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October 4, 2013

Ms. Joyce Kahn
Acting Director, EP Rulings & Agreements
Internal Revenue Service
1111 Constitution Ave NW
Washington, DC 20224-0002

**Re: Revenue Ruling 2013-17**

Dear Ms. Kahn:

The American Society of Pension Professionals & Actuaries ("ASPPA") is pleased to provide comment with respect to "the further guidance on the retroactive application of the Supreme Court's opinion in *Windsor* to…employee benefit plans" that the Internal Revenue Service ("IRS") stated it would issue in Revenue Ruling 2013-17 ("Rev. Rul. 2013-17").

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 the IRS quickly issued guidance on the *Windsor*[1] decision in Rev. Rul. 2013-17 and the two sets of related "Answers to Frequently Asked Questions" that were issued on the same date. Q&A 19 states that "[t]he IRS intends to issue further guidance on how qualified retirement plans and other tax-favored retirement arrangements must comply with *Windsor* and Rev. Rul. 2013-17. It is expected that future guidance will address the following, among other issues:

[1] *United States v. Windsor*, 570 U.S. ___ (2013).

1. Plan amendment requirements (including the timing of any required amendments).
2. Any necessary corrections relating to plan operations for periods before future guidance is issued."

This letter is intended to give input in relation to the issues that still need to be addressed by the IRS.

## Summary

The following is a summary of ASPPA's recommendations regarding the aforementioned forthcoming guidance from the IRS, which are described in greater detail in the **Discussion** section which follows.

I. **Plan Documents Should Not Require Interim Amendments** - A definition of "spouse" should not be required within plan or related documents and, where amendments may be required to correct gender-specific spousal definition language in a plan or related document or where certain options are given to same-gender couples, interim amendments should not be required before the end of the plan's next remedial amendment cycle.

II. **Plan Distributions Under Pre-*Windsor* Rules Should Be Deemed Compliant** - Plans completing distributions in good faith under the pre-*Windsor* rules should be specifically acknowledged by the IRS as complying in both form and operation with the plan document, the Internal Revenue Code of 1986, as amended (the "Code"), and the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

III. **Pre-*Windsor* Actuarial Valuations Should Not Be Required to Be Revised** – Regardless of whether a plan amendment is required to comply with the *Windsor* decision, liabilities arising from the decision should be treated as liabilities resulting from a plan amendment (or a plan loss) when such amendment is actually adopted or legally required to be adopted.

IV. **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, the IRS should use educational outreach to participants and their same-gender spouses to explain the *Windsor* decision and its impact, and plan administrators should be required to modify forms where there is any gender-specific spousal reference on a going-forward basis.

V. **No Changes Should Be Required To Testing Results For Prior Plan Years** - No changes should be required regarding non-discrimination and coverage testing for plan years beginning prior to July 21, 2013,[2] and the IRS should adopt a transition period (commencing on the first day of the plan year beginning on or after July 21, 2013) similar

[2] July 21, 2013 is the effective date of the *Windsor* decision.

to that afforded plan sponsors following mergers and acquisitions under Code Section 410(b)(6)(C).

## Discussion

### I. Plan Documents Should Not Require Interim Amendments

The definition of spouse is not a required element for plan qualification. The List of Required Modifications ("LRMs") contains no such definition. Neither the Code nor the regulations have a specific definition of spouse. Historically, it has been common that the definition of "spouse" was presumed to be that of any applicable law. The fact that the applicable law has been modified should not necessitate a plan amendment to clarify this. Therefore, ASPPA members believe that the holding in *Windsor* does not impose a new qualification requirement that a definition of spouse now be included in qualified plans.[3] Where a plan may have a gender-specific definition of spouse, it simply should be corrected operationally until such time as an amendment to the plan is required to be made.

**ASPPA recommends** that plan sponsors with documents that do not define spouse, or that have a gender-neutral definition of a spouse, not be required to adopt any amendments related to the definition of spouse as a result of the *Windsor* decision.

