



# AFTER DOMA

## WHAT IT MEANS FOR YOU

The Supreme Court victory in *United States v. Windsor* striking down the discriminatory federal Defense of Marriage Act (DOMA) affirms that all loving and committed couples who are married deserve equal legal respect and treatment from the federal government. The demise of DOMA marks a turning point in how the United States government treats the relationships of married same-sex couples for federal programs that are linked to being married. At the same time, a turning point is part of a longer journey, not the end of the road. There is much work ahead before same-sex couples living across the nation can enjoy all the same protections as their different-sex counterparts.

## FEDERAL TAXES

### Keep in Mind:

- The Supreme Court's ruling in *Windsor* applies only to the federal government. It does not change discriminatory state laws excluding same-sex couples from state-conferred marriage rights.
- Federal agencies—large bureaucracies—may need and take some time to change forms, implement procedures, train personnel, and efficiently incorporate same-sex couples into the spousal-based system.
- Until same-sex couples can marry in every state in the nation, there will be uncertainty about the extent to which same-sex spouses will receive federal marital-based protections nationwide. For federal programs that assess marital status based on the law of a state that does not respect marriages of same-sex couples, those state laws will likely pose obstacles for legally married couples and surviving spouses in accessing federal protections and responsibilities.
- Securing fair access to federal protections that come with marriage for all same-sex couples in the nation will take some time and work. In some situations, it may require Congressional action or formal rule-making by agencies.
- Before making a decision, it is essential that you consult an attorney for individualized legal advice. This is particularly important for people who are on certain public benefits, as getting married may jeopardize your eligibility without providing you the full measure of protections other married couples enjoy. In addition, couples who travel to another place to marry and then return to live in a state that does not respect their marriage may be unfairly unable to obtain a divorce, which can lead to serious negative legal and financial consequences. People must make careful decisions when and where to marry, even as we work together to end this injustice.
- We are committed to winning universal access to federal marital protections for married same-sex couples through ongoing public policy advocacy, and, where necessary, strategic litigation. Contact our organizations if you have questions, for updates and to learn more about what you can do to achieve full equality for those who are LGBT.

This Guidance is intended to provide general information regarding major areas of federal marriage-based rights and protections based on how the various federal agencies have administered federal benefits. ***It should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.*** Past practice is no guarantee of future developments. While laws and legal procedure are subject to frequent change and differing interpretations in the ordinary course, this is even more true now as the federal government dismantles DOMA and extends federal protections to same-sex couples. None of the organizations publishing this information can ensure the information is current or be responsible for any use to which it is put.

No tax advice is intended, and nothing therein should be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Contact a qualified attorney in your state for legal advice about your particular situation.

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Because sound legal advice must necessarily take into account all relevant facts and developments in the law, the information you will find in this guidance is not intended to constitute legal advice or a legal opinion as to any particular matter.

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### Marriage Matters For Federal Taxes

A 2004 government report identified 198 separate Code provisions tied to marital status, highlighting the dramatic impact of marriage on personal taxes. Rep. “GAO-04-353R Defense of Marriage Act - Update to Prior Report” (Jan. 24, 2004), see [www.gao.gov/new.items/d04353r.pdf](http://www.gao.gov/new.items/d04353r.pdf).

Summarized below are a few of the many tax issues *potentially* affecting married same-sex couples now that DOMA has been invalidated. In all likelihood, there will be specific guidance forthcoming from the Internal Revenue Service (IRS) before the next income tax filing deadline for tax year 2013. For personal advice on income tax, gift tax, or estate tax – federal or state - please consult a tax advisor. *State income taxes are not addressed in this guidance.* This is not legal or tax advice.

### “MARRIED” FILING STATUS FOR FEDERAL INCOME TAXES

“Filing status” refers to whether you identify yourself as “single,” “head of household,” “married filing jointly” or “married filing separately” on your federal income tax returns. Only married couples can file as married, whether jointly or separately. The filing statuses of “single” or “head of household” are generally reserved for unmarried persons. DOMA barred married same-sex couples from filing as “married,” whether jointly or separately.

