

## ***IRS Invites Comments on Proposed Regulations Describing Marital Status of Taxpayers***

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*November 5, 2015*

As required,<sup>1</sup> on October 23, 2015, the Internal Revenue Service released, for comment, proposed regulations which describe the marital status of taxpayers for various federal tax purposes.<sup>2</sup> The proposed regulations primarily affect married couples, employers, sponsors, and administrators of employee benefit plans and executors.<sup>3</sup> The stated purpose of the proposed regulations is to amend current regulations under §7701 of the Internal Revenue Code in light of United States Supreme Court (“SCOTUS”) holdings in *United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).<sup>4</sup>

In *Windsor*, SCOTUS held §3 of the Defense of Marriage Act (“DOMA”) unconstitutional on grounds that a prohibition imposed on the federal government from recognizing a relationship between same-sex couples as a marriage for federal estate tax purposes, violated the equal protection liberty guaranteed by the Fifth Amendment of the United States Constitution.<sup>5</sup> The issue in *Windsor* involved the government’s denial of a marital exemption in a federal estate tax context; SCOTUS eventually rejected IRS’ argument that *Windsor* was the beneficiary and survivor of, but not a “surviving spouse” of, a same-sex partner.<sup>6</sup> After the *Windsor* decision, IRS issued several notices

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<sup>1</sup> See 5 U.S.C. §553(b).

<sup>2</sup> 80 Fed. Reg. 64,378, (Oct. 23, 2015).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 64,378-9.

<sup>5</sup> *Windsor*, 133 S. Ct. at 2695.

<sup>6</sup> *Id.* at 2683.

providing guidance to practitioners in the context of qualified retirement plans, employment taxes, and administrative procedures.<sup>7</sup>

In *Obergefell*, SCOTUS held that “same-sex couples may exercise the fundamental right to marry in all States...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.”<sup>8</sup>

On the basis of these decisions, the IRS now proposes amendments to regulations under IRC §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 [gender].”<sup>9</sup>

In principle, the proposed regulations defer to the states to define marital status, except when the state statute is otherwise declared void by statute or unconstitutional.<sup>10</sup> Thus, under this principle, polygamous and incestuous relationships are not recognized as “marriages” under the proposed regulations.<sup>11</sup>

Founded on comity rationale, the proposed regulations also provide that whether a marriage conducted in a non-US jurisdiction will be recognized for federal tax

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<sup>7</sup> See Notice 2014-19 (2014-47 IRB 979), amplified by Notice 2014-37 (2014-24 IRB 1100); Notice 2014-1; Notice 2013-61 (2013-44 IRB 432); and D Rev. Rul. 2013-17 involving employer adjustments to claims for refunds and credits.

<sup>8</sup> *Obergefell*, 135 S. Ct. at 2607-8.

<sup>9</sup> 80 Fed. Reg. at 64,379.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*; Also, see *Loughran v. Loughran*, 292 U.S. 216, 223 (1934) for IRS’ proposition that the IRS has traditionally looked to the states to define marital status.

purposes depends upon whether that marriage would be recognized in at least one state, possession, or territory of the United States.<sup>12</sup>

In addition, the proposed regulations clarify that the term “marriage” does not include registered domestic partnerships, civil unions, or other similar relationships recognize under several state laws that are not denominated as “marriages.”<sup>13</sup>

In summary, the regulations propose to define the terms “spouse,” “husband and wife,” “husband,” “wife,” and “marriage” under §301.7701-18 which would be referenced for purposes of all federal income tax, excise tax, estate tax, gift tax, generation-skipping transfer tax, employment tax and collection of income tax at the source, penalties, and IRS procedure and administration.<sup>14</sup>

Considering the socially controversial holdings in *Windsor* and *Obergefell*, the proposed breadth of the proposed regulations, and the wide range of scenarios in which the proposed definitions could be applied, one reasonably can expect enlightening public comments.

Public comments and requests for public hearing on these proposed regulations must be received by the IRS not later than December 7, 2015.

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<sup>12</sup> *Id.*; See *Hilton v. Guyot*, 159 U.S. 113, 167 (1895) cited as authority for comity rationale.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 64,380-1.