**ASPPA also recommends** that any sponsor of a qualified plan that includes a gender-specific definition of spouse not be required to adopt an interim amendment to such plan before the end of the plan's next remedial amendment cycle,[4] so long as the plan is administered in the meantime using an operational definition of spouse that is gender-neutral.

**ASPPA further recommends** that no interim amendment for any other Defense Of Marriage Act ("DOMA") purpose be required in relation to the manner in which adjusted benefit payments or rollovers are handled (see below) until the end of the plan's next remedial amendment cycle. However, the IRS should publish model language to establish these rights for applicable plans that can be used in modifying Code Section 402(f) notices and qualified joint and survivor annuity ("QJSA") and qualified preretirement survivor annuity notices.

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

In forthcoming additional guidance, the IRS should grant relief for the full processing of distributions (including loans and in-service withdrawals) from plans which are subject to Code Sections 411(a)(11) and 417, or ERISA Section 205, which were completed prior to July 21, 2013. Specifically, the IRS should "grandfather" the complete processing of such payments as being made in good faith under DOMA, and should recognize the plans as complying in both form and operation with the Code and ERISA.

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[3] For purposes of this letter, "qualified plans" also includes Code Section 403(b) and 457 plans.

[4] *See,* Revenue Procedure 2007-44, as modified. Additionally, any amendments required under Revenue Procedure 2013-22 to underlying documents in pre-approved Code Section 403(b) plans, including annuity contracts and custodial agreements, should not be required prior to the remedial amendment deadline for prototype and volume submitter plans.

**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, the Code and ERISA.

In addition, with regard to benefit payment types, **ASPPA recommends** the following (subject to the "Other Considerations" in paragraph 5, below):

1. *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):

    a. <u>For defined benefit plans and defined contribution plans (including 403(b) plans), and annuities distributed from such plans:</u>

    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.

    b. <u>Lump sum payments for defined benefit plans with subsidized benefits:</u>

    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 Revenue Procedure 2013-12 ("EPCRS") for corrective distributions from a defined benefit plan would apply and, for purposes of the

two-year correction period for significant failures in Section 9.02(1) of the EPCRS, the two-year period would be the two plan years beginning after the plan year during which the IRS publishes the relevant guidance.

2. *Elected benefits not in pay status.*

Administrators of qualified plans subject to Code Sections 411 and 417 or 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.

3. *Required Minimum Distribution ("RMD")*

To the extent a participant or beneficiary is receiving an RMD as of July 21, 2013, the existing treatment of such payment should be allowed to be retained as the default and treated as complying with the RMD requirements, unless the plan administrator has actual knowledge of a same-gender spouse,[5] or the affected participant or spouse makes an election to defer payments, change calculations, or roll over the non-RMD amounts (as applicable) during a reasonable election window (*e.g.,* six months from the date of the guidance). This approach is generally consistent with the approach taken with the 2009 RMD relief under Code Section 401(a)(9)(H).

4. *Rollovers*

An option should be provided to: (1) a same-gender couple who has received a greater RMD than would have been required had the couple been recognized as married in the year of the "excess" payout, and (2) a surviving same-gender spouse who was required pursuant to Code Section 402(c)(11) to roll over benefit payments to an inherited individual retirement annuity or account ("IRA"). In the case of (1), the couple should be given a transition period (*e.g.,* two years after the date of the guidance) to roll over the excess payout to an IRA or to a qualified retirement plan in which either of the individuals is a participant. In the case of (2), the surviving spouse should be given a similar transition period to (i) transfer or roll over funds remaining in the inherited IRA to an IRA for the benefit of such surviving spouse or to a qualified retirement plan in which the surviving spouse is a participant, and (ii) to roll over funds that had been distributed from the inherited IRA but would not have had to be distributed had the individual been recognized as a surviving spouse in the year of the distribution either to an IRA owned by the surviving spouse or to a qualified retirement plan in which the surviving spouse is a participant. To the extent

[5] If the plan administrator has actual knowledge of a same-gender spouse, then the plan administrator should be required to provide the affected participant or spouse a notice of the right to make an election to defer payments, change calculations, or roll over the non-RMD amounts (as applicable) during a reasonable election window (*e.g.,* six months from the date the plan administrator provides such notice).

a qualified plan receives a rollover contribution under this relief, it may rely on the representation of the participant that he/she is entitled to rely on this relief.

