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December 3, 2013

The Honorable Phyllis C. Borzi  
Assistant Secretary  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Room S-2524  
Washington, DC 20210

**Re: Technical Release 2013-04**

Dear Assistant Secretary Borzi:

The American Society of Pension Professionals & Actuaries (“ASPPA”) is pleased to provide comments with respect to “further guidance addressing specific provisions of ERISA and its regulations” that the Department of Labor’s (“the Department”) Employee Benefits Security Administration (“EBSA”) stated it would issue in Technical Release 2013-04 (“T.R. 2013-04”).

ASPPA is a national organization of more than 16,000 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA’s membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

**Background**

ASPPA appreciates that EBSA quickly issued guidance on the *Windsor*<sup>1</sup> decision in T.R. 2013-04. This letter is intended to give input in relation to the issues that still need to be addressed by EBSA.

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<sup>1</sup> *United States v. Windsor*, 570 U.S. \_\_\_\_ (2013).

## Summary

The following is a summary of ASPPA's recommendations regarding the anticipated guidance from EBSA, which are discussed in greater detail in the **Discussion** section that follows.

1. **Plan Distributions Under Pre-Windsor Rules Should Be Deemed Compliant** - Plans completing distributions in good faith under the pre-*Windsor* notice and consent rules should be specifically acknowledged by EBSA as complying in both form and operation with the plan document and the Employee Retirement Income Security Act of 1974, as amended ("ERISA").
2. **Participant and Spouse Notifications Should Not Be Required** - There should be no independent requirement that a plan administrator affirmatively notify participants and their spouses of the changes to the rules resulting from the *Windsor* decision. Instead, EBSA should use educational outreach to participants and their same-gender spouses to explain the *Windsor* decision and its impact, and plan administrators should only be required to modify administrative forms where there is any gender-specific spousal reference on a going-forward basis.
3. **Participants Have a Duty to Notify the Plan Administrator about a Same-Gender Spouse** - As with a participant with an opposite-gender spouse, the participant should have the duty to notify the plan administrator in the event the participant has a same-gender spouse.
4. **Prohibited Transaction Exemptions Should Be Granted for Pre-Windsor Transactions** - In some cases, the spouse of a business owner is also considered an owner and, therefore, a party-in-interest. As a result, a transaction between the plan and a same-gender spouse that occurred pre-*Windsor* may now be considered a prohibited transaction. Affected parties should be eligible to receive a prohibited transaction exemption for these past transactions.
5. **Model Language Should Be Provided For Summary Plan Descriptions and Summaries of Material Modification** - Plans may eventually need to be amended to comply with the *Windsor* decision. A Summary of Material Modification ("SMM") or a new Summary Plan Description ("SPD") would then need to be distributed to participants. Model language would be very helpful to sponsors, and would permit them to give notice to participants about the effect of the *Windsor* decision on qualified plans without concern that the wording will eventually need to be changed.
6. **Relief Should Be Granted When a Form 5500 Series Should Have Been Filed on a Different Form** - Prior to *Windsor*, a plan covering only the owner and the same-gender spouse may have been eligible to file a Form 5500-SF because the same-gender spouse would have been considered an employee (and, not a spouse). Following the *Windsor* decision, the plan is a one-participant plan because the same-gender spouse is now considered a spouse (and, not an employee). As a result, the Form 5500-EZ may have been

required to be used. Affected plan sponsors should be given relief from refiling and any related penalties for using an incorrect form for a pre-*Windsor* Form 5500 filing.

## Discussion

### 1. Plan Distributions Under Pre-*Windsor* Rules Should Be Deemed Compliant

In forthcoming additional guidance, EBSA should grant relief for the full processing of distributions (including loans and in-service withdrawals) from plans subject to ERISA Section 205 that were completed prior to July 21, 2013, or the date used by the IRS to provide similar relief. Specifically, EBSA should “grandfather” the complete processing of such payments as being made in good faith under the Defense of Marriage Act (“DOMA”), and should recognize the plans as complying in both form and operation with ERISA.

