IRS previously provided guidance in Revenue Ruling 2013-17 indicating that as of September 16, 2013, marital status for federal tax purposes would be determined based on the law of the state or other jurisdiction where the marriage was performed. Please see our previous [advisory](#) on Revenue Ruling 2013-17 for an in-depth discussion of this guidance.

Retroactive Application of *Windsor* Decision

Notice 2014-19 clarifies that qualified retirement plans must recognize same-sex spouses effective no later than June 26, 2013. The Notice permits, but does not require, recognition of same-sex spouses prior to June 26, 2013.

Because Notice 2014-19 does not require retroactive application of *Windsor* to periods before June 26, 2013, plans should not be liable to pay death benefits (including qualified pre-retirement survivor annuities) to same-sex spouses

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prior to that date. Additionally, unless a plan sponsor voluntarily amends its plan to recognize same-sex spouses prior to June 26, 2013, plans generally should not need to reissue election paperwork or obtain spousal consent for benefits commenced or paid out prior to June 26, 2013.

Although a qualified retirement plan need not give application to *Windsor* prior to June 26, 2013, for most plan purposes, *Windsor* can still cause issues for qualified retirement plan administration dating to periods prior to June 26, 2013. For example, any existing beneficiary designations may be automatically invalid without a same-sex spouse's consent, effective June 26, 2013. This can cause practical issues for plan administrators and plan participants who no longer have a valid beneficiary designation for future benefit commencements. Some changes may even be needed for participants in pay status depending on the form of benefit payment elected. For example, if a participant commenced benefits in a joint and survivor form of payment with a non-spouse beneficiary prior to June 26, 2013, there would likely be no need to reelect the beneficiary or obtain spousal consent because of the potential resulting change in payment form. However, if a participant commenced a 10-year certain and life annuity prior to June 26, 2013, with a non-spouse beneficiary, the beneficiary may now need to be changed to the same-sex spouse or spousal consent obtained. Although specific communication to plan participants about the *Windsor* decision is not required by the IRS, plan administrators may consider reminding participants about the need to review their beneficiary designations periodically.

Are Plan Amendments Required?

Plan amendments to reflect the *Windsor* decision may or may not be required, depending on the specific plan language. Generally, amendments will be required if either (1) the plan defines marriage or spouse by reference to DOMA or in a manner inconsistent with *Windsor* (e.g., defining spouse as opposite-sex spouse only), or (2) the plan sponsor voluntarily elects to apply *Windsor* for periods prior to June 26, 2013. If a plan uses a definition of spouse or marriage that is not expressly inconsistent with the *Windsor* decision (e.g., such as "legally married spouse" or "spouse under federal tax law"), no amendment may be required. Generally, plan amendments, if required, will need to be adopted by December 31, 2014.

Plan sponsors should review their retirement plan documents to determine whether specific plan amendments are required or may be desired to clarify the plan's provisions as they apply to same-sex spouses. Even if a plan document amendment is not required, other plan administrative documents, such as the summary plan description, beneficiary forms, election forms, QDRO procedures or other participant communications, may need to be updated to reflect the *Windsor* decision and the recent IRS guidance.

Please do not hesitate to reach out to your Alston & Bird attorney for assistance in reviewing plan documents or related communications, or with specific *Windsor*-related questions.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

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