Bloomberg BNA

Pension & Benefits Daily ™

Same-Sex Marriage and ERISA in the *Windsor* Era

By Benjamin Takis

The Supreme Court's landmark ruling in *United States v. Windsor*,[1] invalidating Section 3 of the Defense of Marriage Act (DOMA) , marks a dramatic shift in our legal system's treatment of same-sex couples. By invalidating Section 3's restriction on federal government recognition of same-sex marriage, *Windsor* returns the determination of spousal status to the states and ensures equal treatment for state-law-recognized same-sex spouses with respect to employee benefits matters, including pension survivor benefits, qualified domestic relations orders, the tax treatment of health and welfare benefits, plan rollovers, and more.

In addition to these immediate consequences under the Employee Retirement Income Security Act (ERISA) and the tax code, *Windsor* and the recent legislative and judicial developments in the states suggest a wider move toward nationwide recognition of same-sex marriage over the years or decades to come. These trends indicate that same-sex couples are likely to eventually achieve total parity with opposite-sex couples with respect to employee benefits, tax and other legal purposes. Employee benefit plans too should eventually be able to administer benefits in the same manner for all participants, gay or straight.

In the meantime, however, plans will need to grapple with difficult issues that *Windsor* did not resolve. In particular, *Windsor* did not address how to determine whether same-sex couples are legally married under state law, or the scope of *Windsor*'s retroactive effect. The Internal Revenue Service (IRS) has started to resolve some of these issues with the recent issuance of Revenue Ruling 2013-17 (169 PBD, 8/30/13; 40 BPR 2081, 9/3/13). This article discusses the effect of *Windsor* and Rev. Rul. 2013-17, and provides an initial exploration of the issues that remain open in the ''*Windsor* era.''

Overview of *Windsor* and Its Effects

The Supreme Court issued its decision in *Windsor* on June 26. *Windsor* was a tax case involving Edith Windsor, who wed her same-sex spouse, Thea Spyer, in Ontario, Canada, in 2007. Windsor and Spyer lived in New York, which recognized the validity of their marriage pursuant to New York law. When Spyer died in 2009 and left her entire estate to Windsor, Windsor sought to avoid paying federal estate taxes on the proceeds through the federal estate tax exemption for surviving spouses. Because DOMA provides that under federal law, ''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 a wife,''[2] the IRS denied Windsor the estate tax exemption and she paid $363,053 in estate taxes before seeking a refund in the federal courts. After a questionable ruling on the Supreme Court's jurisdiction to rule on the appeal,[3] the high court held that Section 3 of DOMA violates due process requirements under the Fifth Amendment of the U.S. Constitution by denying gay couples the marriage rights afforded to them under state law.[4] Accordingly, Section 3 of DOMA is invalid, and state law determinations of spousal status must now be respected for purposes of federal law.

Prior to *Windsor*, Section 3 of DOMA made same-sex spouses ineligible for a wide range of tax benefits, employment-related protections and other federal

[1] 133 S.Ct. 2675 (2013).

Benjamin Takis (btakis@taxexemptsolutions.com) is the founder and principal attorney of Tax-Exempt Solutions PLLC.

[2] DOMA § 3, 1 U.S.C. § 7.

[3] During the course of the proceedings, the Obama administration took the position that it would no longer back the constitutionality of DOMA, which in effect conceded the ruling of the district court in favor of Windsor (which was upheld by the U.S. Court of Appeals for the Second Circuit), and left much doubt about the existence of a ''case or controversy'' under Article III, section 2 of the Constitution.

[4] *Windsor*, 133 S.Ct. at 2695-2696.

 ISSN

rights and entitlements. In the context of employee benefits, *Windsor's* effects include the following:

■ Employees may cover their same-sex spouses under health care plans provided by their employers without having to pay taxes on the value of such coverage.[5]

■ Same-sex spouses have full rights to continuation health care coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA) in the event of a participant's termination of employment, divorce or legal separation.[6]

■ Employees may receive tax-free reimbursement under flexible spending accounts,[7] health reimbursement arrangements[8] and health savings accounts[9] for qualified medical expenses incurred by same-sex spouses.

