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DEPARTMENT OF THE TREASURY

Internal Revenue Service

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

[TD 9785]

RIN 1545-BM10

Definition of Terms Relating to Marital Status

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final Regulations.

SUMMARY: This document contains final 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 describing the marital status of taxpayers for federal tax purposes.

DATES: Effective date: These regulations are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION:

Background

This document contains 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).

On October 23, 2015, the Department of the Treasury (Treasury) and the IRS published in the **Federal Register** (80 FR 64378) a notice of proposed rulemaking (REG–148998–13), which proposed to amend the 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. In addition, the proposed regulations provided 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. Finally, the proposed regulations clarified that 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.

Written comments responding to the proposed regulations were received, and one person requested a public hearing. A public hearing was held on January 28, 2016; however, the individual who requested the hearing was not able to attend, but did submit supplemental comments. When given the opportunity, no one who attended the hearing asked to speak. After consideration of the comments, Treasury and the IRS adopt the proposed regulations as revised by this Treasury Decision.

Summary of Comments and Explanation of Revisions

The IRS received twelve comments in response to the notice of proposed rulemaking. All comments were considered and are available for public inspection at <http://www.regulations.gov>. The comments are summarized and discussed in this preamble.

I. Comments on the proposed regulations generally

The majority of commenters strongly supported the proposed regulations. Many commended Treasury and the IRS for publishing proposed regulations that reflect the holdings of Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015), and Windsor v. United States, 570 U.S. ___, 133 S. Ct. 2675 (2013), instead of relying on sub-regulatory guidance. In general, commenters applauded Treasury and the IRS for determining that, in light of the Windsor and Obergefell holdings, marriages of same-sex couples should be treated the same as marriages of opposite-sex couples for federal tax purposes.

One commenter suggested that the regulations specifically reference “same-sex marriage” so that the definitions apply regardless of gender and to avoid any potential issues of interpretation. Treasury and the IRS believe that the definitions in the proposed regulations apply equally to same-sex couples and opposite-sex couples, and that no clarification is needed. Proposed §301.7701-18(a) states, without qualification, that, “[f]or federal tax purposes, the terms spouse, husband, and wife mean an individual lawfully married to another individual,” and that the “term husband and wife means two individuals lawfully married to each other.” The language is specifically gender neutral, which reflects the holdings in Windsor and Obergefell and is consistent with Revenue Ruling 2013-17. Similarly, the language in proposed §301.7701-18(b)

refers to a marriage of two individuals, without specifying gender. Amending the regulations to specifically address a marriage of two individuals of the same sex would undermine the goal of these regulations to eliminate distinctions in federal tax law based on gender. For these reasons, the final regulations do not adopt this comment.

One comment reflected an overall negative view of same-sex marriage. However, the comment did not recommend any specific amendment to the proposed regulations. Because this comment addresses issues outside the scope of these regulations, the final regulations do not address this comment.

II. Comments on proposed §301.7701-18(a) regarding the definition of terms relating to marital status

Section 301.7701-18(a) of the proposed regulations provides that 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. The preamble to the proposed regulations explains that after Windsor and Obergefell, marriages of couples of the same sex should be treated the same as marriages of couples of the opposite sex for federal tax purposes, and therefore, the proposed regulations interpret these terms in a neutral way to include same-sex as well as opposite-sex couples.

The overwhelming majority of commenters expressed support for proposed §301.7701-18(a). However, one of the commenters recommended that the IRS update all relevant forms to use the gender-neutral term “spouse” instead of “husband and wife.” The commenter stated that updating the forms to use gender-neutral terms would be cost-neutral and would more accurately reflect the varied composition of today’s

families. The commenter further stated that updating the forms to be inclusive of same-sex couples would increase government efficiency by alleviating confusion, delays, and denials caused by current forms using outdated terms.

The commenter's recommendation relates to forms and is therefore outside the scope of these final regulations. Nevertheless, Treasury and the IRS will consider the commenter's recommendation when updating IRS forms and publications.

III. Comments on proposed §301.7701-18(b) regarding persons who are married for federal tax purposes

Section 301.7701-18(b) of the proposed regulations provides that 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. The comments received on paragraph (b) are summarized below.