In general, your filing status is determined on the last day of the year. If you are married on the last day of the year, you will be considered married for the entire year. Alternatively, if you are single on the last day of the year (if you got divorced, for example) you will be considered single for the entire year. There are some exceptions to these rules, so check with your tax advisor if you have a question about your filing status.

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American Civil Liberties Union | Center for American Progress | Family Equality Council | Freedom to Marry | Gay & Lesbian Advocates & Defenders  
Human Rights Campaign | Immigration Equality | Lambda Legal | National Center for Lesbian Rights | National Gay and Lesbian Task Force | OutServe-SLDN.

Now that DOMA has been ruled unconstitutional, we believe that the IRS will instruct married same-sex couples to file their 2013 income taxes as “married”—whether jointly or separately—rather than as “individual” or “head of household,” *provided that the IRS recognizes the marriage*. See below for important information about how the IRS assesses whether or not a person is “married” for tax purposes.

For those marriages recognized by the IRS, tax preparation should be simpler and less expensive than it was with DOMA. The questions that have faced married same-sex couples at tax time, like “who claims which child” and “how much of the mortgage deduction or charitable deduction do we each take” are eliminated for married same-sex couples who may now take these deductions *together* in one joint return.

### WHO DOES THE IRS COUNT AS MARRIED FOR FEDERAL TAX PURPOSES?

This is a critical question to answer before filing your 2013 income taxes, and we expect guidance from the IRS on this point. There may be a period of uncertainty because under current IRS practice, a person can file his or her income tax return as “married filing jointly” or “married filing separately” if the individual is considered married in his or her state of domicile (essentially, the permanent residence/primary home). That practice seems to suggest that only people in states that license or recognize marriages of same-sex couples and in D.C. can expect to be treated as married by the IRS. However, there is no statute or regulation requiring this approach. In addition, the IRS does not always follow this practice. For example, the IRS recognizes “common law” marriages for federal tax purposes no matter where a couple lives as long as their marriage was valid where entered. This will likely be an evolving area of law and you should consult with a qualified tax expert about your circumstances. The legal organizations listed here also hope to provide more information as the situation develops.

#### Q. I married in a state that recognizes marriages between spouses of the same sex, and I still live in such a state. Am I eligible to be treated as a spouse for tax purposes?

A. Yes.

#### Q. I live in a state with a Civil Union or Registered Domestic Partnership system, and my partner and I have entered into that status. Am I eligible to be treated as a spouse for tax purposes?

A. As stated above, the IRS has a practice of using a place of domicile rule for assessing marital status, but not in the case of common law marriages. We should await guidance from the IRS on this point. In addition, certain authorities have indicated that partners in a civil union are not spouses eligible to be treated as “married” for federal tax purposes. On the other hand, the Chief Counsel of the IRS in Illinois stated in a letter that a heterosexual couple joined in civil union, which Illinois had recognized “as husband and wife,” were permitted to file federal returns with the filing status “married filing jointly.” If a person encounters problems or questions, they should contact a tax advisor and a legal organization listed below.

#### Q. I used to live in a state with marriage for same-sex couples and married there, but have since moved to a state that does not recognize marriages of same-sex couples. Am I eligible to be treated as a spouse for tax purposes?

A. As stated above, the IRS has a practice of using a place of domicile rule for assessing marital status, but not in the case of common law marriages. We should await guidance from the IRS on this point. In our mobile society, we believe it would make more sense for the IRS to use a place of celebration rule for all marriages and not just for “common law” marriages, rather than to treat married people as unmarried for tax purposes when they cross state lines. If you encounter problems or questions, contact a tax advisor and a legal organization listed below.