■ Same-sex spouses are entitled to the same special enrollment right under the Health Insurance Portability and Accountability Act (HIPAA) as opposite-sex spouses.[10]

■ Same-sex spouses are entitled to a 50 percent qualified joint and survivor annuity (QJSA) or a 75 percent qualified optional survivor annuity (QOSA) under a participant's pension plan, and the spouse's consent is required to pay pension benefits in any other form.[11]

■ Same-sex spouses are entitled to a 50 percent qualified preretirement survivor annuity (QPSA) where the participant dies prior to commencing pension benefits, unless the spouse consents to waive the benefit.[12]

■ Same-sex spouses are entitled to receive 100 percent of a participant's Section 401(k) account balance at death, unless the spouse consents to another beneficiary.[13]

■ Same-sex spouses are clearly eligible to receive a qualified domestic relations order (QDRO) apportioning pension benefits upon divorce.[14]

■ Same-sex spouses may roll over plan distributions to their own individual retirement account or employer plan, rather than only being able to roll over to an ''inherited IRA'' (which is subject to more restrictions).[15]

Implications for Future Cases

Under *Windsor*, these federal rights apply only to same-sex spouses recognized under applicable state law—there is no requirement that all states recognize same-sex marriage.[16] *Windsor* held only that the federal government's lack of recognition of state-approved same-sex marriages violated the Fifth Amendment's due process and equal protection principles, which do not apply to the states. Only a ruling under the Fourteenth Amendment would have the effect of requiring the states to recognize same-sex marriage, and the majority was careful to emphasize that this was not part of its opinion. As of today, states are thus free to continue to limit marriage to opposite-sex couples and deny recognition of same-sex marriages celebrated in other states.[17]

Notwithstanding the limitations of the majority opinion, *Windsor* may have implications for future cases addressing the validity of state law limitations on same-sex marriage. The majority's reasoning relied largely on the premise that DOMA's purpose was a ''bare . . . desire to harm'' gay couples ''whose moral and sexual choices the Constitution protects.''[18] This language bears a striking resemblance to Fourteenth Amendment principles and may provide the framework for a future decision requiring nationwide recognition of same-sex marriage.

While the majority stressed that DOMA's unique abrogation of traditional state law determinations regarding spousal status was crucial to its decision,[19] Justice Antonin Scalia's dissent, in fact, accused the majority of obscuring the true rationale behind its opinion and predicted that the majority's opinion would lead directly to a decision requiring states to recognize same-sex marriage.[20] Time will tell whether Justice Scalia's predic-

---

[5] Tax code Sections §§ 105, 106.

[6] ERISA Section 607(3).

[7] Prop. Treas. Regs. §§ 1.125-5(a)(1), 1.125-6(a)(3)(ii).

[8] IRS Notice 2002-45, 2002-2 C.B. 93; Rev. Rul. 2002-41, 2002-2 C.B. 75.

[9] Tax code Section 223(d)(2).

[10] Treas. Reg. § 54.9801-6.

[11] ERISA Section 205; tax code Section 401(a)(11).

[12] *Id.*

[13] ERISA Section 205(b)(1)(C); tax code Section 401(a)(11)(B)(iii).

[14] ERISA Section 206(d)(3), tax code Section 414(p). The validity of same-sex QDROs is now beyond question, at least in those states that recognize same-sex marriage and same-sex divorce.

[15] Tax code Section 402(c)(9).

[16] Currently, same-sex marriage is legally recognized in California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington and the District of Columbia.

[17] *Windsor* did not address Section 2 of DOMA, which explicitly permits states to deny recognition of same-sex marriages celebrated outside of their borders. DOMA § 2, 28 U.S.C. § 1738C (''No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.'').

[18] *Windsor*, 133 S.Ct. at 2693-2694.