A. Comment that proposed §301.7701-18(b) is redundant in light of Obergefell and should be removed

One commenter stated that proposed §301.7701-18(b) is redundant and unnecessary in light of Obergefell. According to the commenter, after Obergefell, same-sex marriage should be recognized in every state. Therefore, the commenter states that there is no need for a definition of marriage for federal tax purposes and proposed §301.7701-18 (b) should not be finalized.

Treasury and the IRS disagree that proposed §301.7701-18(b) is unnecessary in light of Obergefell. The purpose of publishing these regulations is to ensure that, regardless of the term used in the Code, a marriage between two individuals entered into in, and recognized by, any state, possession, or territory of the United States will be

treated as a marriage for federal tax purposes. The majority of comments supporting the proposed regulations agree with this view and specifically applaud Treasury and the IRS for publishing regulations to make this clear rather than relying on sub-regulatory guidance. Accordingly, the comment is not adopted and a definition of marriage for federal tax purposes is included in the final regulations under §301.7701-18(b). However, the definition in proposed §301.7701-18(b) is amended by these final regulations, as described below.

B. Comment that the language in the proposed rule should be clarified to eliminate unintended consequences

Another commenter recommended amending §301.7701-18(b) of the proposed regulations to simply state that the determination of an individual's marital status will be made under the laws of the relevant state, possession, or territory of the United States or, where appropriate, under the laws of the relevant foreign country (for example, the country where the marriage was celebrated or, if conflict of laws questions arise, another country). The commenter pointed out that this revision is needed to ensure that a couple's intended marital status is recognized by the IRS. Specifically, the commenter explains that the language in proposed §301.7701-18(b) makes it possible for unmarried couples living in a state that does not recognize common-law marriage to be treated as married for federal tax purposes if the couple would be treated as having entered into a common-law marriage under the law of any state, possession, or territory of the United States.

Next, the commenter explains that the language of the proposed regulations could result in questions about the validity of a divorce. Under Revenue Ruling 67-442,

a divorce is recognized for federal tax purposes unless the divorce is invalidated by a court of competent jurisdiction. The language of the proposed regulations would undermine this longstanding revenue ruling if any state would recognize the couple as still married despite the divorce.

Finally, the commenter states that the language of proposed §301.7701-18(b) could create a conflict with proposed §301.7701-18(c) if at least one state, possession, or territory of the United States recognizes a couple's registered domestic partnership, civil union, or other similar relationship as marriage. The commenter points out that in such a situation, regardless of the couple's intention and where they entered into their alternative legal relationship, they could be treated as married for federal tax purposes under the language of proposed §301.7701-18(b) if any state, possession, or territory recognizes their alternative legal relationship as a marriage.

According to the commenter, these examples demonstrate that the language in proposed §301.7701-18(b) could be interpreted to treat couples who divorce or who never intended to enter into a marriage under the laws of the state where they live or where they entered into an alternative legal relationship as married for federal tax purposes. Without a change to proposed §301.7701-18(b), these couples would be required to analyze the laws of all the states, possessions, and territories of the United States to determine whether any of these laws would fail to recognize their divorce or would denominate their alternative legal relationship as a marriage

This was not the intent of the proposed regulations. Rather, the proposed regulations were intended to recognize a marriage only when a couple entered into a relationship denominated as marriage under the law of any state, territory, or

possession of the United States or under the law of a foreign jurisdiction if such a marriage would be recognized by any state, possession, or territory of the United States. To address these concerns, §301.7701-18(b) is revised in the final regulations to provide a general rule for recognizing a domestic marriage for federal tax purposes and a separate rule for recognizing foreign marriages for federal tax purposes (discussed in section III.C. Comments on marriages entered into in foreign jurisdictions of this preamble).

Accordingly, under the general rule in §301.7701-18(b)(1) of the final regulations, a marriage of two individuals is recognized for federal tax purposes if the marriage is recognized by the state, possession, or territory of the United States in which the marriage is entered into, regardless of the married couple's place of domicile. This revision addresses the concerns raised by the commenter and ensures that only couples entering into a relationship denominated as marriage, and who have not divorced, are treated as married for federal tax purposes. By relying on the place of celebration to determine which state, possession, or territory of the United States is the point of reference for determining whether a couple is married for federal tax purposes, this rule is consistent with the longstanding position of Treasury and the IRS regarding the determination of marital status for federal tax purposes. See Revenue Ruling 2013-17; Revenue Ruling 58-66 (1958-1 CB 60).

