

## Filing and Amending Federal Tax Returns in Light of IRS Recognition of Same-Sex Marriages

Maximize Refunds and Reconciling With State Returns for Income and Estate Tax

WEDNESDAY, OCTOBER 30, 1:00-2:50 pm Eastern

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# Leveraging IRS Recognition of Same-Sex Marriages for Income and Estate Tax Returns

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October 30, 2013

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# Today's Program

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Individual Income Tax Considerations  
Following DOMA decision  
*[Bruce Lev]*

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Estate & Gift Tax Considerations  
Following DOMA decision  
*[Anthony Delfiner]*

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Employee Benefits Considerations  
Following DOMA decision  
*[David J. Wasserstrum]*

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# DOMA DECISION WEBINAR



October 30, 2013



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INDIVIDUAL INCOME TAX  
CONSIDERATIONS  
FOLLOWING DOMA DECISION

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# TAX EFFECT OF WINDSOR DECISION

- **On June 26, 2013, The Supreme Court’s ruling established that the federal government, including the IRS, must treat legally married same-sex couples the same as their heterosexual counterparts.**
  - **Various Issues for Individual Income Taxes**
    - Marriage state vs. resident state.
    - Amended returns and the Statute of Limitations.
    - Benefits and consequences of filing as married.
    - “Marriage equivalents” (i.e. unions and domestic partnerships).
    - Community property states.
  - **Legally-married same-sex couples generally must file their 2013 federal income tax return using either “married filing jointly” or “married filing separately” status.**

## REV RULING 2013 - 17

- There are more than two hundred Code provisions and Treasury regulations relating to the internal revenue laws that include the terms “spouse”, “marriage” (and derivatives thereof, such as marries or married), “husband”, and “wife”.
- The service concludes that gender-neutral terms in the Code that refer to marital status, such as “spouse” and “marriage”, include, respectively, (1) an individual married to a person of the same sex if the couple is lawfully married under state law, and (2) such a marriage between individuals of the same sex.
- Under this rule, individuals of the same sex will be considered to be lawfully married under the Code as long as they were married in a state whose laws authorize the marriage of two individuals of the same sex, even if they are domiciled in a state that does not recognize the validity of same-sex marriages.
- The holdings of this rev ruling apply prospectively as of September 16, 2013.

# “ STATE OF CELEBRATION ”

- The IRS now has ruled that a same-sex couple that was legally married in a domestic or foreign jurisdiction that recognized their marriage will be treated as married for federal tax purposes, regardless of where they currently live. (Rev. Rul. 2013-17, 2013-38 IRB)
- Treasury Secretary Jacob L. Lew described the ruling as assuring “legally married same-sex couples that they can move freely throughout the country knowing that their federal filing status will not change.”
- This treatment applies for all federal tax purposes – including income, gift and estate taxes – and to all federal provisions where marriage is a factor.
  - Including: filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an IRA, the availability of innocent spouse relief, and claiming the earned income tax credit or child tax credit.
- While their federal filing status does not change, their state filing status is still determined at the state level. The court did not completely overturn DOMA and therefore the states still regulate what constitutes a marriage.
  - This means that if a same-sex couple marry in a state which allows same sex marriages but resides in a state that does not, the couple will have to file married for Federal, but single for their resident state.

# AMENDED RETURNS

- Individuals who were in same-sex marriages are permitted, but not required, to file original or amended returns choosing to be treated as married for federal tax purposes for one or more of the prior tax years still open under the statute of limitations on refunds.
- The general statute of limitations for refunds is three years from filing or two years from payment, whichever date falls later.
- Examples where it may be beneficial to file amended returns:
  - If they paid higher taxes as a result of not being able to file jointly.
  - If one spouse has capital gains in a year that would have been offset by the other spouse's capital losses.
  - If they were previously taxed on health benefits provided to a spouse.

# ADVANTAGES OF FILING JOINTLY

- Under federal income tax rules, same-sex married couples can now presumably enjoy benefits that have been unavailable to them because of DOMA. On the other hand, certain strategic advantages previously enjoyed by same-sex married couples who filed as single individuals under federal tax law, have now likewise ended.
- Advantages to filing jointly can be seen when one spouse creates most of the income. This allows the same-sex couple to have a higher tax bracket for the combined income.
- Same-sex couples can use capital losses of one spouse to offset the gains of the other.
- Same sex couples can use all of the deductions to counter the income of one spouse rather than splitting the deductions.

