Submitted Electronically

August 15, 2013

The Honorable Phyllis C. Borzi
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Mr. J. Mark Iwry
Deputy Assistant Secretary
U.S. Department of the Treasury
1500 Pennsylvania Ave., NW
Room 3064D
Washington, DC 20220

Re: **Request for Guidance Regarding Retirement Plans Due to U.S. Supreme Court Decision about the Defense of Marriage Act**

Dear Ms. Borzi and Mr. Iwry:

The SPARK Institute, Inc. respectfully requests that the U.S. Department of Labor (the "DOL") and U.S. Department of the Treasury (the "Treasury") issue guidance with respect to certain issues relating to the administration of employer-sponsored retirement plans in light of the U.S. Supreme Court's (the "Court") decision about Section 3 of the Defense of Marriage Act ("DOMA"). Our member companies include retirement plan record keepers and other service providers that help plan sponsors operate their retirement plans, including communicating with plan participants and processing their requests (e.g., benefit payments).[1] They are the companies that plan sponsors and administrators turn to and rely on for help in understanding, implementing and complying with regulatory requirements.

[1] The SPARK Institute represents the interests of a broad-based cross section of retirement plan service providers and investment managers, including banks, mutual fund companies, insurance companies, third party administrators, trade clearing firms and benefits consultants. Collectively, our members serve approximately 70 million participants in 401(k), and the substantial majority of all participants in 403(b) plans.

We have discussed the developments regarding DOMA with our member companies and appreciate this opportunity to identify the need for guidance and make recommendations with respect to certain issues.

A. Determining Marital Status for Retirement Plan Purposes

An individual's marital status is important with respect to many retirement plan features, rights and required notices. Questions and uncertainty exist regarding treating same-sex couples as married depending on where the individuals enter into the marriage ("State of Celebration") or where the individuals live ("State of Domicile"). Additionally, uncertainty exists regarding the status of civil unions and domestic partners under the broadened federal marriage definition.

It is vital that plan sponsors be able to follow a uniform rule in the administration of their plans for all of their employees. This is particularly important for employers that have employees in multiple states. Although complete uniformity does not appear to be possible at the present time due to the differing laws among the states about same-sex marriages, some degree of uniformity and certainty can be achieved if plan sponsors are permitted to determine a participant's marital status based on the State of Celebration.

Following the State of Celebration approach will simplify plan administration by eliminating the need for plan sponsors to change a participant's marital status, as well as the plan features, rights and notices that such married participants are entitled to, if they move to a different state. Additionally, such uniformity and certainty will be particularly important for married participants and their spouses in connection with benefit distribution rights and beneficiary designations. For example, when a participant marries an individual of the same sex, the participant's spouse is automatically the beneficiary upon death of the participant. However, if such couple moves to a state that does not recognize same-sex marriages and the plan is obligated to follow the State of Domicile rule, the participant's spouse will cease being the beneficiary, unless the participant specifically designates the spouse as such using the proper plan forms.

We are concerned that following the State of Domicile rule will confuse participants and their spouses, and unintentionally create potentially detrimental traps for unwary individuals. Such individuals may incorrectly expect or assume that the plan sponsor or service provider is responsible for advising them on such complex matters, even though doing so may be beyond the scope of what the sponsor or provider is willing or able to do. Consequently, the State of Domicile approach will likely also increase litigation risk for plan sponsors and service providers when participants, their spouses and other possible beneficiaries are surprised and unsatisfied with the implications of decisions that they made, actions they took or actions they failed to take.

Accordingly, we respectfully request that the Treasury and DOL allow plan sponsors to determine a participant's marital status based on the State of Celebration. Further, plan sponsors should not be required to consider the couple's State of Domicile for the purposes stated above. We request that such guidance be issued on an expedited basis.

With respect to civil unions and domestic partners, we understand that federal benefits for spouses generally will not be extended to domestic partners and will instead require the individuals to be legally married. We are aware that some commentators have urged that individuals who entered into a civil union or were domestic partners be considered married post-DOMA, arguing that a lesser or alternate status was their only option because the law did not recognize the relationship as a marriage. Whichever way the Treasury and DOL elect to proceed, we believe that guidance on this issue is vital.

