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Dear Messrs. Iwry and Bostick:

The undersigned organizations applaud your efforts in connection with the Internal Revenue Service's (the "Service") recent issuance of Revenue Ruling 2013-17 (the "Revenue Ruling"), which provided much needed clarification to plan sponsors, administrators, and others, in response to the Supreme Court's decision in *U.S. v. Windsor.*[1] Our members include plan sponsors, recordkeepers,

[1] 570 U.S. 2 (2013).

administrators, and advisors of defined contribution retirement plans, including 401(k) plans, 403(b) plans, and 457 plans, and therefore have a significant interest in the application of *Windsor* to such plans.

As is discussed further below, given the numerous and complex administrative problems associated with the potential retroactive application of *Windsor* to retirement plans, we strongly recommend that the Service utilize its authority under Internal Revenue Code (the "Code") section 7805(b)(8)[2] to limit the extent of the decision's retroactivity. Specifically, we recommend that the Service issue further guidance providing that it will not disqualify a retirement plan as a result of the plan's failure to administratively comply with the Revenue Ruling prior to its September 16, 2013 effective date. Such guidance would be consistent with the Service's guidance issued subsequent to the Court's holding in *Central Laborers Pension Fund v. Heinz,*[3] another case involving retirement plan benefits. As a result of the *Heinz* decision, the Service issued Revenue Procedure 2005-23, which limited the retroactive application of the *Heinz* decision for plan qualification purposes. The Revenue Procedure also stated that "[t]he limitation on the retroactive application in *Central Laborers* under this revenue procedure has no effect on the rights of any party under 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA) or any other law."[4]

## I. Revenue Ruling 2013-17

Revenue Ruling 2013-17, issued on August 29, 2013, generally provides that for Federal tax purposes, 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. The term "marriage" is defined to include a marriage between individuals of the same sex. The Revenue Ruling also adopts a "state of celebration" rule—holding that same-sex couples, legally married in jurisdictions that recognize their marriages, will be treated as married for federal tax purposes, regardless of whether the same-sex couple lives in a jurisdiction that recognizes same-sex marriage.

The Revenue Ruling states that it will be applied prospectively as of September 16, 2013. With respect to employee benefit plans, the Revenue Ruling expressly limits the ability of a taxpayer to rely on it retroactively. In this respect, the retroactive application of the Ruling only applies to the filing of returns associated with an overpayment of employment and income tax relating to employer-provided health benefits or fringe benefits. However, the Revenue Ruling also states that the Service intends to issue further guidance on the retroactive application of the Court's ruling in *Windsor* to other employee benefit plan matters and employee benefit plan arrangements. The Revenue Ruling states that such

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[2] 26 U.S.C. section 7805(b)(8).

[3] 541 U.S. 739 (2004).

[4] Indeed, a participant who subsequently sued under *Heinz* had his benefits restored retroactively. *See Swede v. Rochester Carpenters Pension Fund,* 467 F.3d 216 (2d Cir. 2006). In *Swede*, the Second Circuit held that Revenue Procedure 2005-23 did nothing more than provide that the tax-exempt status of plans would not be jeopardized solely by virtue of pre-*Heinz* plan amendments of the type that *Heinz* found violated ERISA—and that the Revenue Procedure emphasizes that it does not affect the substantive rights of parties under ERISA's anti-cutback rule.

additional guidance will take into account the potential consequences of retroactive application to all taxpayers involved, including the plan sponsor, the plan or arrangement, employers, affected employees and beneficiaries.

We agree with the Service's conclusion in the Revenue Ruling that a rule of recognition based on the state of a taxpayer's current domicile would place substantial financial and administrative burdens on employee benefit plan administrators. Similarly, as is further described below, retroactive application of the *Windsor* decision, for purposes of plan qualification, would also place substantial and financial and administrative burdens on administrators of defined contribution retirement plans—and therefore we strongly oppose requiring retroactive application of *Windsor* to such plans.