# THE MARRIAGE PENALTY

- The benefits of filing joint returns may not always be greater than filing separately as unmarried individuals. Both differences in tax rates, bracket amounts, and a variety of income floors and thresholds used to determine the right to certain tax breaks come into play in determining whether same-sex couples were better off, income tax-wise, before the Supreme Court's decision; and what they should do now.
- Married couples with similar income and tax deductions have generally been better off from a tax standpoint filing as unmarried individuals.
- The Bush-era tax cuts provided some relief from the “marriage penalty”, however the new Obama taxes have reversed that trend and created some additional tax liability for those filing as married.

# THE MARRIAGE PENALTY

- Three ways the marriage penalty has a greater impact in 2013.
  - Obamacare taxes
    - .9% Medicare surtax on wages and self-employment income over the applicable threshold.
    - 3.8% tax on taxpayers net investment income over the threshold.
      - Ex. In 2013 Bert and Ernie each make \$150,000 in wages and \$50,000 in dividend income. If they remain single under that law, neither will be subject to the additional Obamacare taxes. However, if they marry in a state that allows same-sex marriage, their joint wages exceed \$250,000 and they will be taxed on \$50,000 at .9% whether they file jointly or married filing separate. In addition, because the total AGI exceeds the \$250,000 threshold, they will be subject to the 3.8% tax on their \$100,000 of Net Investment Income.

# THE MARRIAGE PENALTY

- Three ways the marriage penalty has a greater impact in 2013.
  - Maximum tax rate under the fiscal cliff deal
    - For the top 1% of taxpayers, 2013 has a higher tax rate of 39.6%, up from 35% in 2012 and an increase in long-term cap gains and dividends from 15% to 20% in 2013.
    - This rate will hit singles on all income in excess of \$400,000, yet same-sex couples now treated as married will be taxed on all income in excess of \$450,000.
  - PEP and PEASE is back
    - Itemized deductions and personal exemptions are limited under the fiscal cliff deal.
    - Same-sex couples prior to the Windsor decision would have this phase-out of itemized deductions begin when the individuals income exceeds \$250,000, while now, as a married filer, their joint income will trigger the phase-out when their joint income exceeds \$300,000.

# 2013 AGI (MAGI) PHASE-OUT THRESHOLD STARTING POINTS

	Joint return	Single	Married Filing Separately
Itemized Deductions:	\$300,000	\$250,000	\$150,000
Personal Exemptions:	\$300,000	\$250,000	\$150,000
Maximum Net Capital Gains:	\$450,000	\$400,000	\$225,000
Net Investment Income Surtax:	\$250,000	\$200,000	\$125,000
Additional Medicare Tax:	\$250,000	\$200,000	\$125,000
Child Tax Credit:	\$110,000	\$75,000	\$55,000
American Opportunity Credit:	\$160,000	\$80,000	\$0
Lifetime Learning Credit:	\$107,000	\$53,000	\$0
IRA Deduction (plan participants):	\$95,000	\$59,000	*
Roth IRA Eligibility:	\$178,000	\$112,000	**

\* Deduction determined under single status if not living with spouse at anytime during tax year; otherwise partial deduction if MAGI is less than \$10,000 and no deduction if MAGI is \$10,000 or more

\*\* \$10,000 if lived with spouse at anytime during tax year; \$112,000 if not living with spouse at anytime during tax year



# DOMESTIC PARTNERSHIPS, CIVIL UNIONS, ETC

- Individuals who are in registered domestic partnerships, civil unions, or other similar formal relationships that aren't marriages under State law aren't considered married or spouses for federal tax purposes. This is true whether the registered domestic partners are same-sex or opposite-sex relationship.
- Therefore registered domestic partners can't file federal tax returns using a married filing jointly or married filing separately status.
- Head of Household Status
  - A taxpayer can't use the head of household filing status if the taxpayer's only dependent is his or her registered domestic partner. A registered domestic partner isn't one of the specified related individuals in Code Sec. 152(c) or Code Sec. 152(d) that qualifies the taxpayer to file as head of household.
- Dependency deduction
  - If a child is a qualifying child under Code Sc. 152(c) of both parents who are registered domestic partners, either parent, but not both, may claim a dependency deduction for the qualifying child. If both parents can claim the child it is then determined by who the child lives with most, then by the higher AGI.