[19] *Id.* at 2694 (''When New York adopted a law to permit same-sex marriage, it sought to eliminate inequality; but DOMA frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law.'').

[20] *Id.* at 2710 (''[T]hat Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the 'personhood and dignity' which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that 'personhood and dignity' in the first place. [citation omitted]. As far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe. By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. Henceforth those challengers will lead with this Court's declaration that there is 'no legitimate purpose' served by such a law, and will claim that the traditional definition has 'the purpose and effect to disparage and to injure' the 'personhood and dignity' of same-sex couples [citation omitted]. The majority's limiting assurance will be meaningless in

  ISSN

tion comes true, but such a result would not be surprising.

Determining Spousal Status

How to determine whether same-sex couples are legally married for federal tax purposes was a key issue left unresolved by *Windsor*. The Supreme Court had no need to address this issue in *Windsor* because it was clear that New York, the state of Edith Windsor's and Thea Spyer's residence, recognized the validity of their marriage, which was celebrated in Canada. The issue is more difficult when a same-sex couple gets married in a state that recognizes same-sex marriage but lives in or moves to a state that does not recognize it. Since Section 2 of DOMA remains intact and each state can make its own decision on whether to recognize same-sex marriage, it was not initially clear whether a same-sex marriage would be considered valid if the couple's state of residence limits marriage to opposite-sex couples. In fact, the Department of Labor's Wage and Hour Division and the Social Security Administration recently issued guidance requiring these agencies to look to the law of the couple's state of residence to determine whether same-sex marriages are valid (a ''state-of-residence'' rule).[21] Moreover, most of the ERISA cases addressing the validity of marriages for purposes of spousal benefits (which generally involve participants with multiple possible spouses) have followed a state-of-residence rule.[22]

The prospect of a state-of-residence rule caused some consternation among employee benefit plans. Such a rule would have required plans to keep track of rapidly evolving state laws and alter plan administration as participants and spouses covered under the plan moved from state to state. Fortunately, the IRS recently issued Rev. Rul. 2013-17, which makes it clear that same-sex marriages will be considered valid for all tax and employee benefit purposes as long as the couple was married in a state that recognizes same-sex marriage (a ''state-of-celebration'' rule).[23]

In Rev. Rul. 2013-17, the IRS held that the terms ''spouse,'' ''marriage,'' ''husband'' and ''wife'' would all be interpreted in a gender-neutral manner under the tax code to include valid same-sex marriages. Additionally, the IRS extended Rev. Rul. 58-66, a 55-year-old ruling applying a state-of-celebration rule, for purposes of determining the validity of common law marriages, to same-sex spouses.[24] The IRS reasoned that ''[g]iven our increasingly mobile society, it is important to have a uniform rule of recognition that can be applied with certainty by the Service and taxpayers alike for all Federal tax purposes.'' The IRS further cited the administrative problems that a state-of-residence rule would raise, particularly for employee benefit plans, explaining that ''the need for and validity of spousal elections, consents, and notices could change each time an employee, former employee, or spouse moved to a state with different marriage recognition rules,'' and ''plan administrators would need to continually track the state of domicile of all same-sex married employees and former employees and their spouses.'' Accordingly, ''individuals of the same sex will be considered to be lawfully married under the [tax code] as long as they were married in a state whose laws authorize the marriage of two individuals of the same sex, even if they are domiciled in a state that does not recognize the validity of same-sex marriages.''

The IRS noted, however, that the terms ''marriage'' and ''spouse'' would not be interpreted to include domestic partnerships, civil unions or other similar formal relationships recognized under state law that are not denominated as ''marriage'' under the laws of that state.

In light of *Windsor* and Rev. Rul. 2013-17, plans should begin reviewing their plan documents and administrative procedures to ensure compliance with the post-*Windsor* definitions of ''marriage'' and ''spouse.'' Plans should also make sure that they follow a state-of-celebration rule in determining the validity of same-sex marriages. The IRS stated in Rev. Rul. 2013-17 that future guidance will be issued providing sufficient time for any such plan amendments or corrections, but the sooner that plans can identify needed corrections, the better.

