



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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MEMORANDUM FOR EMPLOYEE PLANS (EP) DETERMINATIONS EMPLOYEES

FROM: Karen Truss, Director /s/
Employee Plans Rulings & Agreements

SUBJECT: Spousal Provisions in Internal Revenue Code § 403(b)
Applications for Opinion and Advisory Letters

This sets forth interim guidance on the processing of IRC § 403(b) pre-approved plan applications for opinion and advisory letters with respect to spousal benefit provisions. This is not a pronouncement of law and is not subject to use, citation, or reliance as such. Nothing in this interim guidance shall affect the operation of any other provision of the IRC, regulations, or guidance thereunder.

Background

Rev. Rul. 2013-17, 2013-38 I.R.B. 201, clarifies that, pursuant to *Windsor v. United States*, 570 U.S. 12 (2013), marriages of same-sex spouses performed under applicable state law (regardless whether the current state of residence recognized the marriage), including marriages performed in previous years, became recognized for federal tax law purposes, including the rules applying to employee benefit plans. Notice 2014-19, 2014-17 I.R.B. 979, clarifies that effective June 26, 2013, retirement plans must be administered in a manner reflecting *Windsor* and Rev. Rul. 2013-17. Notice 2015-86, 2015-52 I.R.B. 887, sets forth guidance on the application to qualified plans of *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct. 2584 (2015) (relating to same-sex spouses).

For IRC § 401(a) qualified plans, several required provisions relate to spouses, such as qualified domestic relations orders, qualified joint and survivor annuities and spousal rollovers. For IRC § 403(b) plans, the only requirements under the IRC relating to spouses involve spousal rollover rights under IRC § 402(c)(9) (though the IRC does not require a specific plan provision describing those rights) and required minimum distributions under IRC § 401(a)(9) (though the detailed rules can be incorporated by reference).

Generally, opinion, advisory, and determination letters issued by EP Determinations do not address compliance with any applicable non-tax laws such as Title I of the Employee Retirement Income Security Act of 1974 (ERISA). A caveat in all IRC § 403(b) plan opinion and advisory letters will explicitly state that they pertain only to federal tax laws.

Guidelines

If the definition of “spouse” in the IRC § 403(b) plan document specifically excludes a same-sex spouse, Determinations agents and specialists should verify whether that definition is controlling with respect to plan provisions describing spousal rollover rights under IRC § 402(c)(9) and required minimum distributions under IRC § 401(a)(9).

- If so, in conformity with standard practice, request necessary changes to the plan document. If the taxpayer declines the requested changes, do not issue an opinion or advisory letter.
- If that exclusive definition does not control those relevant provisions, or if the plan sponsor amends the definition of “spouse” with respect to IRC §§ 402(c)(9) and 401(a)(9) to comply with Rev. Rul. 2013-17, then issue an opinion or advisory letter, assuming satisfaction of all other applicable requirements.

Example 1. If the plan’s definition of “spouse” excludes a same-sex spouse and applies to all provisions in the plan including spousal rollover rights under IRC § 402(c)(9) and required minimum distributions under IRC § 401(a)(9), the provision violates Rev. Rul. 2013-17.

Example 2. If the plan definition excludes a same-sex spouse but does not apply to spousal rollover rights under IRC § 402(c)(9) and required minimum distributions under IRC § 401(a)(9) (or the provisions regarding required minimum distributions are incorporated by reference), the provisions required under federal tax law do not violate Rev. Rul. 2013-17.

If the IRC § 403(b) plan document provides for a joint and survivor annuity for a surviving spouse pursuant to Title I of ERISA, Determinations agents and specialists are not responsible for determining whether the plan complies with ERISA since the tax provisions of Title II of ERISA do not apply to an IRC § 403(b) plan.

Contact

For questions regarding this interim guidance, contact Seth Tievsky (seth.tievsky@irs.gov).

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