july/august 2014

Retirement PLAN news

Retroactive guidance on the DOMA decision

In *United States v. Windsor*, the Supreme Court ruled to strike down Section 3 of the Defense of Marriage Act (DOMA). Section 3 defines the term "marriage" as being between one man and one woman and the term "spouse" as being a person of the opposite sex. The date of the decision was June 26, 2013.

The IRS issued initial guidance (Revenue Ruling 2013-17) about how the decision applied to qualified plans. Additional guidance (Notice 2014-19) was released recently that clarifies when same-sex marriages must be recognized, when plan amendments are required, and how the decision should be applied retroactively.

Timing issues

According to the IRS notice, there are three time periods plans need to consider when implementing the *Windsor* decision:

- September 16, 2013, and thereafter
- Between June 26, 2013 (the date of the Supreme Court decision), and September 15, 2013 (the day before the IRS Revenue Ruling)
- Prior to June 26, 2013

September 16, 2013, and thereafter

Effective September 16, 2013, Revenue Ruling 2013-17 required that same-sex marriages be recognized for all qualified plan purposes. Thus, same-sex couples married under the laws of any of the fifty states, the District of Columbia, a U.S. territory, or a foreign jurisdiction are to be recognized as married.

June 26, 2013, to September 15, 2013

The *Windsor* decision did not strike down Section 2 of DOMA, which permits states to refuse to recognize same-sex marriages performed in other states. Thus, from the date of the Supreme Court decision on June 26, 2013, until September 15, 2013, a plan is required to recognize same-sex spouses only for participants who lived in a state that recognized same-sex spouses. A plan may, but is not required to, recognize all same-sex marriages for all plan purposes during this time period. Keep in mind that *all* same-sex marriages must be recognized as of September 16, 2013.

Prior to June 26, 2013

For qualified plan purposes, same-sex marriages do not have to be recognized prior to June 26, 2013. Nonetheless, a plan may amend some or all of its provisions to recognize same-sex marriages prior to June 26, 2013, provided the amendment is nondiscriminatory. For example, a plan may be amended solely for qualified joint survivor annuity (QJSA) or qualified preretirement survivor annuity (QPSA) purposes and solely with respect to participants with annuity starting dates or dates of death on or after a specified date.

IRS FAQs

In addition to the Notice, the IRS issued some guidance in the form of FAQs. FAQ 1 addresses a beneficiary designation for a profit sharing or stock bonus plan. It assumes a participant died between June 26 and September 15, 2013.

(Continued on page 2)

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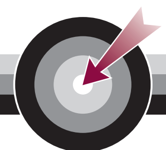

PPA restatement period

The IRS requires preapproved defined contribution plan documents (master, prototype, and volume submitter plans) to be rewritten for new laws and regulations and submitted for review every six years. Once negotiations over the new provisions are completed, the IRS issues new opinion letters (advisory letters for volume submitter plans) signifying that the documents have been approved and that plan sponsors may rely on them.*

On March 27, 2014, the IRS announced that the remedial amendment period for the current cycle will run from May 1, 2014, to April 30, 2016. During this time, defined contribution plan sponsors using preapproved documents must restate their plans by adopting the updated documents. This is the second six-year restatement period for preapproved plans and is known as the "PPA restatement period" because it incorporates changes from the Pension Protection Act of 2006. The first cycle was the "EGTRRA restatement period," which ended April 30, 2010.

Changes

Significant changes incorporated into this document include those from PPA, the final 415 regulations, the Heroes Earnings Assistance and Relief Tax Act (HEART Act), and the Worker, Retiree, and Employer Recovery Act (WRERA). New provisions include in-plan Roth rollovers, qualified automatic contribution arrangements (QACAs), and eligible automatic contribution arrangements (EACAs). The PPA document also contains the required changes from the 2010 IRS Cumulative List (Notice 2010-90). Changes that occurred after Notice 2010-90 are not included.

Timely adoption

It is critical for all sponsors of preapproved defined contribution plans to timely restate by the April 30, 2016, deadline. Failing to keep a plan document updated is an IRS disqualifying event that results in nonamender status. If the plan sponsor does not restate by April 30, 2016, the only way to become compliant is to submit the plan to the IRS under the Employee Plans Compliance Resolution System (EPCRS) *and* pay a noncompliance fee based on the number of participants in the plan. **Note:** If nonamender status is discovered during an IRS audit, there are substantially higher sanctions than those under EPCRS.