Retroactive Application of *Windsor*

The possible retroactive effect of *Windsor* raises more difficult issues that may take some years to fully resolve. Edith Windsor will presumably receive a $363,053 refund for the prior tax year at issue in the litigation. The IRS also stated in Rev. Rul. 2013-17 that the post-*Windsor* definitions of ''marriage'' and ''spouse'' will apply retroactively for purposes of amended returns, adjusted returns or claims for credit or refund, provided the statute of limitations under Section 6511 of the tax code has not expired, including for purposes of determining the taxability of spousal health and fringe benefits.[25] But *Windsor* and Rev. Rul. 2013-17

---

the face of language like that, as the majority well knows. That is why the language is there.'').

[21] DOL Wage and Hour Division, ''Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act,'' at http://www.dol.gov/whd/regs/compliance/whdfs28f.htm (stating for purposes of the Family and Medical Leave Act that ''[s]pouse means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including ''common law'' marriage and same-sex marriage.''); SSA Program Operations Manual System, Part 02, Chapter 002, Subchapter 10, at https://secure.ssa.gov/apps10/public/reference.nsf/links/08092013111040AM (instructing SSA staff to apply a state-of-residence rule when processing spousal benefits).

[22] *See DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918, 37 EBC 2789 (6th Cir. 2006)(104 PBD, 5/31/06; 33 BPR 1369, 6/6/06); *Central States Pension Fund v. Gray*, No. 02 C 8381, 31 EBC 1748 (N.D. Ill. Oct. 10, 2003)(199 PBD, 10/16/03; 30 BPR 2312, 10/21/03); *Croskey v. Ford Motor Company-UAW*, No. 01 CIV. 1094(MBM), 28 EBC 1438 (S.D.N.Y. May 6, 2002)(101 PBD, 5/24/02; 29 BPR 1564, 5/28/02); *Allen v. Western Conference of Teamsters Pension Trust Fund*, 788 F.2d 648 (9th Cir. 1986).

[23] Rev. Rul. 2013-17.

[24] Rev. Rul. 58-66, 1958-1 C.B. 60 (holding that individuals will be treated as married for federal tax purposes if applicable state law treats them as married under common law marriage rules, and further explaining that this treatment continues ''in the case of taxpayers who enter into a common-law marriage in a state which recognizes such relationship and who later move into a state in which a ceremony is required to initiate the marital relationship.'').

[25] Section 6511 of the tax code generally provides that a claim for credit or refund of an overpayment of any tax shall

were silent as to the general retroactive effect of the decision for other federal law purposes. It is therefore unclear at this point how *Windsor* will be applied to the tricky issue of retroactive surviving spouse rights under ERISA.

Problems With Full Retroactivity. Fully retroactive application of *Windsor* in the context of ERISA's QJSA and QPSA rights would raise numerous problems. If *Windsor* is interpreted to grant these rights to same-sex spouses retroactively, plans could potentially be required to pay pensions to the spouses of participants who died years ago, adjust the pensions of participants who have long since retired and commenced payment of pension benefits, or divert pension benefits that may have been paid to nonspouse beneficiaries named without the consent of the same-sex spouses.

An additional problem is that plan administrators, having necessarily relied on the validity of DOMA, may not have incorporated these spousal benefits into their actuarial calculations. Plans would therefore appear to have a compelling argument to make about the hardship of requiring retroactive compliance with *Windsor*, based on the necessity of their reliance on DOMA and the unique difficulty of unwinding and adjusting pension benefits after they have accrued and/or commenced.

Supreme Court Jurisprudence. Despite these reliance arguments, the current state of the Supreme Court's jurisprudence favors full retroactivity of constitutional determinations under civil law for cases not foreclosed by statutes of limitations or res judicata. The traditional common law view, as summarized by the Supreme Court in 1886, was that ''[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.''[26] This view reflects the notion that the Supreme Court's decisions do not make new law, but discover the true state of the law that has always been. As courts are only authorized to interpret the law, prospective rulemaking is considered the sole province of the legislative branch. Under this view, Section 3 of DOMA has been unconstitutional ever since it was passed, and the federal government's attempt to treat same-sex spouses differently pursuant to DOMA has never been valid.