# COMMUNITY PROPERTY STATES

- Registered domestic partners must each report half the combined community income earned by the partners in community property states. (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.)
- A partner who has income that is not community property must also report that separate income.
- Half of the income, deductions and net earnings of a business must be reported by each on Schedule C and each domestic partner owes self-employment tax.
- The IRS cautions that the self-employment tax rules under Code Sec. 1402(a)(5) that overrides community income treatment and attributes the income, deductions, and net earnings to the spouse who carries on the trade or business doesn't apply to registered domestic partners.
- State law governs what is considered community property.

# STATES WHICH PERMIT SAME-SEX MARRIAGE

- California – June 17, 2008 through November 4, 2008 and June 26, 2013 to present
- Connecticut – November 12, 2008
- Delaware – July 1, 2013
- Iowa – April 20, 2009
- Maine – December 29, 2012
- Maryland – January 1, 2013
- Massachusetts – May 17, 2004
- Minnesota – August 1, 2013
- New Hampshire – January 1, 2010
- New Jersey – October 21, 2013
- New York – July 24, 2011
- Rhode Island – August 1, 2013
- Vermont – September 1, 2009
- Washington – December 6, 2012
- District of Columbia – March 9, 2010

– List provided by Social Security Administration.



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ESTATE & GIFT TAX  
CONSIDERATIONS  
FOLLOWING DOMA DECISION

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# ESTATE & GIFT TAX

- Is a tax on your right to transfer property during your life or at death.
- The maximum estate and gift tax rate has changed over the years
  - The tax rate in 2009 was 45%.
  - The tax rate from 2010 to 2012 was 35%.
  - The tax rate in 2013 going forward is 40%.

# ESTATE & GIFT TAX

- Estate & Gift Tax Chart

The Basics				
	2009	2010	2011/2012	2013
Estate Tax Exemption (Basic Exclusion Amount)	\$3.5 million	Election between: \$5 million or no estate tax with carryover basis	\$5 million / \$5.12 million (indexed for inflation) - PORTABLE	\$5.25 million (indexed for inflation) - PORTABLE
Lifetime Gift Tax Exemption	\$1 million	\$1 million	\$5 million / \$5.12 million (indexed for inflation)	\$5.25 million (indexed for inflation)
Maximum Estate & Gift Tax Rate	45%	35% (if estate tax was elected)	35%	40%
GST Tax Exemption	\$3.5 million	\$5 million (if estate tax was elected)	\$5 million / \$5.12 million (indexed for inflation) - NOT PORTABLE	\$5.25 million (indexed for inflation) - NOT PORTABLE
Annual Exclusion	\$13,000	\$13,000	\$13,000	\$14,000

# GIFT TAX IMPLICATIONS

## ▪ Gift Splitting

- An election can be made such that a gift made by one spouse to any other person, except their spouse, can be treated as made one-half by each spouse.
- This election is only available where both spouses are U.S Citizens or residents at the time of the gift.
- An individual is considered to be the spouse of another only if
  - The person is married to such individual at the time the gift and
  - Does not remarry for the remainder of the calendar year (i.e. under a divorce situation).

# GIFT TAX IMPLICATIONS

## ▪ Gift Splitting (continued)

- Both spouses must consent to the election
  - The consent may generally be signed at any time after the end of the calendar year.
  - Two exceptions:
    - The consent may not be signed after April 15 following the end of the year in which the gift was made.
      - But, if neither you nor your spouse has filed a gift tax return for the year, the consent must be made on the first gift tax return for the year filed by either of you.
    - The consent may not be signed after a notice of deficiency for gift tax for the year has been sent to either you or your spouse.
- The Supreme Court decision now allows same sex married individuals to gift split.

# GIFT TAX IMPLICATIONS

## ■ Importance of gift splitting

- Annual exclusion
  - A donor may exclude from taxable gifts made in 2013 the first \$14,000 in gifts of present interests to each donee to whom the donor makes taxable gifts during the year.
  - A gift of a present interest is an unrestricted gift of the immediate use, possession or enjoyment of property or the income from property.
  - The donee is the recipient of a gift or power of appointment.
- Any gift to a donee in excess of the annual exclusion amount of \$14,000 would be considered a taxable gift.
- Example – Annual exclusion
  - Person A gifts \$24,000 to person B in 2013.
  - The annual exclusion for this gift is \$14,000.
  - The taxable gift to person B is \$10,000 (\$24,000 - \$14,000)