Plan sponsors should keep an original signed and dated PPA document as well as any previously executed documents for the life of their plan. Auditors routinely request a copy of the most recent plan document. And it is not uncommon for them to request copies of previous versions as well.

Individually designed plans

Individually designed plans must also be restated. However, they restate every five years based on the last digit of the plan sponsor's identification number (EIN). Currently, individually designed defined contribution and defined benefit plans of sponsors with an EIN ending in 4 or 9 must be submitted to the IRS by January 31, 2015.

* Prototype plans may no longer seek individual determination letters on Form 5307. The IRS stated that opinion letters would be equivalent to favorable determination letters. Volume submitter plans may only submit if there is a change to the document.

Retroactive guidance

(Continued from page 1)

If the participant was married to a same-sex spouse and the beneficiary form named someone other than the spouse as beneficiary without the spouse's consent, then the same-sex spouse must be recognized as the beneficiary.

The decision could also be based on whether the participant lived in a state that recognizes same-sex marriages. If the participant lived in a state that did not recognize same-sex marriages, then the same-sex spouse would not be recognized as the beneficiary. However, if the participant lived in a state that *did* recognize same-sex marriages, then the plan has to recognize that marriage. Note that if the participant died before June 26, 2013, the money would not go to the same-sex spouse.

FAQ 3 addresses retroactive amendments. It states that a retroactive amendment may be implemented using principles similar to those in the Employee Plans Compliance Resolution System (EPCRS).

Plan amendment

Whether a plan must be amended for DOMA depends on the existing plan language, especially with respect to how it defines the terms "marriage" and "spouse." Plans with language inconsistent with the outcome of the *Windsor* case (and subsequent IRS guidance) will need to be amended. For example, a plan that defines "spouse" as a member of the opposite sex will need to be amended because the language does not agree with the *Windsor* outcome. A plan that defines "marriage" with any reference to DOMA also would need to be amended.

Plans with language consistent with the outcome of *Windsor* (and subsequent IRS guidance) will not need to be amended. For example, a plan that defines "spouse" as a person someone is married to would not have to be amended.

The deadline to adopt an amendment is the later of December 31, 2014, or the plan sponsor's tax-filing deadline (including extensions) for the year that the change is effective.

Update beneficiary forms

As a best practice, employers should ask all plan participants to submit new beneficiary forms on a regular basis (once every five years, for example). In addition, employers should regularly remind employees to file new forms following a life event, such as a marriage, divorce, or the birth of a child. With the DOMA change, updated forms could be requested now from any participants whom you know to be in a valid same-sex marriage, or it may be the appropriate time to obtain updated forms across the board.

Qualified plans in mergers and acquisitions

"Has the plan sponsor purchased or sold any entities during the past year?" This is a standard question on many annual plan censuses or questionnaires. Clearly, a business sale or merger will have repercussions for the sponsors' plans. However, when companies are involved in a sale or merger, the impact the transaction will have on the retirement plan(s) of the buyer and/or seller is often overlooked.

Whenever a plan sponsor is involved in a merger or acquisition, the sponsor should notify its plan provider *before* the transaction takes place so the provider can work with the plan sponsor on the impact the transaction will have. Contacting the plan provider after the transaction can have undesirable repercussions. Following is a brief overview of some of the issues.

Transition period

The Internal Revenue Code has a rule that permits an acquiring employer to operate both plans — its own and the seller's — separately during a transition period. The period ends on the last day of the year following the year of the acquisition.

Example: Company A purchases 100% of Company B through a stock sale on May 1, 2014. Both companies sponsor a 401(k) plan. The transition rule allows Company A to operate both plans separately until December 31, 2015.

The transition rule requires both plans to show they can pass the coverage test as of the day before the acquisition. In addition, neither plan can make significant changes in coverage (other than changes resulting from the acquisition), nor can either plan significantly reduce the benefits provided. If either of these changes occurs, the transition period ends at that point and the plans are considered as one.

Type of sale

The first thing a plan provider typically wants to know when informed of a sale or purchase is whether the transaction is an

asset sale or a stock sale. Although each specific sale or purchase may be different, there are some general rules that apply to these types of business transactions.