## II. Retroactive Application of *Windsor* Will Result in Numerous, Significant and Complex Retirement Plan Administration Problems

We have discussed the potential retroactive application of *Windsor* with our members and have identified several resulting significant and complex administrative issues and questions. These issues and questions include, but are not limited to, the following.

### 1. Spousal Pension Benefits

Requiring a retirement plan to comply with the Court's ruling in *Windsor* retroactively in order to maintain its tax-qualified status, in the context of the Code's spousal pension protections would raise numerous problems and complex administrative issues. Prior to *Windsor*, same-sex spouses were not entitled to a Qualified Joint and Survivor Annuity (QJSA), Qualified Pre-Retirement Survivor Annuity (QPSA) or Qualified Optional Survivor Annuity (QOSA). Subsequent to *Windsor,* such spousal protections apply to same-sex spouses.

Application of *Windsor* retroactively raises numerous complex questions, including whether and under what circumstances plans would be required to (1) pay retirement benefits to the spouses of participants who died years ago, (2) adjust the retirement benefits of participants who have retired and commenced benefit payments, or (3) divert retirement benefit payments that may have been paid to non-spouse beneficiaries without the consent of the same-sex spouse. For example, if a same-sex married participant retired prior to *Windsor* and was treated as ineligible to elect a QJSA, must the plan now provide the participant with the opportunity to make that election? If so, must he or she repay benefits to the plan that were paid as a single life annuity? Would the plan have to adjust the annuity benefit going forward to account for the "overpayments" to date? Further, must the plan now attempt to provide and receive the required notices, consent and waivers for periods prior to September 16, 2013?

Further, elections to commence qualified pension benefits have long been irrevocable after the annuity starting date. To require plan sponsors to allow re-elections in some cases many years after the starting date and after single life annuities have commenced would be very burdensome. In addition, if

*Windsor* applies retroactively, and plan sponsors are therefore required to re-calculate elections for QJSAs after single life annuities have been in pay status for years, plan participants could potentially owe significant sums back to the plan in order to change their election. How long plan sponsors have to recoup these funds, what interest rate should be applied and other issues raised by these renewed election opportunities would create confusion for sponsors and participants.

2. 401(k) Plan Death Benefits

Under a defined contribution plan qualifying for an exception to the spousal protection requirements found in section 401(a)(11)(a) of the Code,[5] if the decision were retroactive in accordance with *Windsor*, plans would be required to recoup account balances paid to a non-spouse individual who was, pursuant to applicable federal law at the time of the payment, a legal beneficiary, and to pay the account balance to the same-sex spouse beneficiary. This, of course, raises the question of who would be required to fund the amount for the plan to pay the spousal benefit if the money cannot be recouped from the non-spouse beneficiary. Would it be funded from the accounts of current participants in cases where no employer funding obligation exists?

3. Required Minimum Distributions

As a result of the Court's decision in *Windsor*, a same-sex spouse is now treated as a spousal beneficiary for Required Minimum Distribution (RMD) purposes. Under current law, if a surviving spouse is named as a beneficiary under a retirement plan and the employee dies before the RMDs begin, the surviving spouse can generally wait to begin receiving the benefits until the time when the participant (had he or she lived), would have turned 70½.[6] Non-spouse beneficiaries, on the other hand, are generally required to begin distributions within a year of the participant's death and receive any benefits over five years or over their life expectancy.[7] Requiring a retirement plan to retroactively apply *Windsor* would result in a plan potentially having to recoup RMDs previously paid to a non-spouse beneficiary (*i.e.*, require the non-spouse beneficiary to repay) and recalculate and reapply the RMD rules based on the more favorable surviving spouse RMD requirements. Additionally, administrative issues arise as well. For example, in a case where a participant has reached his or her required beginning date (and is therefore receiving RMDs), would a plan be required to transition the participant to the joint and survivor table (assuming the sole beneficiary of the account is the participant's same-sex spouse and the spouse is more

[5] Section 401(a)(11)(B)(iii) of the Code generally provides that section 401(a)(11)(A) of the Code applies to any participant under any defined contribution plan unless (i) such plan provides that the participant's nonforfeitable accrued benefit is payable in full, upon the death of the participant, to the participant's surviving spouse; (ii) such participant does not elect a payment of benefits in the form of a life annuity; and (iii) with respect to such participant, such plan is not a direct or indirect transferee (in a transfer after December 31, 1984) of a plan subject to the requirements of section 401(a)(11)(A) of the Code.

