



## 2013 Retirement Plan Regulatory Update

Uncertainty Ahead

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# Agenda

- U.S. v. Windsor (Defense of Marriage Act)
- Revenue Recapture Accounts
- Department of Labor Allows Plan Administrators to Reset Annual Distribution Date of 404(a)(5) Comparative Chart
- Securities and Exchange Commission Proposed Changes to Money Market Regulations
- Executive Summary of Final Report on College and University Compliance Project
- IRS Announces Compliance Project for 457(b) “Top Hat” Plans of Exempt Employers
- New Alternatives to Employer Plans Emerging
- Budget Threats

# Defense of Marriage Act “DOMA”

- US v. Windsor rules that Section 3 of the Defense of Marriage Act is unconstitutional
  - Section 3 of DOMA provided that, for all federal law purposes, the term “spouse” refers only to a person of the opposite sex who is a husband or wife
- What the Windsor decision does not do
  - Federal law continues to defer to state-by-state determinations as to whether same-sex couples should be afforded the opportunity to marry
  - The Court’s opinion does not discuss whether civil union partners are “spouses” for federal law purposes
  - The Courts decision provides no guidance as to which state’s marriage law should control for various federal law determinations
  - The Court’s ruling does not address whether same-sex marriages may have retroactive rights

# Defense of Marriage Act “DOMA”

- More than 1,300 federal laws are impacted by the Windsor ruling
  - Internal Revenue Code (“IRC”)
  - Employee Retirement Income Security Act (“ERISA”)
- Normalizes spousal treatment in states that recognize same-sex marriage
- No help for sponsors in states that do not recognize same-sex marriage
  - Married in a state that recognizes same-sex marriage but residing in a state that does not
  - Living in a state that recognizes same-sex marriage but working in a state that does not
  - Living and working in a state that recognizes same-sex marriage, but working for a company whose primary place of business does not

*Licenses for same-sex marriages may be issues in Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington, and the District of Columbia*

# Defense of Marriage Act “DOMA”

- Courts beginning to act in wake of Windsor decision
  - US District Court for the Eastern District of Pennsylvania (Cozen O'Connor v. Tobits)
    - Ruled that a same-sex widow was entitled to survivor benefits under ERISA, even though the couple lived in a state where same-sex marriages are not performed. The court noted that the term “spouse” was not defined by the plan and that as a result, it had to determine if Tobits was Fraley’s spouse under ERISA and the Code.
  - US District Court for the Southern District of Ohio (Obergefell v. Kasich)
    - Court rules that Ohio must recognize the marriage of two men married in the state of Maryland
  - Next issue may be how marriages are treated in states that expressly forbid same-sex marriage

# Defense of Marriage Act “DOMA”

	DOMA	POST-DOMA
<b>Pension Plans – QJSA (Qualified Plans and ERISA 403(b))</b>	Same-sex spouse treated as non-spouse beneficiary – not required to consent to single life annuity, lump sum, etc. payouts (though plan may require)	Same-sex spouse now entitled to 50% survivor annuity protection (and participant may elect 75% survivor annuity), unless consent to form of payout other than QJSA
<b>Pension Plans – QPSA (Qualified Plans and ERISA 403(b))</b>	Same-sex spouse not treated as spouse for qualified pre-retirement survivor annuity protection (though plan may allow)	Same-sex spouse now entitled to 50% survivor annuity protection unless consent to waive (where plan doesn’t subsidize cost)
<b>401(k) Plans – Payment of Account Balance at Death</b>	Same-sex spouse treated as non-spouse beneficiary – not required to consent to another beneficiary designated by participant	Same-sex spouse now entitled to 100% of account balance at death unless consent to another beneficiary
<b>Hardship Distribution (401(k) and 403(b) Plans)</b>	If plan allows, participant may designate same-sex spouse as primary beneficiary when electing hardship distribution for medical, tuition and funeral expenses of such spouse	Plans now required to recognize same-sex spouse as primary beneficiary for purposes of these hardship distributions
<b>Rollovers (all Plans)</b>	Same-sex spouse may make direct rollover only to an inherited IRA	Same-sex spouse now able to roll over plan distribution to own IRA or employer plan account
<b>Loans (mainly money purchase pension plans)</b>	Same-sex spouse is not required to consent to a plan loan	Same-sex spouse must consent to a plan loan
<b>QDROs (all Plans)</b>	Same-sex spouse does not have rights of “alternate payees” to obtain QDROs awarding share of participant’s benefits	Same-sex spouse now able to obtain QDRO if state law recognizes the rights of same-sex spouse (or is entitled to share in community property states)

Source: “A Quick Look at the Impact of Windsor on Benefit Plans” Groom Law Group

# Revenue Recapture Accounts

- Revenue recapture accounts
  - Provider captures revenue sharing from investment products to offset explicit plan fees
  - When revenue captures exceed the cost of the service, the excess can be captured on behalf of the Plan
  - Two flavors
    - Plan Account
    - Bookkeeping Account
- Department of Labor Advisory Opinion 2013-03A acknowledged the existence of these revenue sharing arrangements

# Revenue Recapture Accounts

Bookkeeping Account – Provider captures and retains the excess revenue, but contractually may be obligated to use excess revenues to pay reasonable and necessary expenses incurred by the plan.

