Application of Obergefell to Qualified Retirement Plans and Health and Welfare Plans

Notice 2015-86

I. PURPOSE

This notice provides guidance on the application of the decision in Obergefell v. Hodges, 576 U.S. ___, 135 S.Ct. 2584 (2015), to retirement plans qualified under section 401(a) of the Internal Revenue Code (Code) and to health and welfare plans, including cafeteria plans under section 125 of the Code. This guidance relates solely to the application of federal tax law with respect to same-sex spouses.

II. BACKGROUND

.01 Windsor and Impact on Employee Benefit Plans

Prior to the decision of the Supreme Court in United States v. Windsor, 570 U.S. ___, 133 S.Ct. 2675 (2013), section 3 of the Defense of Marriage Act (DOMA), 1 U.S.C. § 7, prohibited recognition of same-sex spouses for purposes of federal tax law. As a result, same-sex spouses who were married under applicable state law were not recognized as spouses for purposes of the federal tax rules that apply because an individual is married, including the rules that apply with respect to employee benefit plans.

On June 26, 2013, the Supreme Court held in Windsor that section 3 of DOMA is unconstitutional. As a result of this decision, marriages of same-sex spouses were recognized for federal tax law purposes. On August 29, 2013, the Department of the Treasury (Treasury) and the IRS issued Rev. Rul. 2013-17, 2013-38 I.R.B. 201. Among other issues addressed in the ruling, Treasury and the IRS adopted a general rule for federal tax purposes recognizing a marriage of same-sex couples that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of such marriages. As a result of Windsor and Rev. Rul. 2013-17, marriages of same-sex spouses that were valid in the state where they were entered into, including marriages entered into in previous years, were recognized for federal tax law purposes.[1]

Following Rev. Rul. 2013-17, Treasury and the IRS issued the following additional guidance addressing various employee benefit and employment tax issues (collectively

[1] Individuals who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of the state are not recognized as spouses for federal tax law purposes. See Rev. Rul. 2013-17.

referred to in this notice as the Post-Windsor Guidance): Notice 2014-19, 2014-17 I.R.B. 979, amplified by Notice 2014-37, 2014-24 I.R.B. 1100 (applying Windsor and Rev. Rul. 2013-17 to qualified retirement plans); Notice 2013-61, 2013-44 I.R.B. 432 (applying Windsor and Rev. Rul. 2013-17 to employment taxes, including procedures for adjustments or claims for refunds or credits); and Notice 2014-1, 2014-02 I.R.B. 270 (applying Windsor and Rev. Rul. 2013-17 to elections and reimbursements for same-sex spouses under cafeteria plans, flexible spending arrangements, and health savings accounts).[2]

.02 Limited Effect of Obergefell for Federal Tax Law Purposes

On June 26, 2015, the Supreme Court held in Obergefell that the Fourteenth Amendment (i) requires a state's civil marriage laws to apply to same-sex couples "on the same terms and conditions as opposite-sex couples," and (ii) prohibits a state from refusing to "recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character."[3] Because Obergefell requires that states recognize marriages of same-sex couples performed in other states, certain marriages performed in previous periods will be recognized for the first time for state law purposes. However, because these same marriages have already been recognized for federal tax law purposes pursuant to Windsor and the Post-Windsor Guidance, Treasury and the IRS do not anticipate any significant impact from Obergefell on the application of federal tax law to employee benefit plans.

Treasury and the IRS understand, however, that some plan sponsors may alter aspects of their employee benefit plans, or how their plans are administered, in response to Obergefell. In addition, some plan sponsors have asked for clarification of the application of Obergefell to certain changes to employee benefit plans, such as a discretionary expansion of benefits that is not required under the federal tax rules. The following questions and answers provide guidance to address these issues.

III. QUESTIONS AND ANSWERS

Qualified Retirement Plans

Q-1. For federal tax law purposes, does Obergefell require that a sponsor of a qualified retirement plan change the terms or operation of its plan?

---

[2] For further information regarding Windsor, Rev. Rul. 2013-17, and Notice 2014-19, see *IRS FAQs on Application of the Windsor Decision and Post-Windsor Guidance to Qualified Retirement Plans* (http://www.irs.gov/Retirement-Plans/Application-of-the-Windsor-Decision-and-Post-Windsor-Published-Guidance-to-Qualified-Retirement-Plans-FAQs).

[3] On October 23, 2015, Treasury and the IRS published proposed regulations that reflect the holdings of Obergefell, Windsor, and Rev. Rul. 2013-17, and that define terms in the Code describing the marital status of taxpayers. Definition of Terms Relating to Marital Status, 80 Fed. Reg. 64378 (Oct. 23, 2015).