[6] Section 401(a)(9)(B)(iv) of the Code.

[7] Section 401(a)(9)(B)(ii) of the Code.

than 10 years younger than the participant)? Further, what would be the required timeframe for making such a transition?

4. Rollover Distributions

Subsequent to *Windsor*, a same-sex spouse may roll over a plan distribution to his or her own IRA or employer plan account, rather than to an inherited IRA.[8] Application of *Windsor* retroactively could result in a retirement plan being required to review all beneficiary distributions to determine if any prior distributions were made to a same-sex spouse, and inform the same-sex spouse that he or she could have rolled the distribution into his or her own IRA or plan account. This could result in a same-sex spouse seeking to roll over an existing inherited IRA to his or her own IRA or plan account. What would be the allowed time-frame for such a "second" rollover? What if amounts rolled over to an inherited IRA have been fully disbursed? Further, the recipient plan or IRA would potentially have to trace back distributions made years ago to reach a determination that such assets are "qualified" retirement plan assets eligible for a rollover.

5. Hardship Distributions

If provided for under its terms, a plan is now required to recognize same-sex spouse expenses for purposes of hardship distributions (medical, tuition, and funeral expenses of such spouse) and, if required by the plan, obtain same-sex spousal consent for the hardship distribution. With respect to a plan that requires spousal consent for hardship distributions, would a plan be required to obtain such consent retroactively from a same-sex spouse in order to maintain its tax qualification? What would happen if the same-sex spouse does not consent to a prior hardship distribution? Must the plan seek re-payment of the distribution amount from the participant? Further, if a prior hardship distribution request that now qualifies as a hardship distribution was previously denied by a plan administrator (for example, a distribution to pay the medical expenses of a same-sex spouse) would the plan administrator now be considered to have failed to follow the terms of the plan resulting in a qualification defect that would need to be corrected?

6. Plan Loans

If a plan provides for loans, and requires spousal consent for loans, same-sex spouses are now required to provide consent. Retroactive application of *Windsor* could result in a plan potentially having to review all participant loans, determine if the participant had a same-sex spouse at the time of the loan, and obtain consent from the same-sex spouse in order to be certain that the plan administrator did not fail to follow plan terms resulting in a qualification defect. As with hardship distributions, it is unclear how a plan would be required to proceed if the loan had already been made and the same-sex spouse does not consent to the prior loan or in a situation where the loan has been fully repaid to the plan.

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[8] *See generally*, sections 402(c)(9) and 402(c)(11) of the Code.

7. Plan Testing

As a result of *Windsor*, the family attribution rules under section 414 of the Code and the constructive ownership of stock rules under section 318 of the Code must take into account same-sex spouses. This affects the determination of "highly compensated employees" for purposes of nondiscrimination testing and "key employees" for purposes of top heavy testing. Retroactive application of *Windsor* would therefore result in plans potentially having to re-test for prior years. If, for example, as a result of such re-testing, it turns out that a plan is now failing, or failing by a larger margin, and the window to correct has closed, the correction methods available through the Service's Employee Plans Compliance Resolution System could be cost prohibitive.

III. Treasury and the Service Are Authorized to Apply the Revenue Ruling on a Prospective-Only Basis and Have Previously Exercised Such Authority in Another Supreme Court Case Involving Retirement Benefits

Pursuant to section 7805(b)(8) of the Code, the Secretary of the Treasury has the authority to prescribe the extent, if any, to which any ruling (including any judicial determination or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect. Treasury Regulation section 301.7805-1(b)[9] provides for delegation of such authority to the Commissioner of Internal Revenue and provides that the Commissioner, "with the approval of the Secretary, may prescribe the extent, if any, to which any ruling relating to the internal revenue laws, issued by or pursuant to authorization from him, shall be applied without retroactive effect."