C. Comments on marriages entered into in foreign jurisdictions

Section 301.7701-18(b) of the proposed regulations generally provides that 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. The preamble

to the proposed regulations explains that under this rule, as a matter of comity, a marriage conducted in a foreign jurisdiction will be recognized for federal tax purposes if that marriage would be recognized in at least one state, possession, or territory of the United States. The rule in §301.7701-18(b) of the proposed regulations was intended to address both domestic and foreign marriages, regardless of where the couple is domiciled and regardless of whether the couple ever resides in the United States (or a possession or territory of the United States). One commenter suggested amending the proposed regulation to recognize marriages performed in any foreign jurisdiction, for federal tax purposes, if the marriage is recognized in at least one state, possession, or territory of the United States. Similarly, another commenter recommended amending the proposed regulation to reflect the discussion in the preamble to the proposed regulation regarding the recognition of marriages conducted in foreign jurisdictions. This commenter noted that the preamble to the proposed regulation states, “[W]hether 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.” The commenter recommended that, rather than relying on the preamble, language should be included in the regulations’ text making this recognition explicit.

Proposed §301.7701-18(b) was drafted to apply to both domestic and foreign marriages. In light of the comments, the proposed rule has been amended to be more explicit. To clarify how foreign marriages will be recognized for federal tax law, §301.7701-18(b) has been amended to provide a specific rule for foreign marriages. Accordingly, a new paragraph (b)(2) has been added to §301.7701-18 to provide that

two individuals entering into a relationship denominated as marriage under the laws of a foreign jurisdiction are married for federal tax purposes if the relationship would be recognized as marriage under the laws of at least one state, possession, or territory of the United States. This rule enables couples who are married outside the United States to determine marital status for federal tax purposes, regardless of where they are domiciled and regardless of whether they ever reside in the United States. Although this rule requires couples to review the laws of the various states, possessions, and territories to determine if they would be treated as married, it is sufficient if they would be treated as married in a single jurisdiction and there is no need to consider the laws of all of the states, territories, and possessions of the United States. In addition, unlike the language in §301.7701-18(b) of the proposed regulations, this rule incorporates the place of celebration as the reference point for determining whether the legal relationship is a marriage or a legal alternative to marriage, avoiding the potential conflict with §301.7701-18(c) identified by the commenter, above. Finally, this rule avoids the concern that a couple intending to enter into a legal alternative to marriage will be treated as married because this rule recognizes only legal relationships denominated as marriage under foreign law as eligible to be treated as marriage for federal tax purposes. This separate rule for foreign marriages in §301.7701-18(b)(2) is consistent with the proposed regulations' intent, as described in the preamble to the notice of proposed rulemaking, and provides the clarity commenters request.

D. Comment on common-law marriages

One commenter stated that some states that recognize common-law marriage only do so in the case of opposite-sex couples. Accordingly, the commenter recommended amending the regulations to clarify that common-law marriages of same-sex couples will be recognized for federal tax purposes. The commenter further suggested that any same-sex couple that would have been considered married under the common law of a state but for the fact that the state's law prohibited same-sex couples from being treated as married under common law be allowed to file an amended return for any open tax year to claim married status.

As discussed in the preamble to the proposed regulations, on June 26, 2013, the Supreme Court in Windsor held that Section 3 of the Defense of Marriage Act, which generally prohibited the federal government from recognizing marriages of same-sex couples, is unconstitutional because it violates the principles of equal protection and due process. On June 26, 2015, the Supreme Court held in Obergefell 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 _ (slip op., at 23, 28).

In light of these holdings, Treasury and the IRS determined that marriages of couples of the same sex should be treated the same as marriages of couples of the opposite sex for federal tax purposes. See 80 FR 64378, 64379. Neither the proposed regulations nor these final regulations differentiate between civil marriages and common-law marriages, nor is such differentiation warranted or required for federal tax

purposes. See Revenue Ruling 58-66 (treating common-law marriage as valid, lawful marriage for federal tax purposes) and Revenue Ruling 2013-17 (reiterating that common-law marriages are valid, lawful marriages for federal tax purposes). Thus, the general rules regarding marital status for federal tax purposes provided in the proposed and final regulations address marital status regardless of whether the marriage is a civil marriage or a common-law marriage.

Furthermore, even after the Obergefell decision, there are several states, including some states that recognize common-law marriage, that still have statutes prohibiting same-sex marriage. However, after Obergefell, we are unaware of any state enforcing such statutes or preventing a couple from entering into a common-law marriage because the couple is a same-sex couple. Accordingly, the commenter's suggestion has not been adopted.

In addition, Revenue Ruling 2013-17 does not distinguish between civil marriages and common-law marriages of same-sex couples. Therefore, same-sex couples in common-law marriages may rely on Revenue Ruling 2013-17 for the purpose of filing original returns, amended returns, adjusted returns, or claims for credit or refund for any overpayment of tax resulting from the holdings of Revenue Ruling 2013-17 and the definitions provided in these regulations, provided the applicable limitations period for filing such claim under section 6511 has not expired.

IV. Comments on proposed §301.7701-18(c) regarding persons who are not married for federal tax purposes

Section 301.7701-18(c) of the proposed regulations provides that 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 marriage under the law of a state, possession, or territory of the United States. That section further provides that the term “husband and wife” does not include couples who have entered into such a relationship and that the term “marriage” does not include such relationship.

The preamble to the proposed regulations provides several reasons for the rule in proposed regulation §301.7701-18(c). First, except when prohibited by statute, the IRS has traditionally looked to states to define marriage. Second, regardless of rights accorded to relationships such as civil unions, registered domestic partnerships, and similar relationships under state law, states have intentionally chosen not to denominate those relationships as marriage. Third, some couples deliberately choose to enter into or remain in a civil union, registered domestic partnership, or similar relationship even when they could have married or converted these relationships to marriage, and these couples have an expectation that their relationship will not be treated as marriage for purposes of federal tax law. Finally, no Code provision indicates that Congress intended to recognize civil unions, registered domestic partnerships, or similar relationships as marriages. Several commenters submitted comments addressing this section of the proposed regulations. Many agreed with proposed §301.7701-18(c), but three did not. These comments are discussed below.

A. Comments that specifically agree with proposed regulation §301.7701-18(c)

In addition to the four commenters that expressed strong support for the proposed regulations generally, two commenters provided specific comments agreeing with the position taken in proposed §301.7701-18(c). One of these commenters stated

that because no Code section requires, or even permits, Treasury and the IRS to allow individuals in registered domestic partnerships, civil unions, and other similar relationships, to elect a married filing status under section 6013, any extension of section 6013 is a policy choice that Congress should make. This commenter also noted that to evaluate the rights and obligations created by various state legal relationships to determine if they are the same as relationships denominated as a marriage would be a significant drain on IRS resources. Finally, the commenter provided historical examples demonstrating how states have attempted to change state family law to reduce their residents' federal income tax obligations. Based on this historical analysis, the commenter concluded that if Treasury and the IRS were to reverse their position on the status of registered domestic partnerships, civil unions, and other similar relationships, there would be nothing to prevent states from permitting a private contract to create an equivalent state-law marriage to enable their residents to choose a filing status that reduces their federal income tax obligations.

The second commenter that agreed with proposed §301.7701-18(c) observed that the proposed regulations respect the choices made by couples who entered into a civil union or registered domestic partnership with the expectation that their relationship will not be treated as a marriage for federal law purposes. The commenter also observed that the proposed regulations recognize that couples deliberately remain in these relationships, rather than marry, for lawful reasons.

B. Comments that disagree with proposed regulation §301.7701-18(c)

Three commenters disagreed with the proposed regulations, stating that registered domestic partnerships, civil unions, and similar formal relationships should be treated as marriage for federal tax purposes. Their comments are summarized below.

1. Comments regarding relationships with the same rights and responsibilities as marriage

Two of the commenters recommended that the substance of the legal rights and obligations of individuals in registered domestic partnerships, civil unions, and similar relationships should control whether these relationships are recognized as marriage for federal tax purposes, rather than the label applied to the relationship. These commenters stated that regardless of whether a relationship is denominated as marriage, any relationship that has the same rights and responsibilities as marriage under state law should be treated as marriage for federal tax purposes. One commenter cited registered domestic partners in California as an example of a relationship not denominated as marriage but with the same rights and responsibilities as marriage under state law. Another commenter cited civil unions in New Jersey and Connecticut as an example of a relationship not denominated as marriage where the couple has the same rights and obligations as spouses.