A-1. A qualified retirement plan is not required to make additional changes as a result of Obergefell. Q&A-8 of Notice 2014-19 required qualified retirement plans to be amended to reflect Windsor and Notice 2014-19 no later than December 31, 2014 (or a possible delayed amendment deadline for governmental plans, as described in Q&A-8 of Notice 2014-19). Thus, under Windsor and Notice 2014-19, any plan amendments required to recognize same-sex spouses and their marriages with respect to the section 401(a) qualification requirements are already required to be adopted and effective (subject to a possible delayed amendment deadline for governmental plans). However, a plan sponsor may decide to amend its plan following Obergefell to make certain optional changes or clarifications. Examples of discretionary amendments a plan sponsor may decide to make to its qualified retirement plan are described in Q&A-2 and Q&A-3 of this notice.

Q-2. May a qualified retirement plan be amended to provide new rights or benefits with respect to participants with same-sex spouses?

A-2. In response to Windsor, some plan sponsors may have amended their qualified retirement plans to provide new rights or benefits with respect to participants with same-sex spouses in order to make up for benefits or benefit options that had not previously been available to those participants.[4] For example, such an amendment may have provided participants who commenced a single life annuity distribution prior to June 26, 2013 (the date of the Windsor decision) with an opportunity to elect a qualified joint and survivor annuity (QJSA) form of distribution as of a new annuity starting date. Following Obergefell, some plan sponsors might similarly decide to make discretionary plan amendments to provide new rights or benefits with respect to participants with same-sex spouses. Plan sponsors are permitted to make such amendments, which must comply with the applicable qualification requirements (such as the nondiscrimination requirements of section 401(a)(4)).

Q-3. Q&A-3 of Notice 2014-19 provided that a qualified retirement plan could be amended to recognize marriages of same-sex couples on a retroactive basis as of a date earlier than June 26, 2013, the date of the Windsor decision. If a plan sponsor did not make such a retroactive amendment to its qualified retirement plan following issuance of Notice 2014-19, may the qualified retirement plan now be amended to recognize marriages of same-sex couples on a retroactive basis and only for certain purposes as described in Q&A-3 of Notice 2014-19?

A-3. In general, under Windsor and Notice 2014-19, a retirement plan fails to meet the applicable section 401(a) qualification requirements (such as the qualified joint and

---

[4] See, for example, FAQ-4 in *IRS FAQs on Application of the Windsor Decision and Post-Windsor Guidance to Qualified Retirement Plans* (http://www.irs.gov/Retirement-Plans/Application-of-the-Windsor-Decision-and-Post-Windsor-Published-Guidance-to-Qualified-Retirement-Plans-FAQs).

survivor requirements of section 401(a)(11)) if it does not recognize the same-sex spouse of a participant as a spouse on and after June 26, 2013, the date of the Windsor decision. However, a plan will not lose its qualified status if it also applies Windsor prior to June 26, 2013.[5] A plan sponsor that has not yet made such a retroactive amendment in accordance with Notice 2014-19 may decide to make such an amendment after this notice is issued. Such an amendment will not cause the plan to lose its qualified status, provided the amendment otherwise complies with Q&A-3 of Notice 2014-19 (for example, the amendment must comply with applicable qualification requirements, such as section 401(a)(4)).

Q-4. Is an amendment to a single-employer defined benefit plan that is intended to respond to Obergefell or this notice (for example, by extending certain rights and benefits to a same-sex spouse) subject to the requirements of section 436(c)?

A-4. In general, under section 436(c), a discretionary amendment to a single-employer defined benefit plan that increases the liabilities of the plan cannot take effect unless the plan's adjusted funding target attainment percentage is sufficient or the plan sponsor makes the additional contribution specified under section 436(c)(2). Because an amendment that extends rights and benefits to a same-sex spouse in response to Obergefell or this notice (for example, an amendment described in Q&A-2 or Q&A-3 of this notice) is a discretionary expansion of coverage, the amendment is subject to the requirements of section 436(c).

Q-5. What is the deadline for the sponsor of a qualified retirement plan to adopt a plan amendment pursuant to this notice, such as an amendment described in Q&A-2?