As discussed above, the Service has in the past used its authority under section 7805(b)(8) of the Code to limit the retroactive application of another Supreme Court case involving retirement benefits. Specifically, in Revenue Procedure 2005-23, the Service limited the retroactive effect of the Supreme Court's decision in *Central Laborers' Pension Fund v. Heinz*. In *Heinz*, the Court held that a plan's expansion of the types of post-retirement employment that trigger suspension of benefits under the plan violates ERISA's anti-cutback rules. The Court in *Heinz* addressed the potential retroactive effect of its decision, noting that—

> [n]othing we hold today requires the IRS to revisit the tax-exempt status in past years of plans that were amended in reliance on the agency's representations in its manual by expanding the categories of work that would trigger suspension of benefit payments as to already-accrued benefits. The Internal Revenue Code gives the Commissioner discretion to decline to apply decisions of this Court retroactively....This would doubtless be an appropriate occasion for exercise of that discretion.[10]

[9] 26 C.F.R. § 301.7805-1.

[10] *See Heinz*, 541 U.S. at 748, n. 4.

Revenue Procedure 2005-23 provided a transition period for plans to adopt complying amendments so a plan's adoption of the types of plan amendments prohibited by *Heinz* before the *Heinz* ruling would not cause the plan to be disqualified for tax purposes. The Revenue Procedure further stated that its limitation on the retroactive effect of the *Heinz* decision had no effect on the rights of any party under section 204(g) of ERISA or any other law. In *Heinz*, the Court noted that plans relied upon the Service's representations regarding suspension of benefits rules. Similarly, before the *Windsor* decision, retirement plan administrators relied on the provisions of the Defense of Marriage Act (DOMA)[11] to define, for federal tax purposes, the terms "marriage" and "spouse." Apparently, the Service recognized the complexities associated with the potential retroactivity of *Heinz* and issued Revenue Procedure 2005-23 to limit its retroactivity. As described above, similar complexities are associated with the retroactive application of *Windsor*. We therefore urge the Service to utilize its authority under section 7805(b)(8) of the Code and take a similar approach with respect to the retroactivity of the *Windsor* decision by issuing further guidance providing that a plan will not be disqualified as a result of its failure to comply with the Revenue Ruling prior to its September 16, 2013 effective date.

## IV. Recommendation

The issues and questions described above, while not exhaustive, illustrate the complex consequences of a retroactive application of *Windsor* to retirement plans. Such issues and questions are remarkably similar to those present had *Heinz* been applied retroactively. Before the Court's decision in *Windsor*, retirement plans were being administered, with respect to the treatment of same-sex spouses, in accordance with DOMA, a Federal law. To now require plan administrators to retroactively administer such plans in order to maintain their tax-qualified status, as if DOMA never existed, would place a significant, complex, and costly burden on such plans. In accordance with its authority under section 7805(b)(8) of the Code, we therefore strongly urge the Service to issue guidance providing that *Windsor* is required to be applied to retirement plans on a prospective-only basis.[12]

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[11] 1 U.S.C. section 7.

[12] Further, given the short time period within which plans were required to prospectively comply with the Revenue Ruling, we recommend that the Service adopt a "good faith" compliance standard that takes into account whether plans and plan administrators have acted in good faith based on a reasonable interpretation of the *Windsor* decision and the Revenue Ruling.

Thank you for considering our comments on this matter. We are available to provide additional information and clarification regarding these issues and would welcome the opportunity to meet with you to discuss our comments.

AMERICAN COUNCIL OF LIFE INSURERS
THE ERISA INDUSTRY COMMITTEE
THE ESOP ASSOCIATION
FINANCIAL SERVICES INSTITUTE, INC.
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SOCIETY FOR HUMAN RESOURCE MANAGEMENT
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U.S. CHAMBER OF COMMERCE

cc: Phyllis C. Borzi, Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor