

# Management Alert



## IRS Issues Year-End Guidance on Pre-Tax Elections Post-*Windsor*

By Joy Sellstrom and Jennifer Kraft

As year-end approaches, the Internal Revenue Service (“IRS”) has now taken another step in implementing the Supreme Court’s decision in *Windsor v. United States* by issuing [Notice 2014-1](#) regarding pre-tax elections.

In *Windsor*, the Supreme Court struck down the provision of the Defense of Marriage Act (DOMA) that prohibited the recognition of same-gender couples as married for purposes of federal law. Notice 2014-1 provides additional guidance on the impact of this ruling on pre-tax elections under cafeteria plans, flexible spending accounts (FSA) and health savings accounts (HSAs). (For a general discussion of the issues facing plan sponsors that provide benefits to same-gender spouses post-*Windsor* and other guidance issued so far, see our prior Management Alerts available [here](#), [here](#) and [here](#)).

When the *Windsor* decision was issued, it was not clear how the decision would impact employee benefit plans, particularly retroactively. This guidance confirms that certain mid-year changes to pre-tax elections under an Internal Revenue Code Section 125 cafeteria plan are permissible and provides the following specific guidance:

### Mid-Year Election Changes: Participants with Same-Gender Spouses When *Windsor* Was Issued

Plan participants who were married to a same-gender spouse on June 26, 2013 (the date the *Windsor* decision was issued) can be treated as if they had a change in legal marital status for purposes of changing their election under the cafeteria plan rules. Participants must make their election change during the cafeteria plan year that includes either June 25, 2013 or December 16, 2013 (i.e. in 2013 for calendar year plans).

The IRS noted that a cafeteria plan may not permit a participant with a same-gender spouse to make a mid-year election change on the basis that the change resulted in a significant change in the cost of coverage. Nonetheless, in light of the uncertainty in this area at the time, the IRS will permit election changes permitted on this basis between June 26 and December 31, 2013.

**Effective Date of Election Change.** These election changes generally become effective when other election changes become effective under the terms of the plan. To permit employers an opportunity to implement election changes they may have received but not yet applied, however, the IRS will permit these changes to be effective within a reasonable time period after December 16, 2013 (if later than the effective date applying normal procedures).

**Tax Treatment.** The Notice provides that a participant may choose to: (1) give notice to his or her employer and pay for the employee cost of same-gender spousal coverage on a pre-tax basis for the remaining pay periods in the current plan year; or (2) continue paying for these benefits on an after-tax basis. In either case, the participant may seek a refund of federal income or employment taxes paid on the amounts representing the cost of spousal coverage and may exclude these amounts from gross income when filling an income tax return. (This rule applies to the cafeteria plan year including December 16, 2013 and any open tax years.)

	<p>If an employer receives notice that the participant is married by the end of the cafeteria plan year including December 16, 2013 (December 31, 2013 for calendar year plans), the employer must begin treating the participant contributions as pre-tax by the later of:</p> <ul style="list-style-type: none"> <li>the date of the marriage, or</li> <li>a reasonable period after December 16, 2013.</li> </ul> <p>A participant may provide notice by filing a revised Form W-4 showing that the participant is married or by making a pre-tax election to pay for the employee cost of spousal coverage.</p>
<b>Mid-Year Election Changes: Marriage After Windsor Decision</b>	<p>Plans may permit a participant who married a same-gender spouse after June 26, 2013 to make a mid-year election change due to a change in legal marital status pursuant to its normal election change procedures.</p> <p>See above, however, for <b>Effective Date</b> and <b>Tax Treatment</b> information if the plan had not previously implemented the change in election.</p>
<b>FSA Reimbursements</b>	<p>FSAs may permit reimbursement of covered expenses incurred by a participant's same-gender spouse on or after the first day of the plan year that includes June 26, 2013 (i.e. January 1, 2013 for calendar year plans) or, if later, the date of the marriage. Please note, plan amendments may be necessary to implement this provision.</p>
<b>Dependent Care FSA Limits</b>	<p>The annual \$5,000 limit for a married couple's contribution to a dependent care FSA applies for the whole 2013 tax year. If this limit is exceeded, those excess contributions will remain in the FSA and be available to reimburse allowable claims (or be forfeited to the extent that allowable claims are not submitted), but will be treated as taxable.</p>
<b>HSA Limits</b>	<p>The guidance confirmed that same-gender couples are subject to the annual deduction contribution limit (\$6,450 for 2013 if either spouse has family HDHP coverage) for the whole year if they are married on the last day of the tax year - even for 2013.</p> <p>If the combined HSA contributions by same-gender spouses exceed this limit, any excess may be distributed from the HSAs of one or both of the spouses no later than the tax return due date to avoid excise taxes. This excess distribution amount would be treated as taxable in the year distributed.</p>

**Plan Amendment Deadline Extended.** The IRS has provided that any amendments needed to employer plans to reflect this guidance may be adopted as late as the last day of the first plan year beginning on or after December 16, 2013 (**December 31, 2014** for calendar year plans) and may be retroactive back to the first day of the plan year including December 16, 2013 (January 1, 2013 for calendar year plans).

Although it arrives somewhat late for calendar year plans, employers who have allowed participants to make election changes consistent with the Windsor decision will welcome this guidance.

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