

MEMO# 28127

May 16, 2014

IRS Issues Guidance Regarding Mid-Year Amendments to Safe Harbor Plans with Respect to U.S. v. Windsor

[28127]

May 16, 2014

TO: PENSION MEMBERS No. 21-14

BANK, TRUST AND RETIREMENT ADVISORY COMMITTEE No. 22-14

OPERATIONS COMMITTEE No. 27-14

TRANSFER AGENT ADVISORY COMMITTEE No. 29-14 RE: IRS ISSUES GUIDANCE REGARDING MID-YEAR AMENDMENTS TO SAFE HARBOR PLANS WITH RESPECT TO U.S. v. WINDSOR

On May 15, 2014, the Internal Revenue Service (IRS) issued Notice 2014-37, [\[1\]](#) permitting the adoption of mid-year amendments to safe harbor 401(k) and (m) plans to reflect the outcome of United States v. Windsor. [\[2\]](#) As you may recall, in April 2014, IRS issued Notice 2014-19 providing guidance on the application of Windsor and Revenue Ruling 2013-17 [\[3\]](#) to qualified retirement plans, including guidance on the necessity of plan amendments. [\[4\]](#)

Notice 2014-37

Notice 2014-37 provides that a plan will not fail to satisfy the requirements to be a Section 401(k) or (m) safe harbor plan merely because the plan sponsor adopts a mid-year amendment pursuant to Notice 2014-19.

Notice 2014-19

Previously issued notice 2014-19 provides that an amendment is required if a plan's terms define a marital relationship by reference to Section 3 of the Defense of Marriage Act (DOMA), [\[5\]](#) or are otherwise inconsistent with the outcome of Windsor, the guidance in Revenue Ruling 2013-17, or Notice 2014-19. An amendment is also required if a plan sponsor chooses to apply the rules with respect to married participants in a manner that reflects the outcome of Windsor for a period prior to June 26, 2013 (i.e, the effective date of the Windsor decision). However, if a plan's terms are not inconsistent with Windsor (for example, the term "spouse," "legally married spouse" or "spouse under Federal law" is used in the plan without any distinction between a same-sex spouse and an opposite-sex spouse), the guidance in Revenue Ruling 2013-17, or Notice 2014-19, an amendment generally would not be required -- but the plan must be operated in accordance with Notice 2014-19. If an amendment is required, the deadline to adopt the amendment is the later of

(1) the otherwise applicable deadline under Section 5.05 of Revenue Procedure 2007-44, or
(2) December 31, 2014. [6]

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endnotes

[1] Notice 2014-37 is available here: <http://www.irs.gov/pub/irs-drop/n-14-37.pdf>.

[2] 570 U.S. ___, 133 S.Ct 2675 (2013). For the Institute's Memorandum on the impact of the Windsor decision on retirement plans, see [Memorandum](#) to Pension Members No. 31-13, Bank, Trust and Retirement Advisory Committee No. 20-13, Operations Committee No. 32-13, Transfer Agent Advisory Committee No. 54-13 [27377], dated July 16, 2013.

[3] Revenue Ruling 2013-17 is available here: <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf>. For the Institute's summary of Revenue Ruling 2013-17, see [Memorandum](#) to Pension Members No. 41-13, Bank, Trust and Retirement Advisory Committee No. 28-13, Operations Committee No. 43-13, Transfer Agent Advisory Committee No. 66-13, Tax Committee No. 26-13 [27533], dated September 3, 2013.

[4] See [Memorandum](#) to Pension Members No. 15-14, Bank, Trust and Retirement Advisory Committee No. 17-14, Operations Committee No. 20-14, Transfer Agent Advisory Committee No. 22-14 [28022], dated April 8, 2014.

[5] In Windsor, the Supreme Court held that Section 3 of DOMA was unconstitutional. Section 3 provided that in determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.

[6] Revenue Ruling 2007-44 provides, in relevant part, that an interim amendment generally is required by the later of (1) the end of the plan year in which the change is effective, or (2) the due date for the employer's tax return that includes the date the change is first effective.