#### Q. I live in a state that does not recognize marriages of same-sex couples, but I traveled elsewhere to marry. Am I eligible to be treated as a spouse for tax purposes?

A. As stated above, the IRS has a practice of using a place of domicile rule for assessing marital status, but not in the case of common law marriages. We should await guidance from the IRS on this point.

### WILL I OWE MORE OR LESS FEDERAL INCOME TAX NOW THAT I CAN FILE A JOINT RETURN WITH MY SPOUSE?

Every couple’s situation is unique and may also change from year to year. For an individualized income tax analysis, consult a qualified tax advisor.

Joint filing tends to favor married spouses with very different incomes (e.g. where one spouse earns little or no income and the other earns income to support the family). Joint filers will generally owe *less* income tax than they would as single taxpayers. This is because the IRS effectively treats the combined income of married couples as if each spouse earned half, even if, in reality, one earned nothing and the other earned, say, \$80,000. With each spouse treated as having earned \$40,000, the couple can take advantage of a lower tax bracket and rate than would a single person who earned \$80,000.

Note that for some taxpayers—specifically those in marriages in which both spouses are high earners—married status filers generally will owe *more* income tax under the “married filing jointly” status than they would if they filed two separate returns under the “single” filing status. The reason for this “marriage penalty” is that joint return income thresholds (i.e., the income level at which the next marginal tax bracket applies), while higher than unmarried individual return thresholds, are not twice as high. Thus, some high-earning married taxpayers, whether they file as “married filing jointly” or “married filing separately,” will pay higher rates of tax than they would if they were unmarried individual filers.

### WITH DOMA GONE, ARE THERE ANY STEPS I NEED TO TAKE NOW WITH RESPECT TO MY 2013 FEDERAL TAXES?

Your 2013 taxes are not due until April 15, 2014, but if you earn wages as an employee, you may want to consult a tax advisor about whether to change your filing status and claimed allowances on Form W-4, which may affect your withholdings. You also may want to consult a tax advisor if you pay estimated income taxes on a quarterly basis about whether to change the amount of these payments.

If you have not yet filed your 2012 federal income tax return because you obtained a six month extension, you should consult your tax advisor before filing about what is the correct filing status and compute your income accordingly.

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See below if you are considering filing amended returns for a tax refund with respect to earlier tax years.

## WHAT ARE SOME OF THE OTHER DIFFERENCES FOR SAME-SEX COUPLES IN BEING TREATED AS “MARRIED” FOR FEDERAL TAX PURPOSES?

Apart from tax rate schedules, there are numerous other ways in which your marital status *may* affect your federal taxes depending on your individual circumstances. *For those persons the IRS regards as “married,”* for example:

- **Standard Deductions.** Taxpayers can either take “itemized deductions” found on Schedule A of the federal income tax return, or a “standard deduction,” whichever is greater. The standard deduction is a fixed dollar amount based on filing status plus some specific adjustments. For 2013, the standard deduction is \$12,200 for joint filers, exactly double the \$6,100 deduction available to “single” or “married filing separately” filers.
- **Pooled income and deductions.** Only married couples filing jointly may combine spouses’ income and expenses to be taken into account for computing deductions or credits on a return. For example, the itemized deduction for medical and dental expenses on Schedule A permits joint filers to combine their qualifying medical and dental expenses. But this deduction is limited if the couple has a comparatively high aggregated adjusted gross income (“AGI”). Only medical and dental expenses that exceed a certain percentage of the joint filers’ AGI (7.5% of AGI in 2012 and 10% in 2013) may be deducted.
- **Income associated with employer-provided health insurance.** Married same-sex couples should no longer have to pay income taxes on the value of employer provided insurance to an employee’s spouse. Typically, when an employer provides group health insurance and premium contributions for its employees and their spouses, children and other qualifying tax dependents, the value of those benefits is not subject to federal income tax. This tax advantage is now available to married same-sex couples. Under DOMA, the value of the employer-provided health insurance benefits for a same-sex spouse (unless a dependent) was taxable income to the employee.
- **Tax-advantaged fringe benefits.** Some employer-provided fringe benefits will be handled differently now that DOMA has been invalidated. For example, a married taxpayer/employee may be able to use pre-tax dollars to pay premiums on employer-provided health insurance for his or her spouse. Under DOMA, tax-advantaged employment benefits were not available to same-sex spouses unless the spouse qualified as a “tax dependent” of the employee.
- **Earned Income Tax Credit (EITC).** This is a refundable tax credit available to low- and medium-income taxpayers. Credits may in some cases be higher, and may be obtained at higher income levels, for some joint filers.
- **Exclusion of gain from sale of principal residence.** The Code allows taxpayers to exclude from gross income the gain from the sale or exchange of a principal residence. The exclusion is capped at \$250,000 for individuals and \$500,000 for joint returns. Thus, the previous inability of same-sex spouses to file joint returns may have resulted in their receiving a smaller exclusion than they would if they were permitted to file jointly.