While some states extend the rights and responsibilities of marriage to couples in registered domestic partnerships, civil unions, or other similar relationships, as the commenters point out, these states also retain marriage as a separately denominated legal relationship. We also recognize that some states have permitted couples in those relationships to convert them to marriage under state law. Many of those states have continued to designate marriage separately from alternative legal relationships that are

not a marriage, such as registered domestic partnerships, civil unions, or other similar relationships.

The IRS has traditionally recognized a couple's relationship as a marriage if the state where the relationship was entered into denominates the relationship as a marriage. See Revenue Ruling 58-66 (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). Similarly, the IRS has not traditionally evaluated the rights and obligations provided by a state to determine if an alternative legal relationship should be treated as marriage for federal tax purposes.

Adopting the commenters' recommendation to treat registered domestic partnerships, civil unions, and similar relationships as married for federal tax purposes if the couple has the same rights and responsibilities as individuals who are married under state law would be inconsistent with Treasury and the IRS's longstanding position to recognize the marital status of individuals as determined under state law in the administration of the federal income tax. This position is, moreover, consistent with the reasoning of the only federal court that has addressed whether registered domestic partners should be treated as spouses under the Code. See Dragovich v. U.S. Dept. of Treasury, 2014 WL 6844926 (N.D. Cal. Dec. 4, 2014) (on remand following dismissal of appeal by the Ninth Circuit, 12-16628 (9th Cir. Oct. 28, 2013)) (granting government's motion to dismiss claim that section 7702B(f) discriminates because it does not interpret the term spouse to include registered domestic partners).

In addition, it would be unduly burdensome for the IRS to evaluate state laws to determine if a relationship not denominated as marriage should be treated as a

marriage. It would be also be burdensome for taxpayers in these alternative legal relationships, to evaluate state law to determine marital status for federal tax purposes. Besides being burdensome, the determination of whether the relationship should be treated as a marriage could result in controversy between the IRS and the affected taxpayers. This can be avoided by treating a relationship as a marriage only if a state denominates the relationship as a marriage, as the IRS has traditionally done.

2. Comments regarding deference to state law

Two of the commenters stated that by not recognizing registered domestic partnerships, civil unions, and other similar relationships as marriage for federal tax purposes, the IRS is disregarding the states' intent in creating these alternative legal relationships rather than deferring to state law.

To illustrate, one of the commenters noted that Illinois affords parties to a civil union the same rights and obligations as married spouses, and that when Illinois extended marriage to same-sex couples, it enacted a statutory provision permitting parties to a civil union to convert their union to a marriage during the one-year period following the law's enactment. 750 Ill. Comp. Stat. Sec. 75/65 (2014). The Illinois law also provides that, for a couple converting their civil union to a marriage, the date of marriage relates back to the date the couple entered into the civil union. The commenter stated that the fact that couples could convert their civil union to a marriage, and that the date of their marriage would relate back to the date of their union, indicates that Illinois defines civil unions as marriages.

The commenter further observed that when Delaware extended the right to marry to same-sex couples, it stopped allowing its residents to enter into civil unions.

Following a one-year period during which couples could voluntarily convert their civil union into marriage, Delaware automatically converted into marriage all remaining civil unions (except those subject to a pending proceeding for dissolution, annulment or legal separation), with the date of each marriage relating back to the date that each civil union was established. The commenter concluded that the laws in Delaware and Illinois make it clear that by not recognizing civil unions and domestic partnerships as marriage, the IRS is not deferring to the state's judgment in defining marital status.

Rather than support the commenter's position, these examples actually support proposed §301.7701-18(c). As discussed in the preamble to the proposed regulations, states have carefully considered which legal relationships will be recognized as a marriage and which will be recognized as a legal alternative to marriage, and have enacted statutes accordingly. For instance, Illinois did not automatically convert all civil unions into marriages or include civil unions in the definition of marriage. Instead, it allowed couples affected by the new law to either remain in a civil union or convert their civil union into a marriage. Furthermore, under Illinois law, couples who waited longer than one year to convert their civil union into marriage must perform a new ceremony and pay a fee to have their civil union converted into and be recognized as a marriage. Moreover, Illinois continues to allow both same-sex couples and opposite-sex couples to enter into civil unions, rather than marriages.