# GIFT TAX IMPLICATIONS

- **Importance of gift splitting (continued)**
  - The ability of gift splitting allows an individual to give up to twice the annual exclusion amount without creating a taxable gift.
  - Example – gift splitting
    - Person A gifts \$24,000 to person B in 2013
    - Person A elects to gift split with consenting spouse for 2013.
    - The election results in 1/2 the gift, or \$12,000, to be considered by Person A and 1/2 of the gift is consider to be made by Person A's spouse.
    - Person A can take an annual exclusion on this gift equal to the lesser of \$14,000 or the gift.
    - This results in a zero taxable gift to person A on the Person A's gift tax return.
    - The same result happens on Person A's spouse's return.

# GIFT TAX IMPLICATIONS

## ▪ Gift tax exclusion

- Each person has a lifetime unified gift and estate tax exclusion of \$5 million dollars index for inflation
  - In 2012, the exclusion was \$5.12 million and
  - In 2013, the Exclusion is \$5.25 million.
- This allows an individual to make taxable gifts up the lifetime exclusion without actually having to pay gift tax.
- The power of combining gift tax splitting and the lifetime exclusion
  - Under the assumption, a same sex married couple has not used any of their lifetime exclusion amount respectively.
  - The taxpayer or the spouse could give up to \$10.5 million to an one individual and elect gift splitting without incurring an gift tax.

# GIFT TAX IMPLICATIONS

## ▪ GST tax exclusion (continued)

- Generation skipping transfer tax is imposed on transfers to skip persons subject to Federal estate or gift tax.
- A skip person is an individual assigned to a generation more than one generation below that of the transferor.
  - For example donor's grandchild would be considered a skip person.
- The rate of tax for GST transfers is at a maximum rate of 40%
- Taxpayer's get the same annual exclusion for GST purposes as well as for regular gifting purposes.
- Each person has a lifetime unified gift and estate GST tax exclusion of \$5 million dollars index for inflation
  - In 2012, the exclusion was \$5.12 million and
  - In 2013, the exclusion is \$5.25 million in 2013.

# GIFT TAX IMPLICATIONS

- **GST tax exclusion (continued)**
  - Implications of the supreme court decision
    - Before the decision
      - Same sex married couples could not gift split for gifts made to skipped individuals.
      - Any gift in excess of \$14,000 to a skip person would be considered a taxable gift for GST purpose.
    - After the decision
      - Same sex married couples can elect to gift split on gifts to skip persons.
      - The taxpayer or spouse can give up to \$10.5 million to any skip person and elect gift splitting without incurring any GST tax.

# GIFT TAX IMPLICATIONS

## ▪ Marital deduction

- The deduction allows a taxpayer to deduct the value of any property interest transferred by gift to a donee who at the time of the gift is the donor's spouse.
- There is no limitation on the amount of property eligible for the federal gift tax marital deduction.
- The Supreme Court decision has huge implications for same sex legally married couples.
  - Before the decision
    - In 2013, if one spouse gifted over \$14,000 to the other spouse in a same sex marriage then a taxable gift was created.
    - The taxable gift would have gone against that person's lifetime gift/estate tax exclusion.
    - Any gifts to that person's same sex spouse in excess of \$5.264 million would result in a gift tax at a rate of 40%.
  - After the decision
    - One spouse can gift an unlimited amount of property to the other same sex spouse without any gift tax implications.

# ESTATE TAX IMPLICATIONS

- **Marital deduction (continued)**
  - The marital deduction applies to the estate tax as well as gift tax because it is a unified system
  - Implications
    - Before the decision
      - In a same sex marriage, if one spouse left the other spouse property in excess of the life time gift/estate tax exclusion at death then estate tax was paid on the excess.
    - After the decision
      - In a same sex marriage, one spouse can leave an unlimited amount of property to the other spouse at death without any estate tax implications.

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# ESTATE TAX IMPLICATIONS

## ▪ Portability

- Portability became effective January 1, 2011.
- The American Taxpayer Relief Act of 2012 made portability between spouses permanent.
- The concept behind portability
  - Each taxpayer is given a life time exclusion for estate and gift tax purposes.
  - If the taxpayer's estate is less than the life time exclusion amount then this results in an unused exclusion amount for the decedent taxpayer.
  - Portability allows the executor of a decedent, who is survived by a spouse, to make a portability election.

