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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 20, 25, 26, 31, and 301

[REG-148998-13]

RIN 1545-BM10

Definition of Terms Relating to Marital Status

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that reflect the holdings of Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015), Windsor v. United States, 570 U.S. ___, 133 S. Ct. 2675 (2013), and Revenue Ruling 2013-17 (2013-38 IRB 201), and that define terms in the Internal Revenue Code (Code) describing the marital status of taxpayers. The proposed regulations primarily affect married couples, employers, sponsors and administrators of employee benefit plans, and executors. This document invites comments from the public regarding these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by **[INSERT DATE 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-148998-13), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC

20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-148998-13), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC; or sent electronically via the Federal eRulemaking Portal at www.regulations.gov (IRS REG-148998-13).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed amendments to the regulations, Mark Shurtliff at (202) 317-3400; concerning submissions of comments and requests for a hearing, Regina Johnson at (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1), the Estate Tax Regulations (26 CFR part 20), the Gift Tax Regulations (26 CFR part 25), the Generation-Skipping Transfer Tax Regulations (26 CFR part 26), the Employment Tax and Collection of Income Tax at Source Regulations (26 CFR part 31), and the Regulations on Procedure and Administration (26 CFR part 301).

Amendments to Regulations Incorporating Holdings of Windsor, Obergefell, and Revenue Ruling 2013-17

On June 26, 2013, the Supreme Court in United States v. Windsor, 570 U.S. ____, 133 S. Ct. 2675 (2013), held that Section 3 of the Defense of Marriage Act, which generally prohibited the federal government from recognizing the marriages of same-sex couples, is unconstitutional because it violates the principles of equal protection and due process. Revenue Ruling 2013-17 provides guidance on the Windsor decision's effect on the IRS's interpretation of Code sections that refer to taxpayers' marital status. Cf. Notice 2014-19 (2014-47 IRB 979), amplified by Notice 2014-37 (2014-24 IRB 1100)

(regarding the application of the Windsor decision to qualified retirement plans); Notice 2014-1 (2014-02 IRB 270) (regarding elections and reimbursements for same-sex spouses under cafeteria plans, flexible spending arrangements, and health savings accounts following the Windsor decision); Notice 2013-61 (2013-44 IRB 432) (regarding the application of the Windsor decision and Rev. Rul. 2013-17 to employment taxes and special administrative procedures for employers to make adjustments or claims for refund or credit); and Revenue Procedure 2014-18 (2014-7 IRB 513) (regarding extensions of time for estates to make a portability election). On June 26, 2015, the Supreme Court in Obergefell v. Hodges, 576 U.S. ____ (2015), held that state laws are “invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples” 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.” Obergefell, 576 U.S. at 23, 28.

In light of the holdings of Windsor and Obergefell, the Treasury Department and the IRS have determined that, for federal tax purposes, marriages of couples of the same-sex should be treated the same as marriages of couples of the opposite-sex and that, for reasons set forth in Revenue Ruling 2013-17, terms indicating sex, such as “husband,” “wife,” and “husband and wife,” should be interpreted in a neutral way to include same-sex spouses as well as opposite-sex spouses. Accordingly, these proposed regulations amend the current regulations under section 7701 of the Internal Revenue Code (Code) 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.

In addition, these proposed regulations provide that a marriage of two individuals will be recognized for federal tax purposes if that marriage would be recognized by any state, possession, or territory of the United States. Under this rule, whether a marriage conducted in a foreign jurisdiction will be recognized for federal tax purposes depends on whether that marriage would be recognized in at least one state, possession, or territory of the United States. This comports with the general principles of comity where countries recognize actions taken in foreign jurisdictions, but only to the extent those actions do not violate their own laws. See Hilton v. Guyot, 159 U.S. 113, 167 (1895) (“A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law.”).

Although these proposed regulations define terms relating to marital status for federal tax purposes, the IRS may provide additional guidance as needed. For example, the IRS has already issued more particular guidance for employers regarding the application of Revenue Ruling 2013-17 to qualified retirement plans, and that guidance remains in effect. See Notice 2014-19 (2014-47 IRB 979).

Registered Domestic Partnerships, Civil Unions, or Other Similar Relationships Not Denominated as Marriage

For federal tax purposes, the term “marriage” does not include registered domestic partnerships, civil unions, or other similar relationships recognized under state law that are not denominated as a marriage under that state’s law, and the terms

“spouse,” “husband and wife,” “husband,” and “wife” do not include individuals who have entered into such a relationship.

Except when prohibited by statute, the IRS has traditionally looked to the states to define marital status. See Loughran v. Loughran, 292 U.S. 216, 223 (1934)

(“Marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction.”); see also Revenue Ruling 58-66 (1958-1 CB 60) (if a state recognizes a common-law marriage as a valid marriage, the IRS will also recognize the couple as married for purposes of federal income tax filing status and personal exemptions).

States have carefully considered the types of relationships that they choose to recognize as a marriage and the types that they choose to recognize as something other than a marriage. Although some states extend all of the rights and responsibilities of marriage under state law to couples in registered domestic partnerships, civil unions, or other similar relationships, those states have intentionally chosen not to denominate those relationships as marriages. Similar rules exist in some foreign jurisdictions.