5. *Other considerations*

   a. Plan administrators and sponsors should not have an affirmative duty to investigate whether a participant is married under the spousal definition described in Rev. Rul. 2013-17. As with a participant in an opposite-gender marriage, the participant has an obligation to notify a plan administrator if he/she is married. In addition, plan administrators and sponsors should not be required to obtain proof of marriage from same-gender couples to the extent such proof is not currently required of opposite-gender couples. Plans should be considered to have properly complied with the law and related guidance with respect to good faith distributions completed prior to July 21, 2013 that were 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 spouse the applicable consent rights).

   b. 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.

   c. 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 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 the IRS.

   d. 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").

   e. 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.

## III. Pre-Windsor Actuarial Valuations Should Not Be Required to Be Revised

Actuarial valuations performed before July 21, 2013 were based on law and regulations as understood at the time the work was performed. Until further guidance is issued by the IRS, plan actuaries cannot know the extent of any retroactive requirement and, absent an actual plan amendment by the plan sponsor, will not know of any choices made within the framework of the guidance. Retroactive application of *Windsor* for funding and benefit restriction purposes would be impractical and unfair to both plan sponsors and participants. Determinations under Code Sections 430 and 436 for valuation dates before guidance on retroactivity is provided should not be required to reflect additional liabilities for retroactive benefits stemming from any retroactive requirements under future IRS guidance.

**ASPPA recommends** that, whether or not a plan amendment is required to comply with the *Windsor* decision, liabilities arising from the decision should be treated as liabilities resulting from a plan amendment (or a plan loss) when such amendment is actually adopted or legally required to be adopted. IRS guidance should also provide that this "amendment" is an exception under Treas. Reg. §1.436-1(c)(4)(ii), and so is not itself subject to the restriction on amendments for plans that would be less than eighty percent (80%) funded after adoption of the amendment.

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

Currently, there are no established IRS 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 IRS educational outreach to participants and their same-gender spouses. Plan administrators should, however, be required to modify forms where there is any gender-specific spousal reference on a going-forward basis.

## V. No Testing Changes Should Be Required

The definition of highly compensated employee under Code Section 414(q) and key employee under Code Section 416(i) are impacted by the *Windsor* decision. Those definitions, in turn, affect nondiscrimination, coverage and top-heavy testing. For example, the family attribution and constructive ownership rules for stock ownership under Code Sections 414 and 318 must now take into account same-gender spouses. However, as noted in the prior section, many plan sponsors do not maintain data regarding same-gender spouses.

**ASPPA recommends** that for the plan year that includes July 21, 2013 (and for those plan years falling within the transition relief period described below), and for prior plan years, a plan is not required to apply Rev. Rul. 2013-17 to determine family attribution and constructive ownership

rules for purposes of Code Sections 318, 414(q), 416, and 1563. The attribution rules for plan years that begin on or after July 21, 2013, will take into account Rev. Rul, 2013-17 only after a similar transition relief period to that set forth in Code Section 410(b)(6)(C). This would provide plan sponsors (and their recordkeepers) sufficient time to make the necessary design and system changes. For example, plan sponsors should be given through the end of the first plan year beginning after the date of pending IRS *Windsor* guidance (or January 1, 2014, if later) to comply with this change. In particular, for coverage testing in plan years beginning on or after July 21, 2013, where the application of Rev. Rul, 2013-17 results in a change in controlled group or affiliated service group status, such change shall be treated as an acquisition or disposition under Code Section 410(b)(6)(C).

**ASPPA also recommends** that, with regard to changes in imputed income, plan sponsors should not be required to go back to past years to exclude such income from testing or to adjust over-contributions made because of inclusion of such amounts in compensation.

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These comments were prepared by a special task force of ASPPA's Government Affairs Committee, with primary drafting by Elizabeth T. Dold, Esq., APM and Robert J. Toth, Jr., Esq. 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,

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/s/
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