The Supreme Court's adherence to the common law view has fluctuated over the years, due in large part to recognition of the reliance interests that may warrant protection when a law is invalidated. The Supreme Court had for some years followed a flexible approach to retroactive application of civil law decisions, as set forth in *Chevron Oil Co. v. Huson*, a case involving the application of a decision that had the effect of imposing a more strict statute of limitations to certain personal injury claims governed by federal law.[27] *Chevron* required consideration of three factors in determining whether a decision can have nonretroactive effect: (1) whether the decision establishes a new principle of law; (2) the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation; and (3) the injustice or hardship that would be imposed by retroactive application.[28]

The Supreme Court has since retreated from the flexible approach in *Chevron*, and full retroactivity is currently the norm for all cases in which the high court does not specifically reserve the question of retroactivity, aside from cases otherwise barred by res judicata or a statute of limitations. In *James B. Beam Distilling v. Georgia*, the Supreme Court reversed a lower court decision limiting the retroactive effect of an earlier Supreme Court ruling invalidating under the U.S. Constitution's Commerce Clause a state tax statute favoring local alcohol producers.[29] Writing for a fractured Supreme Court in a case that spawned multiple written opinions without a clear majority, Justice David H. Souter concluded, without application of the *Chevron* factors, that the normal rule of full retroactivity applied because the Supreme Court's earlier Commerce Clause ruling did not reserve the question of whether the retroactive effect decision was open for limitation.[30]

A more unified Supreme Court addressed retroactivity again in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), in which it considered the retroactive application of a prior ruling that states violate the constitutional doctrine of intergovernmental tax immunity when they tax retirement benefits paid by the federal government while exempting retirement benefits paid by the state or its political subdivisions.[31] The *Harper* court declined to apply the *Chevron* factors with respect to a prior ruling that did not reserve the question of retroactivity, concluding that ''[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.''[32]

Because *Windsor* was silent as to the possibility of nonretroactive application, the rules established in *Beam* and *Harper* would appear to require fully retroactive application of *Windsor*, despite the apparent injustice to employee benefit plans.

Tax Code Provision Regarding Retroactivity. The tax code has a specific provision that may authorize certain limitations on *Windsor's* retroactive effect on employee benefit plans, notwithstanding *Beam* and *Harper*. Section 7805(b)(8) of the tax code authorizes the Treasury Department to ''prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect.''

Section 7805(b)(8) was most recently applied with respect to employee benefits following the Supreme Court's decision in *Central Laborers' Pension Fund v.*

be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever is later.

[26] *Norton v. Shelby County*, 118 U.S. 425, 426 (1886).

[27] *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

[28] *Id.* at 106-107.

[29] *James B. Beam Distilling v. Georgia*, 501 U.S. 529 (1991).

[30] *Id.* at 539.

[31] *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993).

[32] *Id.* at 97.

  ISSN

Heinz,[33] in which the high 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. Plans had previously relied on IRS representations indicating that such plan amendments were permissible, and the Supreme Court noted in *Heinz* the agency's power under Section 7805(b)(8) to limit the retroactive effect of the decision on employee benefit plans.[34]

The IRS subsequently issued Rev. Proc. 2005-23, providing a transition period for plans to adopt complying amendments, and stating that the adoption of the types of plan amendments prohibited by *Heinz* prior to the date of the *Heinz* ruling would not cause plans to be disqualified for tax purposes.[35] However, Rev. Proc. 2005-23 addressed only the tax-qualification of employee benefit plans under the tax code. It did not affect the rights of participants to sue under the anti-cutback provisions,[36] and participants who subsequently sued under *Heinz* had their benefits restored retroactively.[37]

