



AMERICAN BENEFITS COUNCIL

July 17, 2013

The Honorable Jacob J. Lew
Secretary
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health &
Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Seth D. Harris
Acting Secretary
Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Daniel I. Werfel
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

RE: *United States v. Windsor*

Dear Secretary Lew, Secretary Sebelius, Acting Secretary Harris, and Acting Commissioner Werfel:

We are writing on behalf of the American Benefits Council (the "Council") in light of the United States Supreme Court's June 26, 2013 decision in *United States v. Windsor*, 570 U.S. ___ (2013). As set forth below, the Court's ruling raises many compliance questions for our members regarding their pension and retirement plans, as well as their health and welfare arrangements.

One very important threshold issue is which same-sex spouses must and/or may be treated by an employer or plan as a "spouse" for purposes of administering benefits. Without guidance on this first question, plans and employers will be left in an untenable situation in administering benefits as early as July 22, 2013 - the date the *Windsor* decision is scheduled to become effective. This is because if the employer or plan used the incorrect definition, the plan or employer could find itself having to re-administer benefits at material costs to the plan or employer, or face penalties or

increased litigation risk for failing to comply with applicable federal law. Accordingly, we urge you to work together expediently to provide guidance in advance of July 22, 2013¹ Moreover, as discussed below, we urge you to take account of the unique realities associated with the maintenance of employer-sponsored plans and benefits and adopt guidance that will allow for the uniform administration of plans and benefits across state lines-- for example, by adoption of a rule that looks not at where a same-sex spouse resides, but rather at whether an individual holds a valid marriage certificate regardless of current state of domicile.

The Council is a public policy organization principally representing Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

I. Background

In *Windsor*, the Supreme Court held that Section 3 of the Defense of Marriage Act ("DOMA") is unconstitutional under the Fifth Amendment of the United States Constitution. The Supreme Court's decision is welcome news for many employers who were required to treat same-sex and opposite-sex marriages differently under DOMA, facing administrative burdens as a result. However, *Windsor* also presents significant challenges for employer-sponsored retirement and health and welfare plans, as it creates significant uncertainty and a host of new compliance issues and potential benefit obligations for these plans.

II. Plans and employers need prompt guidance regarding who qualifies as a "spouse" under applicable federal laws for purposes of benefit plan administration

Our members have many questions about how they should administer their benefit plans in light of the decision, and we believe a number of these questions raise complicated issues that may take some time to resolve. However, the threshold

¹ Some employers have advised the Council that they are already implementing the *Windsor* decision, based on a reasonable interpretation of existing laws relating to spousal benefits. For example, some employers have taken steps to reverse or undo the imputation of income for same-sex spousal health coverage, back to January 1, 2013. It would be helpful if any guidance issued expressly affirmed the permissibility of these actions.

question is who a plan should treat as a spouse under applicable federal law – in particular, the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), and the provisions of the Internal Revenue Code (“Code”) relating to qualified retirement plans, deferred compensation, employer-provided health plans, and other employee benefits. Therefore, we are writing to encourage your agencies to provide interim guidance or transition relief in advance of July 22, 2013 (the date *Windsor* will take effect) so that plans will know who they are legally required or permitted to treat as a spouse.

Section 3 of DOMA provided that, for purposes of federal law, the term “marriage” meant only a legal union between one man and one woman as husband and wife and the term “spouse” referred only to a person of an opposite sex who is a husband or a wife. Much of the current uncertainty stems from the fact that Section 2 of DOMA, which allows states to refuse to recognize same-sex marriages performed under the laws of other states, was not challenged in the *Windsor* case and therefore remains intact. Thus, at least at present, one state may refuse to recognize a same-sex marriage that was legally performed in another state. Currently, 13 states and the District of Columbia allow for same-sex marriage. Other states may recognize same-sex civil unions or domestic partnerships and may recognize same-sex marriages performed in other states even if such marriages are not statutorily permitted within that state. It is also entirely possible that some states which currently prohibit same-sex marriage will legalize it in the near future (seven states have passed legislation allowing for same-sex marriage since the beginning of 2011). But other states have statutory or constitutional bans on same-sex marriage and are unlikely to change those laws or bans anytime soon. Given this existing patchwork of state laws and the likelihood that state laws will continue to evolve on this issue, ERISA plans need a clear standard that they can use to identify the individuals to whom they are required or permitted to provide certain spousal rights or benefits and to whom they may provide certain benefits without adverse tax consequences.