Stock sale

In a stock sale, the acquiring employer purchases another company in its entirety. In so doing, the acquiring employer becomes the employer and, thus, the sponsor of the seller's qualified retirement plan. If both the acquiring and selling employers have a 401(k) plan at the time of the transaction, the successor plan rules prevent the acquirer from terminating the 401(k) plan of the purchased company once the sale is complete.

An acquiring employer frequently will decide during the planning stages that the two 401(k) plans will be merged. Once the stock sale transaction is complete, the new owner can merge the two plans together.

If the acquiring employer does not want to keep the selling employer's 401(k) plan, the purchase agreement should be written to include a requirement that the seller terminate the plan before the business transaction occurs. If the resolution to terminate the seller's plan is passed by the board and takes effect prior to the transaction, the seller is responsible for distributing all plan assets. This may continue to occur even after the business stock sale is completed.

Severance status

When a stock sale takes place, the acquired employees typically continue working for the acquiring company and do not incur a severance from employment. As a result, there is no distributable event. The years of service the employees have with the seller should count toward eligibility and vesting credit under the acquiring employer's plan.

Example: Jane has worked for Company B since March 1, 2001. Company B is acquired by Company A on May 1, 2014, through a stock purchase. Company A sponsors a 401(k) with a six-year vesting schedule and a one-year eligibility requirement. Jane should be immediately eligible to participate in Company A's 401(k) plan and be 100% vested in any employer contributions.

Asset sale

In an asset sale, the acquiring company purchases only the assets of the selling company.

Example: Bank A buys 15 branches of Bank B. Bank B continues to exist and continues to maintain its own qualified plan. The employees of the purchased branches move to Bank A and are generally treated as having severed service with Bank B, which entitles them to take a distribution from Bank B's retirement plan.

In certain cases, the entities may agree to transfer the retirement assets of the relocated participants from the seller's plan to the acquiring employer's plan. In that case, there would not be a distributable event since the acquiring employer would be seen as maintaining the seller's plan.

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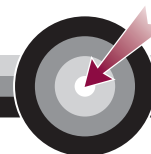

Retirement Plan Administrators

National Service Center / Mailing Address: P.O. Box 2048 • Loves Park, IL 61130-0048
10501 North 2nd Street • Machesney Park, IL 61115-1455

phone 815.394.5500

800.963.5501 natl. toll free
www.pensioninsider.com

815.399.9324 fax

RECENT developments

IRA-to-IRA rollover rules

The Internal Revenue Service (IRS) recently announced (Announcement 2014-15) that individuals will be permitted only one IRA-to-IRA rollover per 12-month period. In an IRA-to-IRA rollover, an individual receives a distribution from one of his or her IRAs and has 60 days to deposit the same amount into an IRA to avoid the distribution being treated as taxable income. The guidance is significant because it is a change in position from the guidance on the subject in IRS Publication 590, *Individual Retirement Arrangements (IRAs)*, which has existed for decades. Announcement 2014-15 adopts language from the Internal Revenue Code (brought to light by a Tax Court case) specifying that an individual can perform only one tax-free IRA-to-IRA rollover per one-year period. The one-year period is measured from the date of the initial distribution and is not based on a calendar year. It is important to note that the restriction does not apply to trustee-to-trustee transfers. There is no limit on the number of IRAs that may be transferred directly from one provider to another in a 12-month period.

Prior to this guidance, if an individual had multiple IRAs, the understanding was that the 12-month rule applied to each individual IRA. The rule change restricting IRA-to-IRA rollovers to one per 12-month period is based on the aggregate of an individual's IRAs. For example, if an individual has three IRAs — A, B, and C — and rolls IRA A into IRA B, the individual cannot perform a similar type of rollover for 12 months from the date of the distribution from IRA A.

IRS Publication 590 is issued annually to help taxpayers prepare their Form 1040 series tax returns. For over two decades, it has included language that contradicts the position taken by the IRS in Announcement 2014-15. As a result, the IRS will not enforce this change for rollovers that occurred prior to January 1, 2015. And it will be revising Publication 590 at some point to reflect this change in position.

The general information in this publication is not intended to be nor should it be treated as tax, legal, or accounting advice. Additional issues could exist that would affect the tax treatment of a specific transaction and, therefore, taxpayers should seek advice from an independent tax advisor based on their particular circumstances before acting on any information presented. This information is not intended to be nor can it be used by any taxpayer for the purpose of avoiding tax penalties.

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