



WRMarketplace

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TOPIC: More IRS Guidance on DOMA: Qualified Retirement Plans after DOMA Repeal

MARKET TREND: The DOMA saga continues. The U.S. Supreme Court's 2013 decision to invalidate the definition of "marriage" under § 3 of the Defense of Marriage Act (the "DOMA decision") affects numerous federal tax laws, including in the areas of employee benefits and retirement plans, and continues to require further clarification and guidance from the IRS.

SYNOPSIS: As previously reported, the DOMA decision effectively requires all federal laws to recognize "lawful marriages" of same-sex couples. To provide clarification, the IRS issued additional guidance on what constitutes a "lawful marriage" for federal tax law purposes in Rev. Rul. 2013-17. Until recently, however, sponsors of tax-qualified retirement plans faced unanswered questions regarding (1) the deadline for a plan's operational compliance with the new rules recognizing same-sex spouses and (2) if and when plan document amendments were required. Notice 2014-19 now addresses these issues as follows:

- To avoid disqualification, a qualified retirement plan's operations must:
 - As of June 26, 2013, reflect the DOMA decision's recognition of same-sex spouses.
 - As of September 16, 2013, recognize same sex spouses as "lawfully married" if married in a state that authorizes same-sex marriages, regardless of their domicile.

The IRS will not disqualify a plan solely because it failed to recognize same-sex spouses or marriages prior to the effective date of the applicable guidance/decision.

- Generally, plans require amendments only if the plan documents limit the definition of spouse to a member of the opposite sex or the plan sponsor wants the plan to recognize same-sex spouses before June 26, 2013. Required amendments must be adopted by December 31, 2014.

TAKE AWAY: Advisors and consultants to employers should meet with their clients promptly to identify whether the employers' plans have been in operational compliance with the

requirements of the DOMA decision and the IRS guidance for the relevant periods and to ascertain whether the plan requires an amendment to ensure continued compliance.

RELATED REPORTS: 13-39; 13-28.

MAJOR REFERENCES: [*IRS Notice 2014-19*](#)

As the result of the DOMA decision, all federal laws referencing “spouses” must now recognize lawfully married same-sex spouses in the same manner as opposite sex spouses. Shortly after the DOMA decision, the IRS issued Rev. Rul. 2013-17, providing guidance on how to determine whether same-sex spouses were “lawfully married” for federal tax law purposes. Despite this guidance, several questions concerning the tax impact of the DOMA decision remained open, particularly with regard to the operation of tax-qualified retirement plans. Recently released IRS Notice 2014-19 addresses the most significant of these issues, specifically the possible retroactive application of the decision to qualified plans and the need and deadline for any plan amendments.

BACKGROUND

Section 3 of DOMA prohibited any federal law that contained a reference to “spouse” from being interpreted to treat as a spouse a party to a same-sex marriage. On June 26, 2013, the U.S. Supreme Court, in its DOMA decision (see *United States v. Windsor*), found DOMA § 3 unconstitutional as it applied to lawful marriages. To clarify what a “lawful marriage” entailed for federal tax purposes, the IRS issued Rev. Rul. 2013-17 on September 16, 2013, ruling that same-sex spouses are “lawfully married” if they married in a state that authorizes same-sex marriages, regardless of whether they reside in a state that does not recognize same-sex marriages (although parties to domestic partnerships, civil unions or similar state law arrangements are not considered spouses for federal tax law purposes).

IRS NOTICE 2014-19

Compliance/Amendment Deadlines

Even with Rev. Rul. 2013-17, sponsors of tax-qualified retirement plans still had questions concerning the timeframes for plan compliance with both the DOMA decision and subsequent IRS guidance. The IRS addressed these questions in Notice 2014-19. As discussed in greater detail below, the new guidance requires:

- ***General operational compliance*** with the repeal of DOMA §3 ***as of June 26, 2013***;
- ***Full operational compliance*** recognizing same sex spouses as “lawfully married” if married in a state that authorizes same-sex marriages ***as of September 13, 2013***; and
- ***Adoption of any required plan amendment generally on or before December 31, 2014.***