Plan Account – Provider captures excess revenue and deposits those excesses into the plan. The plan, assuming the document permits, pays reasonable and necessary expenses from the account. Typically, amounts deposited into the plan would be used to pay expenses in the same plan year. However, amounts may also be returned to plan participants in the form of an additional earnings credit.

# Revenue Recapture Accounts

	Plan Account	Bookkeeping Account
Is it a funded account	Yes	No. This is an obligation, or a promise, to pay a predetermined amount based on the excess revenue generated by the plan.
Is it fully transparent	Yes. Generally the difference between the recordkeeping fee and the revenue sharing fees collected by the recordkeeper is the amount placed in the Plan Account.	No. The process to determine excess revenue is handled by the provider.
Must the assets be exhausted by the end of the plan year	Yes. Generally, unallocated deposits in retirement plans are expected to be used in the plan year during which they are generated.	No
Can the excess be credited to participant accounts	Yes	No
What expenses may be paid	Reasonable and necessary expenses that are associated with administering and maintaining the plan.	Reasonable and necessary expenses that are associated with administering and maintaining the plan.
What expenses cannot be paid	Settlor expenses should not be paid with plan assets.	Settlor expenses should not be paid from Bookkeeping Accounts
Can the account be transferred to another provider	Yes. Plan Accounts may be transferred as any other plan asset would in a provider transition	Generally no. Bookkeeping obligations generally expire with the expiration of the service contract

# Revenue Recapture Accounts

## Bookkeeping Account

- Contractual obligation of the provider
- Indirect compensation being paid to third-party providers
- Creates covered service providers requiring alternative 408(b)2 filings and Schedule C listings on the Form 5500

## Plan Account

- Asset of the Plan
- May be used to credit additional earnings to participants
- Should be included on the plan financial statements

# Fee Disclosure Timing

Field Assistance Bulletin No. 2013-02

The Department of Labor would not seek enforcement against plan administrators who furnish the 2013 comparative chart to participants not later than 18 months after the 2012 comparative chart was furnished

- If sponsor has released the 2013 disclosure they will have 18 months from that disclosure to publish the 2014 disclosure
- DOL has extended the timing to allow plan administrators to schedule the timing of these required disclosures to be in line with other annual disclosures
  - Summary Annual Report
  - Qualified Default Investment Alternative Notices

DOL is considering whether to allow a 30 or 45-day window during which any subsequent annual comparative chart would have to be furnished, rather than fixing the 12-month “at least annually” period to end on one specific day

# Money Market Regulations

Financial Stability Oversight Council issued a recommendation on new money market reforms. The Commissioners of the SEC voted unanimously to move forward with the Council's recommendations, which are now in the comment period

1. Floating NAV – Institutional and prime money funds would no longer use a \$1 NAV and would be required to calculate an actual NAV to 0.0001
    - Concerns over accounting treatment. Currently investors do need to track investment gains and losses
  2. Redemption Restrictions – Designed to discourage a “run” on retail and institutional municipal and prime money market funds. Funds would be required to impose a 2% redemption or potentially a liquidity “gate,” suspending all redemptions for a period of up to 30 days when weekly liquidity falls below 15%
- Retail vs. Institutional
  - Plan level liquidity gate

# College and University Compliance Project

IRS releases the Executive Summary of Final Report for their Compliance Project

- Underreporting of Unrelated Business Taxable Income (UBTI)
  - 90% of those audited underreported UBTI
- Problems fulfilling executive compensation requirements
  - Inadequate adherence to reasonable compensation requirements of section 4958
- Employment Tax Issues
  - 100% required adjustments in wages
- Retirement Plans
  - 50% of those audited

# Compliance Project for 457(b) “Top Hat” Plans

IRS Employee Plan Compliance Unit (“EPCU”) will be checking a broad array of “Top Hat” plans

1. Verify that deferrals reported on the W-2 represent a 457(b) plan
2. Determine if the sponsor is eligible to have a 457(b) plan
3. Verify that participation is limited to a select group of highly compensated employees
4. Determine whether the plan contains impermissible features
  - Loans
  - Age 50 catch-up
  - Contributions placed in trust
5. Determine whether unforeseeable emergency distributions have been made

# Alternatives to Employer Plans Emerging

- Oregon House Bill 3436
  - Would allow Oregon residents to contribute to an account managed by the state
- US Sen. Orin Hatch introduces bill that would give states the option to turn over state worker pension plan to private insurance companies
- California votes to establish California Secure Choice Retirement Savings Program
  - Would direct employer without an employer sponsored retirement plan to withhold 3% of pay unless the employee opts out of the savings program, which can be done every two years
  - Assets managed by an investment committee
- Illinois considering the Illinois Automatic IRA Act
  - Participant directed investment options
    - Principal protection
    - Target Date
    - Equity
- Maryland established Maryland Private Sector Employees Pension Plan
- US Senate Health Education Labor & Pensions Committee

# Budget Threats

## Joint Committee on Taxation

- “Blank Slate” approach
- Eliminate all deductions, and force the defense of any measure by advocates wish to see them retained
- Pension and retirement savings tax breaks could amount to \$2 trillion over 10 years
  - Equivalent to a rate change of 1.3 to 2.2%

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