

**Covington & Burling
LLP**

**ERIC FocusOn Call:
Windsor,
Rev. Rul. 2013-17, and
Retirement Plans**

Sept. 17, 2013

Overview

- *Windsor*: Federal government must recognize same sex marriage under state law
- Rev. Rul. 2013-17:
 - Same sex marriage will be recognized if valid where entered
 - Federal tax rules recognize same sex marriage
 - Tax-qualified retirement plans must recognize same sex marriage for purposes of tax-qualification as of Sept. 16 2013.
- Key open issue: periods before Sept. 16, 2013

Windsor and Tax-Qualification Requirements

- Surviving Spouse Benefits (QJSA/QOSA/QPSA/other)
- Required Minimum Distributions (Code § 401(a)(9))
- QDROs
- Rollovers
- 415 Limits for Defined Benefit Plans
- Hardship Distributions
- Family Aggregation Rules

Key Open Issue: Retroactivity

- Rev. Rul. 2013-17 effective Sept. 16, 2013
- *Windsor* holding binds the federal government but not private parties
- Claim for past benefits?
 - claim for benefits under terms of the plan depends on plan interpretation (ERISA § 502(a)(1)(B))
 - claim for benefits under ERISA would seek equitable relief, which might not be available (ERISA § 502(a)(3); see *Manhart*)
- Tax-Qualification: IRS authority under Code § 7805(b)

Other Open Issues

- Deadline for plan amendments
- Annuities in pay status
 - change permitted now on account of marriage under § 401(a)(9)?
- Benefits commenced under non-spouse RMD rules
- Benefits limited under § 415 non-spouse rules
- One-year marriage rule

Going Forward

- Plan amendments
 - consider interaction with retroactivity issue
- Claims processing
 - consider plan interpretation for past
- Plan design
 - treatment of domestic partners and civil unions