

IRS and Treasury issue Proposed Regulations on Marital Status

Proposed Regulations that explain the IRS position on same-sex marriages have been published for comment. You can read the proposed regulations here:

<https://www.federalregister.gov/articles/2015/10/23/2015-26890/definition-of-terms-relating-to-marital-status>

The proposed regulations reaffirm all of the positions taken in Revenue Ruling 2013-17.

Point one: All marriages entered into in states that recognize the marriage will be recognized as valid by the IRS.

Point two: If a marriage was entered into in a foreign country then under “comity” principles, that marriage will be recognized by the IRS so long as there is at least one state in U.S. that will recognize that marriage. This rule should take care of most Canadian marriages entered into before Massachusetts recognized marriages in 2004, as well as valid Dutch marriages, which were available as early as 2001 (The Netherlands was the first country to recognize same-sex marriages).

Point three: Registered Domestic Partners (RDPs) and Civil Union Partners (CUPs), even though granted full spousal rights and responsibilities under state law, will NOT be recognized as spouses under federal tax law.

It is Point Three that I have a problem with. Here is the IRS/Treasury justification for its position:

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.

Here's my problem: if a state elects to provide a registered couple with all of the benefits and responsibilities of marriage, why should they be treated as unmarried at the federal level? The IRS seems to say that such couples should be protected in their decision by having their cake and eating it too. They can be treated as spouses at the state level, but avoid federal penalties that attach to true spouses who are recognized as such by the federal government. Hey, why not create a check the box regime as we did for corporations? Check here if you want to be treated as spouses by the federal government and check here if you do not want to be so treated.

Only a handful of states have adopted the marriage equivalent alternative status for its residents. That means residents in those states have options that residents in other states do not have. You can enjoy state spousal benefits and avoid the federal marriage penalty if you live in California or Nevada or Illinois, but not if you live in Georgia or Texas or Michigan. That does not seem fair.

And it is not entirely true to say that “states have carefully considered the types of relationships that they choose to recognize as a marriage.” Some states were prevented from “carefully considering” whether a relationship between same-sex couples should be a marriage or a registered partnership because some states (e.g., Nevada, Oregon, and during a period of time, California) were prohibited from recognizing same-sex marriages once a state constitutional prohibition on such recognition was passed. For the same reason, it is not entirely true to say that states that have created RDP or CUP status “have intentionally chosen not to denominate those relationships as marriages.” California, for example, had no choice when it created Registered Domestic Partnerships in 1999 because there was an initiative known as Proposition 22 which prevented the legislature from enacting same-sex marriage. And many states that used to have these alternative statuses have determined, now that same-sex marriages are recognized, those alternative statuses should in fact be marriages. So they have converted them into marriages, often from the date the alternative relationship was entered into. (Connecticut was one of the first states to do this.) So is it really logical to rely on the state’s intent in determining that such partnerships should not be considered marriages as a justification for not doing so at the federal level?

When RDPs and CUPs dissolve their relationships they go through exactly the same sorts of processes that spouses go through in a divorce. Alimony obligations are calculated in the same way. Property divisions occur in the same way as for spouses. And yet, so far, the IRS has not been willing to allow RDPs and CUPs to use the various divorce tax statutes that apply to these transactions because the statutes use the word “spouse.” And their justification for this position is that “no provision of the Code indicates that Congress intended to recognize as marriages civil unions, registered domestic partnerships, or similar relationships.” Please, until 2013 Congress was bound by a statute (DOMA) that said even **married** same-sex couples could not be treated as spouses. Is it even plausible that Congress ever intentionally said (or considered) that if DOMA was struck down ONLY spouses and not RDPs could be treated as married?

Windsor and *Obergefell* have changed the world of taxation and the role of marriage in the tax laws. One would hope that the IRS, the agency entrusted with construing tax laws, could take this change into account in its own construction of the laws. Here are the questions left unanswered by the proposed regulations:

1. How will RDPs and CUPs be taxed when they dissolve their relationships and one partner is ordered by the court to provide support to the other partner?
2. How will RDPs and CUPs be taxed when upon dissolution the court orders them to divide their property in a certain way?

3. How will RDPs and CUPs be taxed upon dissolution when a court rules that the retirement plan of one partner should be split with the other partner?

4. How will RDPs and CUPs who were not spouses at the beginning of their relationship be taxed when their state of domicile declares that now they are considered spouses under state law? [which is the case in Massachusetts, Connecticut, New Hampshire, and who knows how many other states that now recognize marriage but not alternative relationships]. If foreign marriages are recognized by Treasury so long as one state recognizes the marriage, what about RDP relationships being recognized as marriages so long as one state recognizes the relationship as a marriage?

The IRS has concluded that since same-sex couples now have the right to enter into marriages, their choices not to do so and instead to enter into registered partnerships should have lasting tax consequences. Here's what they say in explanation: "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."

Perhaps it is worth pointing out that until *Windsor* (June 2013) there would have been little reason to enter into a marriage rather than an RDP. And now, as RDPs and CUPs are "divorcing," it seems as though the IRS is saying: "if you want certain tax consequences you better marry each other before you divorce." That makes no sense to me.

Substance is substance and it should control over form. If the relationship is substantively a marriage, the IRS should recognize it as such. IRS took that substance over form position back in the late 1970s, early 1980s. Remember the *Boyer* case? *Boyer v. C.I.R.*, 668 F.2d 1382 (4th Cir. 1981). In that case, husband and wife divorced at year end and then remarried in early January. They filed as single to avoid the marriage tax penalty on two-earner couples. The RS said that despite state law, this divorce followed by remarriage was a n December 31 (the relevant date for determining federal filing status). The Fourth Circuit agreed. So Maryland state law for the Boyters was irrelevant even though it said they were not married. And now for RDPs state law is determinative because it calls the relationship something other than marriage even while giving all the same benefits and responsibilities of marriage. Can someone explain to me why the Boyters were married even though divorced under state law and yet RDPs are not married even though treated the same as spouses under state law? I honestly have trouble with this one.

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