Some couples have chosen to enter into a civil union or registered domestic partnership even when they could have married, and some couples who are in a civil union or registered domestic partnership have chosen not to convert those relationships into a marriage even when they have had the opportunity to do so. In many cases, this choice was deliberate, and couples who enter into civil unions or registered domestic partnerships may have done so with the expectation that their relationship will not be treated as a marriage for purposes of federal law. For some of these couples, there are benefits to being in a relationship that provides some, but not all, of the protections and

responsibilities of marriage. For example, some individuals who were previously married and receive Social Security benefits as a result of their previous marriage may choose to enter into a civil union or registered domestic partnership (instead of a marriage) so that they do not lose their Social Security benefits. More generally, the rates at which some couples' income is taxed may increase if they are considered married and thus required to file a married-filing-separately or married-filing-jointly federal income tax return. Treating couples in civil unions and registered domestic partnerships the same as married couples who are in a relationship denominated as marriage under state law could undermine the expectations certain couples have regarding the scope of their relationship. Further, no provision of the Code indicates that Congress intended to recognize as marriages civil unions, registered domestic partnerships, or similar relationships. Accordingly, the IRS will not treat civil unions, registered domestic partnerships, or other similar relationships as marriages for federal tax purposes.

Effect on Other Documents

These proposed regulations would, as of the date they are published as final regulations in the **Federal Register**, obsolete Revenue Ruling 2013-17. Taxpayers may continue to rely on guidance related to the application of Revenue Ruling 2013-17 to employee benefit plans and the benefits provided under such plans, including Notice 2013-61, Notice 2014-37, Notice 2014-19, and Notice 2014-1.

Proposed Effective/Applicability Date

The regulations, as proposed, would be applicable as of the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**.

Statement of Availability for IRS Documents

For copies of recently issued Revenue Procedures, Revenue Rulings, Notices, and other guidance published in the Internal Revenue Bulletin, please visit the IRS website at <http://www.irs.gov>.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. In addition, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Accordingly, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act (5 U.S.C. chapter 6). Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the “Addresses” heading. Treasury and the IRS request comments on all aspects of the proposed rules. All comments will be available at www.regulations.gov or upon request. A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public

hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Mark Shurtliff of the Office of the Associate Chief Counsel, Procedure and Administration.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

26 CFR Part 25

Gift taxes, Reporting and recordkeeping requirements.

26 CFR Part 26

Estate, Reporting and recordkeeping requirements.

26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Reporting and recordkeeping requirements, Social Security, Unemployment compensation.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1, 20, 25, 26, 31, and 301 are proposed to be amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 ***

Par 2. Section 1.7701-1 is added to read as follows:

§1.7701-1 Definitions; spouse, husband and wife, husband, wife, marriage.

(a) In general. For the definition of the terms spouse, husband and wife, husband, wife, and marriage, see §301.7701-18 of this chapter.

(b) Effective/applicability date. The rules of this section apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register**.

PART 20--ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Par. 3. The authority citation for part 20 continues to read in part as follows:

Authority: 26 U.S.C. 7805 ***

Par. 4. Section 20.7701-2 is added to read as follows:

§20.7701-2 Definitions; spouse, husband and wife, husband, wife, marriage.

(a) In general. For the definition of the terms spouse, husband and wife, husband, wife, and marriage, see §301.7701-18 of this chapter.

(b) Effective/applicability date. The rules of this section apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register**.

PART 25--GIFT TAX; GIFTS MADE AFTER DECEMBER 31, 1954

Par. 5. The authority citation for part 25 continues to read in part as follows:

Authority: 26 U.S.C. 7805 ***

Par. 6. Section 25.7701-2 is added to read as follows:

§25.7701-2 Definitions; spouse, husband and wife, husband, wife, marriage.

(a) In general. For the definition of the terms spouse, husband and wife, husband, wife, and marriage, see §301.7701-18 of this chapter.

(b) Effective/applicability date. The rules of this section apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register**.

PART 26--GENERATION-SKIPPING TRANSFER TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1986

Par. 7. The authority citation for part 26 continues to read in part as follows:

Authority: 26 U.S.C. 7805 ***

Par. 8. Section 26.7701-2 is added to read as follows:

§26.7701-2 Definitions; spouse, husband and wife, husband, wife, marriage.

(a) In general. For the definition of the terms spouse, husband and wife, husband, wife, and marriage, see §301.7701-18 of this chapter.

(b) Effective/applicability date. The rules of this section apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register**.

PART 31--EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT THE SOURCE

Par. 9. The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 ***

Par. 10. Section 31.7701-2 is added to read as follows:

§31.7701-2 Definitions; spouse, husband and wife, husband, wife, marriage.

(a) In general. For the definition of the terms spouse, husband and wife, husband, wife, and marriage, see §301.7701-18 of this chapter.

(b) Effective/applicability date. The rules of this section apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register**.

PART 301--PROCEDURE AND ADMINISTRATION

Par. 11. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 ***

Par. 12. Section 301.7701-18 is added to read as follows:

§301.7701-18 Definitions; spouse, husband and wife, husband, wife, marriage.

(a) In general. For federal tax purposes, the terms spouse, husband, and wife mean an individual lawfully married to another individual. The term husband and wife means two individuals lawfully married to each other.

(b) Persons who are married for federal tax purposes. A marriage of two individuals is recognized for federal tax purposes if the marriage would be recognized by any state, possession, or territory of the United States.

(c) Persons who are not married for federal tax purposes. The terms spouse, husband, and wife do not include individuals who have entered into a registered

domestic partnership, civil union, or other similar relationship not denominated as a marriage under the law of a state, possession, or territory of the United States. The term husband and wife does not include couples who have entered into such a relationship, and the term marriage does not include such relationships.

(d) Effective/applicability date. The rules of this section apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulation in the **Federal Register**.

John M. Dalrymple,

Deputy Commissioner for Services and Enforcement.