The law in Delaware also demonstrates the care that states have taken to determine which legal relationships will be denominated as marriage. In 2014, Delaware law eliminated the separate designation of civil union in favor of recognizing only marriages for couples who want the legal status afforded to couples under state

law. On July 1, 2014, Delaware automatically converted all civil unions to marriage by operation of law. Del. Code Ann. tit. 13, Sec. 218(c). Civil unions that were subject to a pending proceeding for dissolution, annulment, or legal separation as of the date the law went into effect, however, were not automatically converted. As a result, these couples are not treated as married under Delaware law, and the dissolution, annulment, or legal separation of their civil union is governed by Delaware law relating to civil unions rather than by Delaware law relating to marriage. Del. Code Ann. tit. 13, Sec. 218(d).

As these examples demonstrate, states have carefully determined which relationships will be denominated as marriage. In addition, states may retain alternatives to marriage even after allowing couples to convert those relationships to marriage. IRS's reliance on a state's denomination of a relationship as marriage to determine marital status for federal tax purposes avoids inconsistencies with a state's intent regarding the status of a couple's relationship under state law.

3. Comments regarding taxpayer expectations

As explained in the notice of proposed rulemaking, some couples have chosen to enter into a civil union or registered domestic partnership even when they could have married. In addition, some couples who are in civil unions or registered domestic partnerships have chosen not to convert those relationships into marriage when they had the opportunity to do so. In many cases, the choice not to enter into a relationship denominated as marriage was deliberate, and may have been made to avoid treating the relationship as marriage for purposes of federal law, including federal tax law.

Two commenters stated that taxpayer expectations do not support §301.7701-18(c). According to the commenters, many same-sex couples entered into a domestic partnership or civil union because at the time they were prohibited under state law from marrying. According to the commenters, now that they have the option to marry, some of these couples have remained in domestic partnerships or civil unions not by choice, but because one member of the couple has died, has become incapacitated, or otherwise lacks the capacity to enter into a marriage. One of the commenters stated that these couples are trapped in this alternative legal relationship and have no ability to marry, even if they have an expectation that their relationship be treated as a marriage for federal tax purposes. The other commenter pointed out that some taxpayers may have resisted entering into or converting their relationship into marriage because of a principled opposition to the marriage institution, but may still have an expectation of being treated as married for federal tax purposes. Thus, the commenters conclude, many taxpayers do not voluntarily enter into or remain in alternative legal relationships because of any particular expectation that they will not be treated as married for federal purposes.

The commenters stated that even if the type of relationship entered into represents a decision not to be treated as married for federal purposes, taxpayer expectations should not be taken into account for purposes of determining whether alternative legal relationships are recognized as marriage for federal tax purposes. One commenter stated that taking taxpayer expectations into account encourages tax-avoidance behavior. The other commenter stated that it is inappropriate for the IRS to

determine tax policy based on taxpayers' expectations of reaping nontax benefits, such as Social Security.

However, another commenter, who also disagreed with proposed §301.7701-18(c), stated the opposite, explaining that non-tax reasons support treating alternative legal relationships as marriage for federal tax purposes. According to this commenter, because nationwide protections for employment and housing are lacking, many same-sex couples remain at risk for termination at work or eviction from an apartment if their sexual orientation is discovered. Similarly, the commenter contends that individuals in the Foreign Service who work overseas may also feel unsafe entering into a same-sex marriage. Therefore, the commenter explained, in light of these realities, registered domestic partnerships, civil unions, and similar relationships provide a level of stability and recognition for many couples through federal programs like Social Security, and, therefore, should be treated as marriages for federal tax purposes. Finally, the commentator stated that recognizing these relationships as marriages for federal tax purposes would not impede the IRS's ability to effectively administer the internal revenue laws.

Treasury and the IRS disagree with the commenters and continue to believe that the regulation should not treat registered domestic partnerships, civil unions, and other similar relationships—entered into in states that continue to distinguish these relationships from marriages—as marriage for federal tax purposes. While not all same-sex couples in registered domestic partnerships, civil unions, or similar relationships had an opportunity to marry when they entered into their relationship, after Obergefell, same-sex couples now have the option to marry under state law.