The IRS indicated in Rev. Rul. 2013-17 that it intends to issue further guidance concerning the retroactive application of *Windsor* to employee benefit plans, which 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.''[38] There are two major questions as plans await this IRS guidance: (1) whether the IRS will follow the approach in Rev. Proc. 2005-23 and limit its guidance to affect only the tax-qualification of employee benefit plans, or alternatively whether this guidance will purport to affect the rights of same-sex surviving spouses to sue under ERISA; and (2) if the IRS guidance does rule on the retroactivity of surviving spouse rights under ERISA, whether such guidance is authorized by Section 7805(b)(8) and valid in light of *Beam* and *Harper*.

Courts have not addressed whether Section 7805(b)(8) authorizes the IRS to limit the rights of participants to sue to enforce ERISA rights.[39] Arguably, the surviving spouse rights set forth in Section 205 of ERISA ''relate[] to the internal revenue laws'' within the meaning of Section 7805(b)(8), insofar as such rights are also set forth as a condition of tax-qualified plan status under sections 401(a)(11) and 417 of the tax code. Moreover, the IRS has exclusive authority to issue regulations, rulings, opinions, variances and waivers under Section 205 of ERISA pursuant to Reorganization Plan No. 4, which Congress ratified in 1984.[40] On the other hand, it is not clear whether Section 7805(b)(8) authorizes the IRS to do anything more than protect the tax-qualified status of plans that relied on the validity of DOMA. It is also not clear whether Section 7805(b)(8) trumps the retroactivity rules of *Beam* and *Harper*. Until the IRS issues further guidance on the retroactivity issue and courts rule on the permissible scope of such guidance, the prospect of retroactive liability for same-sex surviving spouse benefits under ERISA remains a very real possibility for employee benefit plans.

Conclusion

In time, it is likely that the questions regarding the application of *Windsor* will fade from relevance, as recognition of same-sex marriage evolves throughout the country and subsequent court decisions and administrative guidance clarify unresolved issues. With the issuance of Rev. Rul. 2013-17, the IRS has resolved one of the major issues in a manner very favorable to plans and same-sex couples by adopting a state-of-celebration rule for determining the validity of same-sex marriages. Other difficult issues remain, however, particularly involving the possibility of retroactive liability for same-sex surviving spouse benefits.

For now, plans should review their plan documents and administrative procedures for compliance with the post-*Windsor* definitions of ''marriage'' and ''spouse'' and the state-of-celebration rule announced in Rev. Rul. 2013-17. Additionally, plans should assess their potential liability for retroactive same-sex surviving spouse benefits and watch carefully for further guidance from the IRS and/or the DOL.

---

[33] *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 32 EBC 2313 (2004)(109 PBD, 6/8/04; 31 BPR 1295, 6/15/04).

[34] *Id.* at footnote 4.

[35] Rev. Proc. 2005-23, 2005-1 C.B. 991 (74 PBD, 4/19/05; 32 BPR 935, 4/26/05).

[36] *Id.* at Section 1.02 (''The limitation on the retroactive application of [*Heinz*] under this revenue procedure has no effect on the rights of any party under section 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA) or any other law.'').

[37] *Swede v. Rochester Carpenters Pension Fund*, 467 F.3d 216, 39 EBC 1149 (2d Cir. Oct. 20, 2006)(204 PBD, 10/24/06; 33 BPR 2595, 10/31/06).

[38] Rev. Rul. 2013-17.

[39] In *Swede*, the Second Circuit noted that because Rev. Proc. 2005-23 did not purport to limit the retroactivity of benefit claims under ERISA, ''we have no occasion to consider whether *Harper*'s retroactivity rule or other legal principles might constrain the IRS's authority to limit the retroactive effect on the rights of parties of judicial decisions relating to the internal revenue laws.'' 467 F.3d at footnote 9.

[40] Reorg. Plan No. 4 of 1978, 43 Fed. Reg. 47,713 (1978); Pub. L. No. 98-532, 98 Stat. 2705 (1984).