A-5. Amendments to a qualified retirement plan that are contemplated by this notice are not interim amendments within the meaning of section 5.02 of Rev. Proc. 2007-44, or successor guidance, but are discretionary amendments. Thus, pursuant to section 5.05(2) of Rev. Proc. 2007-44, the deadline to adopt a plan amendment pursuant to this notice is generally the end of the plan year in which the amendment is operationally effective. However, pursuant to section 5.06(1) of Rev. Proc. 2007-44, in the case of a governmental plan, the deadline for any amendment made pursuant to this notice is the later of (i) the end of the plan year in which the amendment is operationally effective, or (ii) the last day of the next regular legislative session beginning after the amendment is operationally effective in which the governing body with authority to amend the plan can consider a plan amendment under the laws and procedures applicable to the governing body's deliberations.

Health and Welfare Plans

[5] See Q&A-3 of Notice 2014-19.

Q-6. For federal tax law purposes, does Obergefell require that a sponsor of a health or welfare plan change the terms or operation of its plan?

A-6. Federal tax law generally does not require health and welfare plans to offer any specific rights or benefits to the spouse of a participant. To the extent that a health or welfare plan does offer benefits to the spouse of a participant, the federal tax treatment of the benefits that are provided to a same-sex spouse has already been addressed in Rev. Rul. 2013-17 and Notice 2014-1. Accordingly, no changes to the terms of a health or welfare plan are required due to Obergefell.

If a health or welfare plan does offer benefits to the spouse of a participant, however, Obergefell could require changes to the operation of the plan to the extent that the decision results in a change in the group of spouses eligible for coverage under the terms of the plan. For example, if the terms of a health or welfare plan provide that coverage is offered to the spouse of a participant as defined under applicable state law, and the plan administrator determines that applicable state law has expanded to include same-sex spouses as a result of Obergefell, then the terms of the plan would require coverage of same-sex spouses as of the date of the change in applicable state law. See Q&A-7 below for a discussion of election changes under a section 125 cafeteria plan under such circumstances.

Q-7. If, as of the beginning of a plan year, a health or welfare plan that is offered under a section 125 cafeteria plan does not permit coverage of same-sex spouses, and the terms or operation of the plan change during the plan year to permit coverage of same-sex spouses, may the cafeteria plan permit a participant to revoke an existing election and submit a new election?

A-7. Yes, if the terms of the cafeteria plan allow (or, under Q&A-8 of this notice, are amended to allow) a participant to make a change in coverage due to a significant improvement in coverage during the coverage period under an existing coverage option, then the participant may revoke an existing election and make a new election as permitted under § 1.125-4(f)(3)(iii). If the eligibility criteria for a qualified benefit offered under a cafeteria plan change during a plan year to add eligibility for same-sex spouses, this change constitutes a significant improvement in coverage under an existing coverage option for purposes of § 1.125-4(f)(3)(iii). Such a change in eligibility criteria could occur, for example, as a result of an amendment to the terms of the plan; a change in applicable state law (to the extent the terms of the plan refer to state law); or a change in the interpretation of the existing terms of the plan.

A cafeteria plan that allows participants to make a change in election due to a significant improvement in coverage under an existing coverage option may permit a participant to revoke an existing election and submit a new election if same-sex spouses first become eligible for coverage under the terms of the plan during the period of coverage for any reason, including but not limited to those listed in the preceding paragraph. This new election may be an election by a participant to add coverage for a same-sex spouse to a benefit option in which the participant is already enrolled, or an election by a participant

who had not previously elected coverage to add coverage for the participant and a same-sex spouse.

Q-8. If the terms of a cafeteria plan do not allow participants to make a change in election due to a significant improvement in coverage during the coverage period under an existing coverage option, may the plan sponsor amend the terms of the cafeteria plan to allow such an election?

A-8. Yes. The cafeteria plan may be amended at any time to permit participants to make a change in election. In the case of a change described in Q&A-7, such an amendment must be adopted no later than the last day of the plan year including the later of (i) the date same-sex spouses first became eligible for coverage under the plan, or (ii) December 9, 2015. Such an amendment may be retroactive to the date same-sex spouses first became eligible for coverage under the plan.

IV. EFFECT ON OTHER DOCUMENTS

Notice 2014-19 is amplified.

V. NO INFERENCE

No inference should be drawn from this notice as to the application of any law other than federal tax law, including the application of any provisions of the Constitution of the United States or Title VII of the Civil Rights Act of 1964,[6] to the treatment of same-sex spouses under employee benefit plans.

VI. DRAFTING INFORMATION

The principal authors of this notice are Jeremy Lamb and Shad Fagerland of the Office of Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding the qualified retirement plan aspects of this notice, contact Mr. Lamb at (202) 317-6799 (not a toll-free call) and regarding the health and welfare plan aspects of this notice, contact Mr. Fagerland at (202) 317-5500 (not a toll-free call).

[6] Public Law 88-352, 78 Stat. 241.