*Important Note: There are many portions of the Code that differentiate between married and unmarried persons. Consult a tax advisor for more information about how these and many other factors might affect you.*

## I live in a community property state that permits same-sex couples to marry or register as domestic partners. Will this ruling affect how much income I report on my Federal return?

It depends. We do not yet know how long it will take for the IRS to release instructions about how married same-sex couples should file in community property states. But, if you are married and recognized as married in the state where you live, we expect that the IRS will instruct you to file federal income taxes as a married couple. You will then be able to combine your income and file one return just as other married couples if you use the “married filing jointly” filing status. If you file jointly, you will avoid the need to engage in a process known as income-splitting, in which all community income earned by both individuals is added together and half is allocated to each individual. If you use the “married filing separately” filing status in one of these community property states, then the same rules that apply to different-sex couples who use this status also will apply to you. This means you will apply income-splitting to your separate returns, unless an exception applies. For example, you may have entered into a valid pre-nuptial or post-nuptial agreement opting out of the community property system.

If you are in a registered domestic partnership (or another union recognized as a registered domestic partnership) in a community property state and are not married, you will likely use the “single” or “head of household” filing status and income-splitting will likely apply. It is too early to tell if the IRS will or will not allow registered domestic partners to file a joint return.

In 2010, the IRS announced that it would recognize the community property rights of same-sex couples, including those who were married or in registered domestic partnerships. This was consistent with the longstanding rule that *state* law determines ownership of property, while *federal* law determines how much federal tax the owner must pay. Because DOMA did not bar the IRS from applying income-splitting to same-sex couples, the ruling striking down DOMA should not change how the IRS treats same-sex couples’ community property rights if they continue to file taxes separately.

The following states have community property laws: Alaska (which permits a community property election), Arizona, California, Nevada, Idaho, Louisiana, New Mexico, Texas, Washington and Wisconsin. However, only three of those states—California, Nevada and Washington—currently allow same-sex couples either to marry or register as domestic partners and thus be governed by the state’s community property laws. In New Mexico, the Attorney General has issued an opinion stating the marriages of same-sex couples performed elsewhere will be recognized in the state. Because same-sex married couples in New Mexico are and should be recognized as married in their state, we believe that same-sex married couples in New Mexico should file their state and federal tax returns as married unless there is contrary instruction from relevant state or federal authorities.

For more information, go to [www.irs.gov/pub/irs-pdf/p555.pdf](http://www.irs.gov/pub/irs-pdf/p555.pdf).