# ESTATE TAX IMPLICATIONS

- The concept behind portability (continued)
  - This election permits the surviving spouse to apply the decedent's unused exclusion (referred to as the deceased spousal unused exclusion amount "DSUE") to the surviving spouse's own transfers during life and death.
    - DSUE is calculated as the lesser of:
      - The basic exclusion amount, or
      - The last deceased spouse's applicable exclusion amount, minus
      - The amount with respect to which the tentative tax is determined on the estate of such deceased spouse.
    - The second part of the calculation refers to the last deceased spouse; therefore, it is not possible for individuals who have been married multiple times to tack on multiple applicable exclusion amounts on their predeceased spouses.
    - This election must be filed on a timely filed estate tax return on which the amount of the deceased's unused exclusion amount was computed.

# ESTATE TAX IMPLICATIONS

- The concept behind portability (continued)
  - Portability Example
    - Facts:
      - Taxpayer dies on January 31, 2013 survived by spouse.
      - The taxpayer made lifetime gifts of \$1 million and has assets remaining of \$1 million.
      - Taxpayer's spouse made no taxable gifts during taxpayer's lifetime.
    - The decreased spouse unused exclusion amount is calculated as follows:
      - Beginning with Lifetime exclusion amount of \$5,250,000
      - Subtract out lifetime gifts of \$1,000,000
      - Subtract out estate assets of \$1,000,000
      - The balance of \$3,250,000 represents the DSUE.
    - The taxpayer's spouse will be able to use their own lifetime exclusion of \$5,250,000 and the DSUE of \$3,250,000 for a total exclusion amount of \$8,500,000 toward transfers during life and death.



# ESTATE TAX IMPLICATIONS

- Implications
  - Before the decision
    - Same sex married couples were not able to take advantage of the portability election
    - Any used exemption amount of a deceased spouse was lost.
  - After the decision
    - Same sex married couples now can take advantage of the portability election.
    - The combined exclusion amount for same sex married individuals that can be used to shelter estate/gift tax is \$10.5 million.

# PLANNING OPPORTUNITIES

- **The supreme ruling retroactively changes the definition of marriage which opens the door for same sex married individuals to amend their Gift and estate tax returns.**
- **Amending gift tax returns**
  - The statute of limitations on gift tax returns is three years after such return is filed or after the deadline for filing the return, whichever is later.
    - This means that if a taxpayer filed before the April 15<sup>th</sup> tax deadline, the statute of limitation will lapse three years after the April 15<sup>th</sup> deadline.
    - However, for taxpayers who filed for an extension or just filed late, the statute of limitations will lapse three years after the filing date.

# PLANNING OPPORTUNITIES

## ■ Amending gift tax returns (continued)

- The open tax years to amend gift tax returns are 2010, 2011 and 2012.
- Same sex married couples will now be able to amend their gift tax returns to claim the marital deduction if they were legally married in those years.
  - In some case it could result in tax refunds if the gift to a same sex spouse resulted in gift tax actually being paid.
  - At a minimum its worth amending the returns to change taxable gifts to non-taxable gifts and preserve each person's life time exclusion amount (i.e. the \$5 million indexed for inflation).
- Unfortunately, same sex married couples will not be able to go back an amend returns to elect gift splitting with their spouse.
  - This situation creates an interest dilemma. The taxpayer's could have gift split on prior returns but due to an illegal law they were not able to.
  - Could this situation supersede the time for electing gift splitting?
  - Taxpayer's might be able to get relief under IRC Reg §301.9100-1 which gives taxpayers extensions of time for making elections.

# PLANNING OPPORTUNITIES

## ■ Amending estate tax returns

- The statute of limitations on estate returns is the same rule for gift tax returns.
  - The difference is that estate tax returns are due nine months after the date of death.
  - You can get an extension of time to file an estate tax return for six months, which would result in the filing date being 15 months after the date of death.
- Same sex married couples will now be able to amend their spouse's estate return for open years to claim the marital deduction if they were legally married on the date of death.
  - This will result in no taxes being paid on transfers between same sex spouses at death.