No Retroactive Application of DOMA Decision

Neither the DOMA decision nor Rev. Rul. 2013-17 addressed whether the DOMA decision would apply retroactively. The issue was of particular concern for tax-qualified plans, because retroactive application could result in significant obligations for the plan and potentially cause inadvertent plan disqualifications as a result of a plan’s prior non-recognition of same-sex spouses. For example, the tax-qualification rules require a spouse to be provided with survivor

benefits under defined benefit plans and to be treated as the death beneficiary of a participant's account balance under a defined contribution plan, unless the spouse consents otherwise. If the DOMA decision applied retroactively, qualified plans could have to provide same-sex spouses of participants who retired or died before June 26, 2013 with survivor and death benefits – perhaps back to 1996 when DOMA was enacted.

Notice 2014-19, however, clarifies that the IRS will not retroactively apply the DOMA decision for plan qualification purposes. Thus, lawfully married same-sex spouses are required to be treated as spouses for purposes of the relevant tax-qualification rules only ***on and after June 26, 2013.*** In addition, because of the uncertainty regarding the definition of “lawful marriage” for same-sex spouses, Notice 2014-19 states that the IRS will not disqualify a plan solely because, during the period ***between June 26, 2013 and September 13, 2013,*** a plan recognized “spouses” as only those same sex-spouses that then resided in a state recognizing same-sex marriages.

Plan Recognition of Same-Sex Spouses for Periods Before DOMA Decision

Notice 2014-19 also permits a plan to treat same-sex spouses as “spouses” for periods before June 26, 2013 but cautions that doing so for purposes of all plan rules may be difficult to implement retroactively. Accordingly, a plan sponsor may decide to include same-sex spouses under the current definition of “spouse” for periods before June 26, 2013 only for certain purposes (*e.g.*, making available retirement and pre-retirement survivor annuities) and only for benefits commencing on or after a specified date. Thus, the notice provides significant flexibility to plan sponsors in dealing with the implementation of the DOMA decision.

Plan Amendments: Requirements & Deadline

Requirements. Under Notice 2014-19, a plan must be amended if:

- Its terms define a marital relationship by reference to DOMA § 3 or in a manner inconsistent with the DOMA decision requirements (*e.g.*, defining “spouse” as a member of the opposite sex).
- The plan sponsor decides to have the plan’s definition of “spouse” comply with the DOMA decision for any period before June 26, 2013.

Otherwise, if the relevant portions of the plan document do not directly or indirectly distinguish between same-sex and opposite-sex spouses, no plan amendment is necessary.

Note there is a special rule applicable to the amendment of defined benefit pension plans under Internal Revenue Code (“Code”) § 436(c), which generally requires a plan to meet certain funding requirements at any time it is amended in a manner that increases the plan’s liabilities. Notice 2014-19 provides that a plan amendment to bring the plan into compliance with the DOMA decision and Rev. Rul. 2013-17 is not subject to the limitations of Code § 436(c), **unless** the amendment applies the DOMA decision rule for periods before June 26, 2013.

Deadline. Required plan amendments must be adopted before the later of (1) December 31, 2014 and (2) the end of the plan’s relevant remedial amendment period.¹ As these amendments generally will take effect no later than June 26, 2013, in most cases, ***the plan amendment will be required to be adopted on or before December 31, 2014.***

TAKE AWAY

- Advisors and consultants to employers should meet with their clients promptly to identify whether the employers' plans have been in operational compliance with the requirements of the DOMA decision and the IRS guidance for the relevant periods and to ascertain whether the plan requires an amendment to ensure continued compliance.
- With respect to the need for plan amendments, plan sponsors using prototype or volume submitter plans will likely receive amendments from the provider that maintains the plan document. In such cases, the plan sponsor should inquire if the provider anticipates an amendment, particularly if the sponsor does not receive any communication from the provider by Fall 2014.
- Because the necessity of a plan amendment involves an interpretation of existing plan language, advisors may want to refer their clients to counsel to determine if an amendment is needed, particularly if the sponsor uses an individually designed, rather than a prototype or volume submitter, document.

NOTES

¹ A plan's remedial amendment period generally extends to the later of (a) the end of the plan year in which the change is first effective, and (b) the due date of the employer's tax return for the fiscal year that includes the date the change is first effective

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