**ASPPA recommends** that qualified plans that fully processed distributions under the pre-*Windsor* rules be specifically acknowledged as complying in both form and operation with the plan document and ERISA.

In addition, with regard to benefit payment types, **ASPPA recommends** the following (subject to the “Other Considerations” in paragraph c, below):

- a. *Benefits in pay status* (e.g., plans with benefits that are currently in pay status (including lump sum distributions), other than those that meet the requirements of a QJSA form of payment):
  - i. For defined benefit plans and defined contribution plans (including 403(b) plans), and annuities distributed from such plans:

Within a reasonable period of time after receiving notification of the existence of a “qualified same-gender spouse” from either the participant or the spouse, the plan administrator shall be required to provide the affected participant with a notice of the right to elect a QJSA and adjust the payment of benefits prospectively as of the date of notification (as if the date of notification were the annuity starting date).

A “qualified same-gender spouse” is a person who:

- has been identified as such to the plan administrator;
- is established as the same-gender spouse of a participant who would have qualified for such spousal rights under the plan as of the original annuity starting date; and
- previously has not been provided spousal notice and consent rights.

ii. Lump sum payments for defined benefit plans with subsidized QJSA benefits:

Within a reasonable period of time after receiving notification of the existence of a qualified same-gender spouse from either the participant or the spouse, the plan administrator of a defined benefit plan under which benefits were paid in a lump sum (based on a form of payment less valuable than the subsidized QJSA, most commonly the single life annuity) will provide the affected participant with notice of a right to elect a subsidized QJSA upon the participant's repayment to the plan of the lump sum. The plan administrator shall begin payment upon receipt of such election and repayment. However, if the plan would have paid the lump sum value of the subsidized QJSA had the plan known about the same-gender spouse, then a participant should be able apply for the additional lump sum value that could have been paid. The procedures under IRS Revenue Procedure 2013-12 ("EPCRS") for corrective distributions from a defined benefit plan would apply.

b. Elected benefits not in pay status.

Administrators of qualified plans subject to ERISA Section 205 under which annuity benefits in a form other than a QJSA have been elected (or deemed elected) but are not yet in pay status will be required, upon notification of the existence of a qualified same-gender spouse by either the participant or the spouse, to provide the affected participant with notice and spousal consent rights prior to the commencement of such benefits being made in a form other than a QJSA.

c. Other considerations

- i. Plans should have protection with respect to good faith distributions made on the basis of the representations of the participant, provided that the plan administrator does not have actual knowledge of contrary information (*e.g.*, an owner of a small business who claims not to be married in order to deny his or her same-gender spouse the applicable consent rights).
- ii. Any annuity payment changes to the form of a QJSA should be actuarially adjusted to reflect amounts already paid in a form other than a QJSA in order to avoid an economic loss to the plan.
- ii. Qualified plans should not need to honor claims of qualified same-gender spouses with respect to benefits fully paid or in pay status prior to July 21, 2013<sup>2</sup> if notification to the plan administrator of the existence of a same-gender spouse occurs more than two years after the date guidance is published by EBSA.

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<sup>2</sup> July 21, 2013 is the effective date of the *Windsor* decision.

- iii. Notice, consent and rights to payments should be made to a former same-gender spouse under a court order that otherwise qualifies as a Qualified Domestic Relations Order (“QDRO”).
- iv. Insurance companies that have issued annuities from which payments are being made (either from within the plan or from a qualified plan distributed annuity) should be required, in order to continue the qualified status of payments from such contracts, to amend their contracts to provide for rights of a same-gender spouse. However, to the extent that such contracts do not permit the insurer to make such changes, companies will be given a two-year period under which to seek approval of such changes from the applicable state insurance regulatory body. For those annuity contracts which have been distributed from the plan, the insurer (not the plan sponsor) will be considered to be the plan administrator.