In addition, the fact that some couples may not voluntarily enter into marriage because of a principled opposition to marriage supports not treating alternative legal relationships as marriages for federal tax purposes because this ensures that these couples do not risk having their relationship characterized as marriage. Further, as discussed in the preamble to the proposed regulations, treating alternative legal relationships as marriages for federal tax purposes may have legal consequences that are inconsistent with these couples' expectations. For instance, the filing status of a couple treated as married for federal tax purposes is strictly limited to filing jointly or filing as married filing separately, which often results in a higher tax liability than filing as single or head of household. After Obergefell, a rule that treats a couple as married for federal tax purposes only if their relationship is denominated as marriage for state law purposes allows couples in a registered domestic partnership, civil union, or similar relationship to make a choice: they may either stay in that relationship and avoid being married for federal tax purposes or they may marry under state law and be treated as married for federal tax purposes. The rule recommended by the commenters would eliminate this choice.

4. Comments regarding difficulties faced by couples if alternative legal relationships are not treated as marriage

Two commenters stated that not recognizing registered domestic partnerships, civil unions, and other similar relationships as marriages for federal tax purposes makes it difficult for couples in these relationships to calculate their federal tax liability. One commenter explained that when these couples dissolve their relationships, they are required to go through the same processes that spouses go through in a divorce;

alimony obligations are calculated in the same way, and property divisions occur in the same way as for spouses. Yet, because they are not treated as married for federal tax purposes, these couples cannot rely on the certainty of tax treatment associated with provisions under the Code such as sections 71 (relating to exclusion from income for alimony and separate maintenance), 215 (relating to the deduction for alimony or separate maintenance payments), 414(p) (defining qualified domestic relations orders), 1041 (relating to transfers of property between spouses incident to divorce), 2056 (relating to the estate tax marital deduction), and 2523 (relating to gifts to spouses).

The purpose of these regulations is to define marital status for federal tax law purposes. The fact that the Code includes rules that address transfers of property between individuals who are or were married should not control how marriage is defined for federal tax purposes. Rather, as discussed in this preamble, the regulations are consistent with the IRS's longstanding position that marital status for federal tax purposes is determined based on state law. See Revenue Ruling 2013-17; Revenue Ruling 58-66. Accordingly, the proposed regulations have not been changed based on this comment. In addition, although not addressed specifically in the Code, guidance relating to registered domestic partnerships, civil unions, and other similar relationships, including answers to frequently asked questions, is available at www.irs.gov.

5. Comments regarding the fact that the Code does not address the status of alternative legal relationships

After describing the reasons for not treating civil unions, registered domestic partnerships, and similar relationships as marriage for federal tax purposes, the preamble to the proposed regulations states "Further, no provision of the Code indicates

that Congress intended to recognize as marriages civil unions, registered domestic partnerships, or similar relationships.” That language makes clear that the Code is silent with respect to alternative legal relationships, and therefore, does not preclude the IRS from not recognizing these relationships as marriage for federal tax purposes.

Two commenters took issue with this language and stated that the government should not interpret the lack of a Code provision specifically addressing the marital status of legal alternatives to marriage as an indication of Congressional intent that such relationships should not be recognized as marriage for federal tax purposes. In addition, the commenters explained that the reason Congress did not enact such a provision after DOMA is because it would have been inconsistent with DOMA’s restriction on treating same-sex couples as married for federal law purposes.

These comments are unpersuasive. Since DOMA was enacted on September 21, 1996, many states have allowed both same-sex and opposite-sex couples to enter into registered domestic partnerships, civil unions, and similar relationships. Although it would have been inconsistent for Congress to recognize alternative legal relationships between same-sex couples as marriage under DOMA, nothing prevented Congress from recognizing these relationships as marriages for federal tax purposes in the case of opposite-sex couples. Yet, since DOMA was enacted nearly 20 years ago, Congress has passed no law indicating that opposite-sex couples in registered domestic partnerships, civil unions, or similar relationships are recognized as married for federal tax purposes. Because no Code provision specifically addresses the marital status of alternative legal relationships for federal tax purposes, there is no indication that Congress intended to recognize registered domestic

partnerships, civil unions, or similar relationships as marriage for purposes of federal tax law.

C. Final regulations under §301.7701-18(c)

In sum, Treasury and the IRS received twelve comments with respect to the proposed regulations. Only three of those comments disagreed with the approach taken in proposed §301.7701-18(c), which provides that registered domestic partnerships, civil unions, and similar relationships not denominated as marriage by state law are not treated as marriage for federal tax purposes. Of the nine comments that supported the proposed regulations, two provided specific reasons why they agreed with the approach taken in proposed §301.7701-18(c). Accordingly, the majority of comments supported the approach taken in proposed §301.7701-18(c).

