

FINAL REGULATIONS ON SAME-SEX MARRIAGE

The Internal Revenue Service (“IRS”) has issued final regulations on September 2, 2016 that reflect the holdings of *Obergefell v. Hodges* (2015), *Windsor v. US* (2013) and Revenue Ruling 2013-17. The regulations define terms in the Internal Revenue Code of 1986, as amended (“Code”), describing the marital status of taxpayers in a gender-neutral way for federal tax purposes. In addition, the regulations provide that domestic partnerships, civil unions or other similar relationships are not considered “marriage” for federal tax purposes.

Background

On June 26, 2013, the Supreme Court in *Windsor* held that Section 3 of the Defense of Marriage Act, which generally prohibited the federal government from recognizing the marriages of same-sex couples, is unconstitutional because it violated the principals of equal protection and due process.

Revenue Ruling 2013-17 provided guidance on the *Windsor* decision’s effect of the IRS’s interpretation of Code sections that refer to taxpayers’ marital status. The IRS ruled that if a same-sex couple is married in a state that recognizes such marriages, that marriage will be recognized for all federal purposes, no matter where the couple lives.

On June 26, 2015, the Supreme Court in *Obergefell* held that state laws are “invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite sex couples” and “that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”

In light of the holdings of *Windsor* and *Obergefell*, the IRS determined that, for federal tax purposes, marriages of same-sex couples should be treated the same as marriages of opposite-sex

couples and that, for reasons set forth in Revenue Ruling 2013-17, terms indicating sex, such as “husband,” “wife,” and “husband and wife,” should be interpreted in a neutral way to include same-sex spouses as well as opposite-sex spouses.

Final regulations have been issued that reflect these holding, and are effective September 2, 2016. The final regulations adopt the proposed regulations, issued in October 2015, with few changes. The regulations render Rev. Rul. 2013-17 obsolete, but the IRS stated that taxpayers may continue to rely on the ruling’s guidance as it relates to employee benefit plans and the benefits provided under such plans.

Final Regulations Define Terms Relating to Marital Status

The final regulations amend the current regulations under IRC Section 7701 to provide that, for federal tax purposes, the terms “spouse,” “husband,” and “wife” mean an individual lawfully married to another individual, and the term “husband and wife” means two individuals lawfully married to each other. These definitions apply regardless of sex.

Proposed regulations, issued in October 2015, provided that a marriage of two individuals would be recognized for federal tax purposes if that marriage would be recognized by any state, possession or territory of the US. Under this rule, whether a marriage conducted in a foreign jurisdiction will be recognized for federal tax purposes depends on whether that marriage would be recognized in at least one state, possession or territory of the United States.

A practitioner raised concerns that this rule in the proposed regulations could be interpreted to treat couples who divorce or who never intended to enter into a marriage under the laws of the state where they live or where they entered into an alternative legal relationship as married for federal tax purposes, if at least one state, possession, or territory of the United States recognized

the taxpayer as married. To address these concerns, the final regulations provide, for federal tax purposes, a general rule for recognizing a domestic marriage and a separate rule for recognizing foreign marriages.

Under the general rule for domestic marriages, a marriage of two individuals is recognized for federal tax purposes if the marriage is recognized by the state, possession, or territory of the United States in which the marriage is entered into, regardless of the married couple's place of domicile.

Under the separate rule for foreign marriages, two individuals entering into a relationship denominated as marriage under the laws of a foreign jurisdiction are married for federal tax purposes if the relationship would be recognized as marriage under the laws of at least one state, possession, or territory of the United States. This rule enables couples who are married outside the United States to determine marital status for federal tax purposes, regardless of where they are domiciled and regardless of whether they ever reside in the United States.

Registered Domestic Partnerships, Civil Unions Or Other Similar Relationships Not Denominated as Marriage

The IRS noted that some couples choose to enter into a civil union or registered domestic partnership even when they could have married, and some couples who are in a civil union or registered domestic partnership choose not to convert those relationships into a marriage even when they have had the opportunity to do so. In many cases, such choices are deliberate, and couples who enter into civil unions or registered domestic partnerships may have done so with the expectation that their relationship will not be treated as a marriage for purposes of federal law.

The IRS observed that, for some of these couples, there are benefits to being in a relationship that provides some, but not all, of the protections and responsibilities of marriage. For example, some individuals who were previously married and receive Social Security benefits as a

result of their previous marriage may choose to enter into a civil union or registered domestic partnership (instead of a marriage) so that they do not lose their Social Security benefits. More generally, the rates at which some couples' income is taxed may increase if they are considered married and therefore required to file a married-filing-separately or married-filing-jointly federal income tax return.

The IRS said that treating couples in civil unions and registered domestic partnerships the same as married couples who are in a relationship denominated as marriage under state law could undermine the expectations certain couples have regarding the scope of their relationship. Furthermore, no provision of the Code indicates that Congress intended to recognize marriages as civil unions, registered domestic partnerships or similar relationships.

Accordingly, the final regulations provide that for federal tax purposes, the term "marriage" does not include registered domestic partnerships, civil unions or other similar relationships recognized under state law that are not denominated as a marriage under that state's law, and the terms "spouse," "husband and wife," "husband" and "wife" do not include individuals who have entered into such a relationship.