Any rule that is adopted must allow for the uniform administration of plans at the federal level. This is particularly the case for employers that operate in multiple states, as well as employers that operate in one state and whose former employees move to other states. A uniform rule is necessary to ensure that the ongoing sponsorship and maintenance of employee benefit plans is not unduly complex or costly, therefore allowing American workers and their spouses broad access to a full range of benefits. In this regard, the Council is generally supportive of a rule that would allow employers and plans to define “spouse” as a person with whom a participant has entered into a marriage in a state or foreign country where the marriage was considered valid under that state or foreign country’s law at the time it occurred, and such marriage has not subsequently been legally dissolved. Such an approach is often referred to as determining marriage based on the “state of celebration.”

For example, assume a participant married a same-sex spouse in Maryland (where same-sex marriages are currently legal) and they moved to Virginia (which has a constitutional amendment defining marriage as between one man and one woman and prohibits recognition of relationships that attempt to “approximate” such marriages). In determining whether spousal benefits must be offered, the plan could simply refer to Maryland law and determine if the marriage was valid under law at the time it occurred, and, assuming the marriage remains in effect, treat the spouse accordingly.

We believe the agencies have broad discretionary authority to implement the requested rule as it would apply to ERISA, the Code and other applicable federal laws. We note that the requested rule is consistent with prior IRS guidance as set forth in IRS Revenue Ruling 58-66, which held that taxpayers who enter into a common-law marriage in a state which recognizes such relationship and who later move into a state that requires a marital ceremony are still treated as married for Federal income tax purposes.

We understand the agencies may also be considering the possibility of applying a so-called “domicile” rule. Under this alternative, a “spouse” would be defined as a person with whom a participant has entered into a marriage that is legally recognized under the laws of the state in which that couple presently resides. Our members have indicated that it would be much more difficult and expensive for benefit plans to administer such a rule. Given the mobile nature of the American workforce, as well as the fact that many employers have employees residing in many states across the country, such a rule would be very difficult to administer. It would require employers to constantly track employees’ and retirees’ movements to avoid federal tax law and ERISA issues. For example, if the state of domicile rule were to apply, then to determine whether it would be necessary to impute income to a former employee for spousal health coverage, the plan would have to track on a monthly basis the current state of domicile of each former employee and the law in each such state. Additionally, with respect to active employees the workplace state will not always be the residence state, as employees often live in one state and work in another. The resulting confusion would increase the extent to which employers and plans would need to utilize correction programs such as the Employee Plans Compliance Resolution System (“EPCRS”). Also, while many of our members enjoy access to talented and sophisticated benefits professionals that would have the ability to try and assist with the complicated aspects of administering benefits under a domicile rule, such a rule would require the introduction of complex monitoring processes and would likely prove impossible to administer for smaller-sized employers.

There are many practical examples where such a rule would create significant administrative complexity for plans. Take, for example, a defined contribution retirement plan. Code Section 401(a)(9) generally provides that spouses can defer commencement of required minimum distributions until the end of the calendar year in which the participant would have reached age 70½. However, payment of required

minimum distributions to non-spouses must generally commence within one year of the death of the participant or be paid in full within five years of the participant's death. Because a non-spouse beneficiary often must take inherited amounts into income sooner than a surviving spouse, a plan will need to determine whether the beneficiary is a spouse. Under a "domicile" rule, it is very unclear how Code Section 401(a)(9) would apply.

To return to the example from earlier in this letter, assume that a same-sex couple was legally married in Maryland but lives in Virginia. The participant enters into an assisted living facility in Virginia, and the spouse then moves back to Maryland. The participant then dies. It is not at all clear if the marriage should be evaluated based on where the participant lived or where the surviving spouse lived at the time of the participant's death, and whether the surviving spouse has the right to defer benefits without the plan forfeiting its tax-qualified status. Also, if they both lived in Maryland at the participant's death, and in a later year the surviving spouse moves to Virginia, it is not clear whether survivor benefits would be required to start immediately at that point, or if distribution still would be governed by the deemed age 70½ of the spouse who died in Maryland.