# PLANNING OPPORTUNITIES

## ■ Amending estate tax returns (continued)

- Same sex married couples will also be able to amend the spouse's estate return to make the portability election in limited circumstances.
  - The portability election must be made no later than 9 months after the decedent's date of death or the last period covered by an extension.
  - Estate returns that have an extension can have the executor amend the return to make the portability election if the 15 month period has not expired.
  - This situation also creates an interest dilemma. The same sex married couple could have made the election but to an illegal law they were not able to.
  - Again taxpayer's might be able to get relief under Treasury Regulation §301.9100.
  - IRS has not issued any guidance regarding the portability election under this circumstance if the tax returns are still open and don't expect them to.
- Practitioners believe that the statute of limitations on amending estate tax returns for both the marital deduction and the portability election will be challenged in the courts from a spouse in a same sex marriage because of the magnitude of dollars that will be at stake.

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EMPLOYEE BENEFITS  
CONSIDERATIONS  
FOLLOWING DOMA DECISION

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# EMPLOYEE BENEFITS - QUALIFIED RETIREMENT PLANS

## ▪ Introduction:

- With a few exceptions, plans providing retirement benefits, health benefits, disability benefits, life insurance, severance benefits and apprenticeship benefits are subject to federal regulation under the Employee Retirement Income Security Act (ERISA).
  - IMPORTANT- As a result of the invalidation of DOMA Section 3, all beneficiary designations must be reviewed.

## ▪ Qualified Retirement Plans

- Qualified retirement plans (“QRPs”) are deferred compensation plans that satisfy the requirements of IRC 401(a). QRPs include, for example:
  - Defined contribution plans, such as:
    - Profit sharing plans
      - 401(k) plans are generally profit sharing plans
    - Money purchase **pension** plans
    - ESOPS
  - Defined benefit pension plans

# SUMMARY OF QRP MATTERS UNDER DOMA

- QRPs must protect the rights of the spouse of a plan participant certain rights.
- Examples:
  - Rights to minimum survivor benefits to the surviving spouse in the event of the participant's death.
    - The participant must obtain the spouse's notarized consent to have the spouse waive those rights.
    - Exception for profit sharing and 401(k) plans- A profit-sharing plan may make distributions in any form without spousal consent as long as:
      - Benefits may not be paid in the form of a life annuity
      - The surviving spouse must be to the death benefit beneficiary
      - The profit sharing plan must not be the direct transferee of assets from a plan subject to the minimum survivor requirements.
        - E.g., The merger of a money purchase pension plan into a PSP.
  - Qualified retirement plans may have a participant's account balance assigned or alienated in order to satisfy a qualified domestic relations order (QDRO) in a marital dissolution.
  - 401(k) plans frequently allow "hardship" distributions. As a result of the invalidation of DOMA, eligible financial hardships of a participant's spouse allow the participant to take a distribution from his or her account for the benefit of the spouse.

# EMPLOYEE BENEFITS - QUALIFIED RETIREMENT PLANS AND IRAs

- **Required Minimum Distributions (“RMDs”)**
  - **IRC §401(a)(9) in general**
    - IRC §401(a)(9) generally requires that a plan participant and an IRA owner must commence receipt of RMDs no later than April 1 following the year during which he or she attains age 70½.
  - **RMDs to Non-Spousal Beneficiary**
    - Non-spouse beneficiaries must conclude receiving RMDs by the end of the 5<sup>th</sup> calendar year following the participant’s death; or
    - Non-spouse beneficiaries must commence annual distributions by the end of the 1<sup>st</sup> calendar year following the participant’s death occurred.
    - A non-spouse beneficiary can only roll over into an “inherited” IRA, which is treated as though received directly by the beneficiary.
    - Distributions are accelerated as a result of using less favorable (i.e., shorter) life expectancies.

# EMPLOYEE BENEFITS - QUALIFIED RETIREMENT PLANS AND IRAs

- **Required Minimum Distributions (“RMDs”) continued**
  - **RMDs to Spousal Beneficiary**
    - A participant’s surviving spouse may defer the receipt of RMDs until the year in which the deceased participant spouse would have attained age 70 ½.
      - Used when the surviving spouse is younger than the deceased spouse to extend (defer) timing of distributions
    - The period over which RMDs will generally be determined by using the **Uniform Lifetime Table** found in A-2 of Treasury Regulation §1.401(a)(9)-9.
      - Under this table, longer payout periods are permitted where the age difference between the spouses does not exceed 10 years.
  - **Rollovers**
    - A spousal beneficiary is permitted to rollover death benefit proceeds to his or her IRA or another eligible retirement plan.

