

The *Windsor* Decision and Qualified Retirement Plans IRS Notice 2014-19

The IRS has issued [Notice 2014-19](#) and posted Answers to [Frequently Asked Questions](#) Regarding the Application of the Windsor Decision and Post-Windsor Published Guidance to Qualified Retirement Plans on its website.

ErisaALERTs [2013-04](#) and [2013-06](#) discussed government guidance issued as a result of the *United States v Windsor* (the Supreme Court decision that holds Section 3 of the Defense of Marriage Act (DOMA) unconstitutional). However, not addressed in previous guidance was retroactivity with respect to qualified retirement plans.

Key Compliance Points

- Any retirement plan qualification rule that applies to a married participant must be applied to a participant in a same-gender marriage.
- Qualified retirement plans must reflect these rules effective June 26, 2013 (the date of the *Windsor* decision) however a plan will not be treated as failing to follow the rules before September 16, 2013 (the date of Revenue Ruling 2013-17 regarding state of celebration) if the plan only recognized same-gender marriages for participants living in states that recognized same-gender marriages.
- A plan sponsor can choose to apply the *Windsor* decision prior to June 26, 2013 but you must be careful of the impact on other government requirements.
- Your plan will have to be amended if it defines spouse by reference to DOMA or if its terms are inconsistent with the outcome of *Windsor*. However, the answer to Question 6 of Notice 2014-19 indicates that a "clarifying amendment" might be useful for those plans which do not require an amendment.
- For most plans the amendment must be made by December 31, 2014. Importantly, for single employer defined benefit plans an amendment which takes effect on June 26, 2013 will not be treated as an amendment to which IRC 436(c) applies. Note: under IRC 436(c), amendments to single employer defined benefit plans cannot take effect unless the plan's adjusted funding target attainment percentage (AFTAP) is sufficient or the employer makes an additional contribution.

The Impact

Qualified plan rules impacted include:

- Joint and survivor annuity rules (QJSA)
- Preretirement survivor annuity rules (QPSA)
- Minimum distribution rules
- Rollover rules
- QDROs
- Attribution rules under IRC 1563(e)(5) for controlled group purposes and IRC 318(a)(1) for key employee determination
- ESOP rules under IRC 409(n) regarding the 25% limitation of stock; also impacted is the IRC 409(p) rule relating to S corporations.

Our previous ErisaALERTs discussed details of the various provisions; this ALERT will focus on the operational issues and provide a mini-checklist of items that plan sponsors and their vendors must address (excludes the impact on stock related plans such as ESOPs). It is important to note that plan sponsors may have already addressed many of the items in the mini-checklist since the September 16, 2013 guidance.

Issue	Affected areas	Action Steps
Governing documents	Plan document Summary Plan Description Administrative Forms	Review the definition of spouse. Does it reference DOMA? If yes, the plan must be amended. If no, consider whether a "clarifying amendment" is in order.
Data	Marital status codes	How do you capture marital status? Apply the same procedure to same-gender participants and inform the plan's recordkeeper and/or actuary.
Communication channels	How do you communicate benefit information to your participants? Internet, intranet, third party administrator portal?	Identify all employee benefit communication channels and carefully review to ensure consistency with the amended plan document.
Beneficiary Designations	Outdated beneficiary forms can be a nightmare resulting in litigation. Many plan sponsors have already taken steps to "refresh" existing beneficiary designation since plan sponsors have been aware of the Windsor decision since last year.	You may want to resolicit beneficiary designations if you have not already done so.
Benefits in pay status before June 26, 2013	Plans are not required to apply the <i>Windsor</i> decision before June 26, 2013	Potential communication opportunity to plan participants
Benefits in pay status beginning on or after June 26, 2013 and before September 16, 2013	A retirement plan will not be treated as failing to meet the requirements before June 26, 2013 if same-gender marriages were recognized only if the participant was domiciled in a state that recognized same-gender marriages.	Verify administrative forms and procedures reflected rules and were applied. Potential communication opportunity to plan participants
Benefits in pay status beginning on or after September 16, 2013	State of celebration rule must be followed regardless of where participant lives.	Verify administrative forms and procedures reflected rules and were applied. Potential communication opportunity to plan participants
QDROs	Administrative procedures must be updated.	If QDROs processed internally - verify procedures updated accordingly. If QDROs processed externally - obtain written verification that procedures are in compliance with the Windsor decision
Rollovers	Same gender spouse will be able to rollover the distribution of a deceased participant to his or her own IRA.	Verify procedures are in place to identify same-gender spouses and rollovers are administered properly.
Minimum Distributions	The same gender spouse will be entitled to the same distribution options currently afforded the opposite gender spouse, i.e., the beneficiary can defer payment until the end of the calendar year in which the participant would have been 70 ½. In addition, the minimum incidental death benefit rules will not apply to same-gender spouses.	Verify procedures are in place to identify same-gender spouses and minimum distributions are administered properly.

What should plan sponsors focus on now?

1. Discuss the merits of a "clarifying amendment" with counsel if your plan's definition of spouse is in compliance.
2. If your plan's definition of spouse requires an amendment, determine who will prepare and when to ensure that it will be adopted in a timely manner.
3. Obtain written verification from plan vendors that administrative procedures have been updated to reflect the *Windsor* decision. Add this to your self-audit checklist.
4. Review all plan communication materials and all methods of communication, e.g., company website.
5. If you decide to implement *Windsor* provisions before the required effective date, make sure you understand the ramifications to other aspects of the plan (e.g., IRC 436 funding requirements)

Finally, if you go through the checklist and are confident that you are in compliance with the ramifications of the *Windsor* decision, think about some "**what if**" scenarios.

What if benefit payments which began on or after June 26, 2013 and/or September 16, 2013 (for purposes of the state of celebration rules) were not administered correctly due to the retroactive nature of the guidance? IRS Frequently Asked Question No. 3 indicates that a plan can follow the EPCRS procedures.

What if a same-gender married partner died on or after June 26 but before September 16?

We are sure there are other "what if" scenarios exist; it would be prudent to discuss them with your advisors. Whether there are definitive answers to "what if" scenarios is not clear.

Whatever you do, always remember that you will have to prove it! So, you must document, document, document.

Note: all links are active as of the date of issuance of this ErisaALERT.

Disclaimer: This material is for the sole purpose of providing general information and does not under any circumstances constitute legal advice and should not be used as a substitute for legal advice. You should seek the advice of counsel when applying the requirements to your plan. For more information on this ErisaALERT contact us by phone at 610-524-5351 and ask for Mary Andersen or 201-857-1137 and ask for Leanne Fosbre or 215-508-5629 and ask for Theresa Borzelli at SFE&G.