Similarly, assume that a participant in a 401(k) plan has a same-sex spouse and they live in Virginia. The participant names a daughter as beneficiary under the plan, without the consent of the spouse. Should the plan honor that designation as long as the participant lives in Virginia, but void if the participant moves to Maryland, and then honor it again if the participant returns to Virginia? As these examples illustrate, while there may be other purposes for which it is appropriate to look at the couple's state of domicile to determine what law applies, with regard to benefit plans, such a rule would be too difficult to administer.²

III. There are a host of other open issues that employers are confronting, including the potential retroactive application of *Windsor*, questions regarding when and how *Windsor* applies on a going-forward basis, and issues related to the federal income and payroll taxation of certain spousal benefits.

²If the agencies do opt for a domicile rule, we hope they will consider a transition rule along the lines that if a same-sex spouse is married to an employee for any portion of a year and moves to a state that does not recognize same-sex marriages, then, for purpose of ERISA and the Code, the same-sex couple should be considered "married" for the remainder of the year. In that way, employers would have a transition period in which to change benefits administration, as opposed to being held accountable for mid-year changes that may not become known in sufficient time to properly address.

In addition to needing a clear definition of who a plan can or must treat as a spouse, there are many other issues with respect to which plans need guidance. As mentioned above, employees and employers alike are likely to have many questions regarding the implications of *Windsor* on employer-sponsored plans. We anticipate it may take the agencies time to provide the needed guidance, and we look forward to having a dialogue with the agencies on these issues. Given the importance of these rules to plan administration, we ask that the agencies work on an expedited basis to ensure that plan sponsors and administrators have the rules before them necessary to correctly and appropriately administer employer-sponsored plans. Where possible, we request that the agencies utilize a public notice and comment period to ensure that all interested parties are able to contribute to the rulemaking process.

We would like to highlight the following issues preliminarily, in anticipation of what we expect to be a longer and more involved review by the agencies of issues affecting benefit plans. The following is not intended as an exhaustive list, but rather as a sampling of issues that have been raised by our members. We expect to provide future correspondence highlighting additional issues of relevance to plan sponsors.

Possible Retroactive Impact of Windsor: The Court's decision that Section 3 of DOMA is unconstitutional raises the issue of whether lawfully married same-sex couples that were adversely impacted by DOMA in the past may have some claim for retroactive relief. For example, if an employee died while covered under a pension plan, and his or her same-sex spouse was not provided with a right to survivor benefits based on the plan's determination that they were not married under federal law, can the same-sex spouse now make a claim for survivor benefits? If an employee is currently receiving a pension, but was not given the opportunity to elect certain forms of benefit available to married participants based on the plan's determination that the employee was not married to his or her same-sex spouse under federal law, must the employee be given a new election?

We respectfully request that the agencies give full consideration to the likely ramifications of a rule that requires a plan or an employer to provide retroactive benefits or to re-administer benefits previously adjudicated under the terms of a plan. For health plans, we believe that the agencies should only *require Windsor* to be applied prospectively, but that plan sponsors should be given the discretion to amend their plans to provide for retroactive coverage of benefits. For example, if a health plan previously determined that an employee's same-sex spouse was not eligible for coverage because the couple was not married under federal law, the health plan should not now be required to cover medical charges that were incurred pre-*Windsor*, but should be permitted to amend its plan to cover such benefits at its discretion. Requiring (as opposed to permitting) employers to provide retroactive coverage consistent with *Windsor* would likely create significant administrative problems and unanticipated expense for many employers.

Prospective Implementation in Light of Windsor: When the *Windsor* decision takes effect on July 22, 2013, plans will need time to come into compliance with their new obligations. Plan documents and policies will need to be amended, and communications will need to be sent to newly covered beneficiaries advising them of their rights.

For example, for health plans, there are many open issues needing guidance-- including how HIPAA and special enrollment rules will apply to same-sex spouses. It appears likely that under HIPAA, plans will be required to offer a special open enrollment period for same-sex spouses. A related question is how such enrollment rights would apply to same-sex couples married pre-*Windsor*. Given that the HIPAA special enrollment rights act as an affirmative obligation on employers, it is important that guidance be issued clarifying these open issues.

