

Administering IRAs After DOMA Ruled Unconstitutional
excerpt from August 2013 Issue of Pension Digest

The IRS has released Revenue Ruling 2013-17 setting forth its positions on various tax issues as a result of the Supreme Court's ruling in *United States v. Windsor* that Section 3 of the Defense of Marriage Act is unconstitutional as it violates the equal protection principles of the fifth amendment. The IRS does not expressly address the impact on IRAs.

Under DOMA the IRS had concluded that because of Section 3 of DOMA, the two individuals comprising a same-sex marriage could not be considered to be married for federal tax purposes as Section 3 of DOMA defined marriage to mean only a legal union between one man and one woman as husband and wife, and the word spouse refers only to person of the opposite sex who is a husband or a wife.

This article focuses on administering IRAs after *Windsor*.

Under the U.S. tax laws there are "tax bonuses" and "tax penalties" for individuals who are married.

The first marriage tax bonus associated with IRAs is the spousal contribution rule. The spouse with the lesser compensation is allowed to use the other spouse's income to make a larger contribution for himself or herself than if he or she was not married. Example, John and Mark are married. John is age 48 and Mark is age 44. For 2013 John has compensation of \$55,000 and Mark has compensation of \$2,600 and dividend and interest income of \$40,000. Since they are married under federal income tax law, Mark is able to make a \$5,500 IRA for himself using John's excess compensation.

It does not appear that Mark will be able to make a contribution in 2013 for 2010, 2011 or 2012 based on the argument he would have made a contribution had he known he could. Had Mark made contributions based on John's compensation and such contributions had been considered to be excess contributions, such contributions would now be considered to qualifying spousal contributions.

The second marriage tax bonus associated with IRAs is that a spouse beneficiary who is the sole beneficiary has the right to treat the deceased spouse's IRA as his or her own IRA. Any spouse beneficiary has the right to take a distribution from the deceased spouse's IRA and then rollover such distribution to the extent that no required distribution is rolled over. The same-sex surviving spouse will now have such rights to treat as own or to make a rollover contribution.

What policies and procedures will the IRS be applying with respect to same-sex marriage?

The IRS will still be applying the general rule that whether one is married or not is determined by state law. The IRS will also be applying the following rules.

First, for federal tax purpose, the terms "spouse," "husband and wife," "husband," and "wife" include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term "marriage" includes such marriage between individuals of the same sex. That is, a state must have revised its marriage laws to include same-sex marriages.

Secondly, for federal tax purpose, the IRS adopts a rule that as long as the same-sex couple has been married in a state authorizing same-sex marriages that they are not required to live or be domiciled in a state which has authorized or recognizes same-sex marriages.

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Thirdly, the IRS makes the rule that the terms “spouse,” “husband and wife,” “husband,” and “wife” do not include individuals (whether the same sex or the opposite sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law, but which is not “marriage” under such state law.

The same-sex couple has the discretion to file original or amended returns to reflect being married for a prior tax year if such tax year is still open. The couple is not required to file or amend their tax return for a prior year claiming a married status. If they wish to change their filing status they may do so only if a prior tax year is still open under the statute of limitations. Tax years 2010, 2011 and 2012 are still open. Generally, the deadline for filing a refund claim is three years from the date the return was filed or two years from the date the tax was paid, whichever is later.

Most likely the transaction to lead a same-sex surviving spouse to file an amended tax return will be when he or she will choose to treat the inherited IRA of a deceased spouse as his or her IRA. In this situation the same-sex surviving spouse might have been required to take an RMD as he or she did not qualify as a spouse at the time. Such distributions may certainly be stopped on a prospective basis. As to past distributions, the IRS may be receptive to a request to waive the 60 day rollover rule. That is, the IRS might authorize the same sex spouse to rollover such distribution amounts.