# PROTECTION OF THE RIGHTS OF SPOUSES

- **Minimum Survivor Benefits:**

- **Survivor Annuities:**

- Pension plans, including defined contribution money purchase pension plans, must provide that **married participants** must receive their distributions in the form of a minimum survivor benefit.
      - Protects the surviving spouse.
    - There are 2 types of minimum survivor benefits, including:
      - Qualified Joint and Survivor Annuities (“QJSA”)- Provides an annuity payable for the life of the participant with a survivor annuity to the participant's spouse which is not less than 50% or greater than 100% of a life annuity (see Section 417(b)).
      - Qualified Pre-Retirement Survivor Annuity (“QPSA”)- This is a survivor annuity for the life of the surviving spouse in the event of a participant’s death prior to reaching the plan’s normal retirement age. In general, a QPSA is a payment to the surviving spouse which is not less than the amount which would be payable to the survivor under a qualified joint and survivor annuity (see Section 417(c)).

- **Spousal Consent:**

- Distributions in any form other than a QJSA or QPSA require that the participant’s **spouse consent in writing** which must be **witnessed** by a **plan representative or a notary public** (Section 417(a)(2)).

# PROTECTION OF THE RIGHTS OF SPOUSES

## ▪ **Hardship distributions**

- An employee's pre-tax elective deferrals under a §401(k) plan or a §403(b) plan are subject to withdrawal restrictions, such that distributions are limited to the occurrence of certain events.
  - The employee's financial hardship is an event that permits a withdrawal from the participant's §401(k) or §403(b) accounts.
  - A plan participant may request a hardship distribution to satisfy the needs of spouses and dependents. Therefore, a plan participant may request a hardship distribution for the benefit of a same-sex spouse.

## ▪ **Qualified Domestic Relations Orders ("QDROs")**

- A QDRO is a court ordered alienation of one spouse's QRP accrued benefit or account balance for the benefit of a former spouse (the "Alternate Payee") in connection with a divorce.
  - With invalidation of §3 of DOMA, a court may now name a same-sex spouse as the alternate payee.

# HEALTH INSURANCE COVERAGE

- **Health plans in general** - Health plans that provide reimbursement of medical expenses to spouses include:
  - Health Savings Accounts (“HSAs”);
  - Health Reimbursement Accounts (“HRAs”)
  - Flexible Spending Accounts (“FSAs”)
  
- **Change in tax treatment of health insurance coverage**
  - Payments by an employer for health insurance coverage for an employee, a spouse, and dependent children up to age 26 are excluded from gross income.
    - Because of DOMA, a same-sex spouse could not qualify for the income tax exclusion applicable to health coverage provided to an employee’s opposite-sex spouse.
      - As a result, the value of benefits provided by the employer for spousal coverage were includable in the employee’s income and subject to federal income and FICA taxes.
    - The Court’s ruling means that the spousal health coverage exclusion will extend to coverage provided to employees’ same-sex spouses who are recognized as spouses for federal tax purposes. As a result, employers will no longer have to impute income to those employees, and employees who previously had to pay for same-sex spouse health coverage on an after-tax basis will be able to make those contributions on a pre-tax basis.
  
- **Refund claims for federal income and FICA taxes should be considered.**

# CAFETERIA PLANS AND FLEXIBLE SPENDING ACCOUNTS ( “ F S A s ” )

## ▪ Cafeteria (Section 125) Plans

- Same-sex spouses may benefit from the flexible spending account of the other spouse.
- Cafeteria plans generally permit a participant to change existing elections mid-year when a qualifying event occurs.
- Qualifying events include marriage, divorce, and the birth or death of a child, including an adopted child.
- Same-sex spouses may change mid-year elections upon the occurrence of a qualifying event.

## ▪ Impact on Dependent Care Flexible Spending Accounts (“Dependent Care FSAs”)

- A participant in a Dependent Care FSA may not be reimbursed for payments to a same-sex spouse who is caring for the employee’s child.
- If the employee and same-sex spouse file a joint income tax return, the employee will not be eligible for reimbursement of dependent care expenses unless his or her spouse is employed, seeking employment, a full-time student, or incapable of self-care.
- General rule- A stepchild is the child of an individual’s spouse and may be treated as a dependent of the employee.

# CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT ("COBRA")

- **Consolidated Omnibus Budget Reconciliation Act ("COBRA")**

- COBRA provides for qualified beneficiaries, including spouses, to obtain continuation coverage upon the occurrence of certain qualifying events.
  - Depending upon the event, the qualified beneficiary is eligible for group health continuation coverage for a period of 18 months or 36 months.
  - Qualifying events include the employee's:
    - Death
    - Reduction in hours or termination of employment
    - Marital dissolution
- Prior to the invalidation of §3 of DOMA, group health plans were not obligated to offer COBRA to spouses in same-sex marriages.
  - The invalidation of §3 of DOMA requires group health plans to extend COBRA coverage to the spouses of same-sex couples.

# THE FAMILY AND MEDICAL LEAVE ACT ( “ FMLA ” )

- An employee is entitled to take an unpaid leave of absence under the Family and Medical Leave Act (“FMLA”) to care for a spouse.
- The U.S. Department of Labor has issued an updated Fact Sheet #28 defining “spouse” as a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee **resides**, including “common law” marriage and same-sex marriage.
- Revenue Ruling 2013-17 provides that for purposes of the IRC, any same-sex marriage that was legal in the state or country where the couple **got married** will be recognized.
  - The DOL definition of spouse is inconsistent with the definition in Revenue Ruling 2013-17.

# HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT ( “HIPAA” )

- **HIPAA special enrollment.** Previously ineligible same-sex spouses who become eligible for health coverage mid-year may have HIPAA special enrollment rights. This would mean that:
  - An employee already enrolled in the group health plan would be able to enroll the spouse (and the spouse’s children if they are now eligible) and would have to be given the opportunity to change plan options (for example, may change from an HMO to a PPO).
  - An employee who previously declined coverage would have to be permitted to enroll himself or herself and the same-sex spouse and children.
  - It does not appear that same-sex spouses who were eligible for coverage prior to the ruling but were not enrolled would have special enrollment rights; thus a plan would not have to permit their enrollment. However, enrollment may be permitted as described below.

# SOCIAL SECURITY AND MEDICARE

- **Social Security Benefits**

- Social Security provides survivor and death benefits to surviving spouses and under certain circumstances, benefits are also provided to a divorced spouse. These benefits are available to same-sex spouses.

- **Medicare**

- The Medicare Secondary Payer rules generally will require an employer to pay primary premiums to Medicare for the same-sex spouse of an active employee when the spouse is age 65 or disabled.
  - Thus, employers may find that individuals recognized as spouses may be less likely to drop coverage at age 65 because they will now qualify for the waiver of the Medicare Part B late-enrollment penalty.
    - This waiver is available to individuals who have employer-sponsored coverage due to their spouse's active employment.

# REOPEN PAST ADMINISTRATIVE DECISIONS

- **Reopen past administrative decisions:**
  - The Supreme Court invalidated §3 of DOMA. V It was not repealed
  - Implies that same-sex spouses lawfully married under state law have been married from the date marriage ceremony was performed.
- For example, a pension plan participant with a same-sex spouse should not have permitted to waive the spousal survivor annuity and take a lump sum payment without spousal consent.
  - Revenue Ruling 2013-17 states that guidance on how to handle past situations is forthcoming.
  - Revenue Ruling 2013-17 also confirms the retroactive impact of *Windsor* for tax purposes.

# PLANNING AND ADMINISTRATIVE ISSUES

- **Next Steps for Plan Sponsors and Fiduciaries:**
- Review all qualified and nonqualified plan documents, and Beneficiary health and welfare plan insurance policies with provisions relating to spouses to determine whether
  - they are in compliance with applicable rules following *Windsor*, and
  - whether any plan amendments are necessary.
- Beneficiary designation forms- Revising beneficiary designation forms to require the consent of a same-sex spouse
  - Individuals with same-sex spouses should now know that spousal consent is now required to waive spousal survivor benefit rights under qualified retirement plans, and that the designation of any prior beneficiary, whether or not a spousal, is void.
- Review existing employment records accurately reflect participants' marital status, taking into account same-sex marriages.

# PLANNING AND ADMINISTRATIVE ISSUES

- Update tax withholding and reporting payroll policies and procedures to reflect the changes in tax treatment as a result of Revenue Ruling 2013-17.
  - State taxes will generally still need to be imputed in states that do not recognize same-sex marriage.
- Monitor state and federal legislation and regulatory guidance for continued clarification on the issues left unresolved by Revenue Ruling 1013-17.

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