## 2. Participant and Spouse Notifications Should Not Be Required

Currently, there are no established EBSA rules or procedures for affirmatively notifying participants of the need to update their marital status, regardless of the gender of either spouse. In addition, many plan sponsors do not maintain data regarding same-gender spouses. As a result, plan sponsors and administrators should not be burdened with additional notification requirements as a result of *Windsor*.

**ASPPA recommends** that there be no independent requirement that a plan administrator affirmatively notify participants and their spouses of the changes to the rules resulting from the *Windsor* decision. Instead, the disclosure of the *Windsor* decision and its impact should be addressed with EBSA educational outreach to participants and their same-gender spouses. Plan administrators should, however, be required to modify administrative forms where there is any gender-specific spousal reference on a going-forward basis.

## 3. Participants Have a Duty to Notify the Plan Administrator of a Same-Gender Spouse

Plan administrators may not be aware that a participant has a same-gender spouse as defined in T.R. 2013-04. As with a participant in an opposite-gender marriage, the participant has an obligation to notify a plan administrator if he/she is married. Therefore, plan administrators and sponsors should not have an affirmative duty to investigate whether a participant is married under the spousal definition described in T.R. 2013-04. Instead, plan administrators and sponsors should only be required to obtain proof of marriage from same-gender couples to the extent such proof is currently required of opposite-gender couples.

**ASPPA recommends** that plan administrators and sponsors not be required to survey participants to determine the existence of a same-gender spouse.

#### 4. Prohibited Transaction Exemptions Should Be Granted for Pre-*Windsor* Transactions

In some cases, the spouse of a business owner is also considered an owner and, therefore, a party-in-interest. As a result, a transaction between the plan and a same-gender spouse that occurred pre-*Windsor* may now be considered a prohibited transaction between the plan and a party-in-interest under ERISA Section 406(a).

**ASPPA recommends** that the Department and its Secretary create a class prohibited transaction exemption as permitted by ERISA Section 408(a) to provide relief from past transactions that would now be deemed to be prohibited transactions as a result of *Windsor*.

#### 5. Model Language Should Be Provided for Summary Plan Descriptions and Summaries of Material Modification

Plans may eventually need to be amended to comply with the *Windsor* decision. An SMM or a new SPD will then need to be distributed to participants. Model language would be very helpful to sponsors, and would permit them to give notice to participants about the effect of the decision on qualified plans without concern that the required wording will eventually be different.

**ASPPA recommends** that EBSA publish model language for SMMs and SPDs describing the benefits and rights of same-gender spouses.

#### 6. Relief Should Be Granted When a Form 5500 Series Should Have Been Filed on a Different Form

Prior to *Windsor*, a plan covering only the owner and the same-gender spouse may have been eligible to file the Form 5500-SF because the same-gender spouse would have been considered an employee (and, not a spouse).<sup>3</sup> Following the *Windsor* decision, the plan is a one-participant plan because the same-gender spouse is now considered a spouse (and, not an employee). As a result, the Form 5500-EZ would have been required to be used for the filing if the “Conditions for Filing” on page 7 of the Instructions For Form 5500-SF would not have been satisfied.<sup>4</sup>

**ASPPA recommends** that the Department provide specific relief from any refiling requirements and related penalties for plans that used an incorrect form for a pre-*Windsor* Form 5500 filing.



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<sup>3</sup> If the plan did not satisfy all of the conditions for utilizing a Form 5500-SF (*see*, “General Instruction” on page 2 of the Instructions For Form 5500-SF), then the plan would have been required to file a Form 5500.

<sup>4</sup> *See also*, item 11 under “Do Not File a Form 5500 for a Pension Benefit Plan That Is Any of the Following” on page 3 of the Instructions For Form 5500.

These comments were prepared by the Department of Labor Subcommittee of ASPPA's Government Affairs Committee, Todd Berghuis, Chair, with primary drafting by Patricia L. Scahill. Please contact Ronald J. Triche, Esq., APM, Assistant General Counsel and Director of Government Affairs, at (703) 516-9300 if you have any comments or questions on the matters discussed above. Thank you for your time and consideration.

Sincerely,

/s/

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/s/

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