Another question relates to Code Section 125 cafeteria plans. Existing IRS regulations appear to permit plans to allow an employee with a same-sex spouse to make a mid-year cafeteria plan election change under Code Section 125 (because the cost of coverage for the same-sex spouse will effectively decrease by the employee's marginal federal income tax rate and corresponding savings of payroll tax). It would be very helpful if the IRS could confirm this in guidance.

These are just a few examples of the open questions posed by the *Windsor* decision. Given the myriad of issues that will need to be addressed, it is imperative that benefit plans be provided some sort of appropriate transition relief in order to ensure that plans have sufficient time to come into compliance with the new legal landscape in an organized and prudent matter. Sponsors will need time to review their existing plan documentation, determine what changes need to be made, formally amend or adopt new plan terms, change their payroll and benefit eligibility systems, communicate with participants and beneficiaries regarding their new rights. Given the administrative challenges, plans should not have to adopt any required amendments prior to the last date (including extensions) for filing a form 5500 for plan years beginning in 2013.

Imputation of Income Related to Employer-Provided Health Coverage in 2013: Prior to *Windsor*, for federal income tax purposes, employers generally needed to treat the value of employer-paid coverage for an employee's same-sex spouse as imputed income for that employee. Now, in reaction to *Windsor*, some employers are considering changing, or already have changed, their payroll practices based on their understanding that the cost of such coverage should no longer be treated as imputed income. Many other employers are considering making this change as well.

Many questions have arisen regarding the imputation of income for coverage attributable to a same-sex spouse. Specifically, can, or must, an employer no longer impute income attributable to coverage of a same-sex spouse in 2013? If *Windsor* takes effect on July 22, 2013, will an employer be permitted to wait until the beginning of the

next payroll period or month to implement the process of no longer treating health contributions as imputed income? Must (or may) the employer go back and revise its determination of imputed income provided to the employee for earlier in 2013 (or prior years)?³

Claims for Tax Refunds: As you know, the *Windsor* case was brought in the context of an estate tax refund that the plaintiff sought from the IRS. Since that refund request apparently will be honored, we anticipate that many employees and employers may have questions regarding whether they are entitled to a refund with respect to federal income and payroll taxes paid as a result of employer-sponsored health coverage received for a same-sex spouse. In addition, an employer may have "grossed up" an employee's compensation to reduce the adverse tax consequence experienced by the employee because the value of the employer-provided coverage was imputed as taxable to the employee.

Employers and plans need to know how to advise employees regarding the issues associated with the filing of tax refunds. Moreover, for the reasons addressed above, many employers are likely to have questions regarding their own eligibility for potential refunds of taxes paid. For example, questions have arisen regarding the eligibility to file claims for refunds for amounts already imputed in 2013 or prior tax years.⁴ Similarly, questions have arisen regarding whether an employer must provide an amended Form W-2 upon an employee request or otherwise. With respect to this latter issue, the Council anticipates that some employers will voluntarily provide amended Forms W-2 to employees upon request in order to facilitate claims for refunds. However, the Council would generally favor a rule that provides employers flexibility in choosing to make available amended Forms W-2 (for example, by issuing guidance that does not require employers to provide an amended Form W-2, and allows an employer to assist an employee by providing other documentation such as a signed letter on company letterhead setting forth the amount of imputed income) given the cost and administrative burdens in doing so.

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³ Additionally, we understand that some employers may seek to not impute any income for all of 2013. Accordingly, the Council requests enabling guidance in this regard.

⁴ The Council is generally supportive of a rule that would allow employers and employees to file for refunds of the federal income taxes paid on their imputed income for all open tax years, including any "gross-up" amounts.

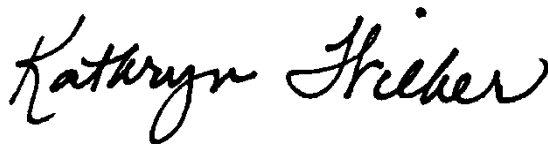
We greatly appreciate your consideration of our thoughts on this matter. While we know there are many open issues that must be addressed in light of *Windsor*, we would like to reiterate our request that the agencies provide in advance of July 22, 2013, at a minimum, preliminary guidance regarding who *must* be treated as a spouse as of that date.

We would welcome the opportunity to meet with representatives of your agencies to elaborate on our members' views in greater detail. If you have any questions or would like to discuss this issue further, please contact us at (202) 289-6700.

Sincerely,



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