B. Retroactive Rights

Among the most difficult issues plan sponsors must address are those dealing with retroactive rights of same-sex spouses who may not have been considered married for plan purposes when certain notices, rights and plan features would have otherwise been triggered. It is still too early to identify all of the circumstances that may present retroactivity issues. However, such issues are likely to occur in connection with benefit payments (including annuity payment elections), beneficiary designations and domestic relations orders.

In many instances it is likely to be onerous, cost prohibitive, impracticable or impossible to provide notices, rights, and plan features retroactively. For example, it will likely be impracticable to provide retroactive notice and rights to a spouse who was not treated as such when an employee/plan participant requested a lump sum distribution from a plan that would have otherwise required spousal consent before making such payment. Additionally, it will likely be impossible for a plan to correct a situation where a spouse was not treated as such when a participant's account balance was paid upon death to a different beneficiary indentified by the participant on the appropriate plan forms.

Accordingly, we request that the Treasury and DOL consider the numerous implications related to plan administration and allow plan sponsors to limit, when appropriate, the retroactive effect of the Court's decision regarding DOMA to the effective date of the decision.[2] Doing so will allow plan sponsors to follow reasonable approaches with respect to these matters and minimize the potential additional administrative costs and complexities of operating their plans.

C. Plan Amendments and Other Document Changes

A plan sponsor may have to amend its plan documents if such documents include a definition of "spouse" that is inconsistent with the Court's ruling about DOMA. Many plan sponsors use documents that are furnished and maintained by third party vendors.

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[2] We understand that there is Internal Revenue Service precedent for such approach. See Revenue Procedure 2005-23 (relating to retroactive application of the decision of the Court in Central Laborers' Pension Fund v. Heinz dealing with plan amendments that violated Internal Revenue Code anti-cutback rules). Further, we understand that Benefits Administration Letter, Number 13-203 from the United States Office of Personnel Management expressly provides that pre-existing same-sex marriages will be treated as new marriages, with appropriate current enrollment windows, because they were not recognized under federal law prior to the recent Supreme Court decision. See *Letter Number: 13-203* at pp. 1, 8 (July 17, 2013).

Additionally, other plan materials and participant communications may be affected. Such plan sponsors, their document providers and other service providers will want to take into consideration the guidance that is ultimately issued by the Treasury and DOL on the issues raised herein before attempting to amend their plans and change other impacted documents. This will help ensure that any such amendments and other changes are done correctly and will minimize the costs of doing so.

Accordingly, we request that plan sponsors be permitted to amend their plans retroactively until the filing deadline of the sponsor's 2013 tax return. We note, however, that additional time may be necessary for amendments in the event that the needed guidance is not issued sufficiently early enough for document vendors and plan sponsors to work together to make and execute the needed changes by the tax return filing deadline.

D. Good Faith Compliance

The implications of the Court's decision regarding DOMA are broad and complex. It will affect nearly every employee benefit plan that employers offer, including every retirement plan. As noted above, the retirement plan community, and plan sponsors in particular, need time to identify and understand the potential implications of the decision. They also need regulatory guidance, as discussed above. Therefore, plan sponsors and their service providers will have to make good faith efforts to apply the new rules based on the information and guidance, if any, that are available. We respectfully request that the Treasury and DOL adopt a lenient enforcement approach that takes into account the complexity of the issues and challenges faced by plan sponsors and service providers as they await guidance. Plan sponsors that make such good faith efforts should not be unreasonably faced with enforcement actions on issues that could not have been anticipated and with respect to which there is little, or no, guidance or precedent.

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Thank you for considering our views and recommendations on this very important topic. The SPARK Institute is available to provide additional information and clarification regarding these matters. Please do not hesitate to contact us at (704) 987-0533.

Respectfully,

Larry H. Goldbrum
General Counsel