For the reasons discussed above, the points raised by the three comments that disagreed with the approach taken in proposed §301.7701-18(c) are not persuasive. Treasury and the IRS believe that federal tax law should continue to defer to states for the determination of marital status, and the rule in proposed §301.7701-18(c) does that. Any other approach would unduly burden the IRS and taxpayers by requiring an interpretation of multiple state laws and potential controversy when disagreements arise regarding this interpretation. In addition, Treasury and the IRS continue to believe that treating couples in registered domestic partnerships, civil unions, and similar relationships not denominated as marriage under state law, as married for federal tax purposes could undermine taxpayer expectations regarding the federal tax consequences of these relationships. To provide a rule that concludes otherwise would leave those couples who choose alternative legal relationships over marriage without a

remedy to avoid the federal tax consequences of being married. In contrast, couples who wish to be treated as married may do so after Windsor and Obergefell.

While §301.7701-18(c) of the regulations will continue to provide that registered domestic partnerships, civil unions, and other similar relationships not denominated as marriage under state law are not recognized as married for federal tax purposes, §301.7701-18(c) is revised in the final regulations similar to revisions to §301.7701-18(b) to account for the place of celebration. As discussed in section III. Comments on proposed §301.7701-18(b) regarding persons who are married for federal tax purposes of this preamble, this change is necessary to ensure that there is a point of reference for which state law is applicable when determining whether the alternative legal relationship is recognized as marriage under state law. Accordingly, §301.7701-18(c) is revised in the final regulations to provide that the terms “spouse,” “husband,” and “wife” and “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 the state, possession, or territory of the United States where such relationship was entered into, regardless of domicile.

V. Comment that the final regulations should address community-property issues

One commenter recommended amending the proposed regulations to make a clear connection between marital status and community property tax treatment under state law. These regulations provide definitions for purposes of determining marital status for federal tax law purposes. These regulations do not provide substantive rules for the treatment of married or non-married couples under federal tax law. Accordingly, because the federal tax treatment of issues that arise under community-property law

involves resolution of issues under substantive tax law, which is outside the scope of these regulations, the commenter's recommendation is not adopted by these final regulations.

Effect on Other Documents

These final regulations will obsolete Revenue Ruling 2013-17 as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. 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, Notice 2014-1, and Notice 2015-86 to the extent they are not modified, superseded, obsoleted, or clarified by subsequent guidance.

Effective Date

These regulations are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Statement of Availability for IRS Documents

IRS Revenue Procedures, Revenue Rulings notices, notices and other guidance cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by visiting 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).

Drafting Information

The principal author of these 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, Railroad retirement, 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.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1, 20, 25, 26, 31, and 301 are 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) Applicability date. The rules of this section apply to taxable years ending on or after **[INSERT DATE OF PUBLICATION 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) Applicability date. The rules of this section apply to taxable years ending on or after **[INSERT DATE OF PUBLICATION 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) Applicability date. The rules of this section apply to taxable years ending on or after **[INSERT DATE OF PUBLICATION 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) Applicability date. The rules of this section apply to taxable years ending on or after **[INSERT DATE OF PUBLICATION 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) Applicability date. The rules of this section apply to taxable years ending on or after **[INSERT DATE OF PUBLICATION 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 lawfully married for federal tax purposes--(1) In general. Except as provided in paragraph (b)(2) of this section regarding marriages entered into under the laws of a foreign jurisdiction, a marriage of two individuals is recognized for federal tax purposes if the marriage is recognized by the state, possession, or territory of the United States in which the marriage is entered into, regardless of domicile.

(2) Foreign marriages. Two individuals who enter into a relationship denominated as marriage under the laws of a foreign jurisdiction are recognized as married for federal tax purposes if the relationship would be recognized as marriage under the laws of at least one state, possession, or territory of the United States, regardless of domicile.

(c) Persons who are not lawfully 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 formal relationship not denominated as a marriage under the law of the state, possession, or territory of the United States where such relationship was entered into, regardless of domicile. The term husband and wife does not include couples who have entered into such a formal relationship, and the term marriage does not include such formal relationships.

(d) Applicability date. The rules of this section apply to taxable years ending on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: August 12, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).