## How does DOMA’s invalidation affect divorce?

Divorcing spouses unwinding their economic partnership by dividing marital assets should obtain information from qualified professionals about possible tax consequences, which may include:

- **Transfers of property because of divorce.** Property transferred between spouses because of a divorce is not subject to income or gift tax. Under DOMA, when a married same-sex couple divorced, transfers of the home and other assets were taxable events.
- **Spousal support.** If alimony (also known as “spousal support”) or separate maintenance payments are paid to a spouse or former spouse under a divorce or separation instrument or court order, the payments are deductible to the person making the payments on his or her tax returns. The spouse or

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former spouse receiving the payments must report the payments as income. Under DOMA, the spouse paying alimony could not deduct payments for spousal support.

- **QDROs.** Certain retirement assets in the name of one spouse may be viewed as marital property to be divided at divorce. Without DOMA, it will be easier to divide retirement assets that normally cannot be touched by anyone other than the employee/retiree. Through a court-issued “Qualified Domestic Relations Order” (QDRO), certain workplace retirement plans belonging to one spouse can be assigned to (or shared with) the non-employee/former spouse on a tax-free basis.

A former spouse who receives benefits paid under a QDRO generally must report the benefits as income. If the employee/retiree (“plan participant”) contributed to the retirement plan, then a prorated share of the participant’s cost (investment in the contract) is used to figure the taxable amount.

- **IRA transfers pursuant to divorce.** The transfer of all or part of an interest in a traditional IRA to a spouse or former spouse, under a decree of divorce or separation or divorce instrument incident to the decree, is not considered a taxable transfer.

### In prior tax years, I paid more taxes than I should have because DOMA disrespected my marriage. What can I do?

There may be steps you can take to preserve your rights if you act within the time permitted by law. You can discuss with your tax advisor whether it makes sense for you to pursue a refund claim with the IRS.

Generally, to make a refund claim for income taxes, an individual must complete an amended tax return for each tax year at issue and send it to the IRS with an explanation as to why the original filing was incorrect. There is some question about the deadline for filing an amended return when a couple could not file a tax return as married but now can. Planning conservatively, you should file any amended return within three years of its original due date, as opposed to the extended due date. For example, for the tax year 2010 (where the return was originally due April 15, 2011), any amended return would have to be filed by April 15, 2014.

The IRS has a precise process and required forms for amended returns. For more information, see the [instructions for IRS Form 1040X \(www.irs.gov/pub/irs-pdf/i1040x.pdf\)](http://www.irs.gov/pub/irs-pdf/i1040x.pdf), and GLAD’s [Tax Time and Preserving Your Federal Rights](#). Note that to recover Social Security taxes paid or taxes imputed on health insurance for a spouse you have to specifically request that such amounts be refunded.

A taxpayer should also consider potential downsides of taking these steps, such as an increased risk of audit, possible assessment of a tax deficiency, and in some instances, the burden, expense, and uncertainty of litigation.

If your spouse died before DOMA was struck down and you think you paid more in taxes than you should have because of DOMA (e.g., you could not take an inherited IRA as a spouse), you should consult a qualified tax professional for advice.

### How does DOMA’s invalidation affect gift taxes?

As a very general matter, spouses make gifts and transfer property to one another without incurring gift taxes. With DOMA invalidated, the gift tax “marital exemption” should apply to married same-sex couples. Married same-sex couples will not have to file a federal gift tax return if one spouse transfers a home, other property, or cash to the other spouse. For more information about gift taxes, consult your tax advisor.

If you made one or more substantial gifts to a spouse of the same sex before DOMA was invalidated and filed a federal gift tax return, you should

consult a knowledgeable tax professional about your circumstances.

### How does DOMA’s invalidation affect estate taxes?

A taxable “estate” (the money and assets of the deceased person) may take an “unlimited marital deduction.” This means that, essentially, the estate will not incur any estate tax liability with respect to any assets left by the deceased spouse to his or her surviving spouse. The “marital deduction” effectively permits married couples to postpone federal estate tax that otherwise would have to be paid on the deceased’s estate because the property passing to the surviving spouse will not be taxed until the surviving spouse’s death.

Under DOMA, no marital deduction was available to same-sex couples, and the value of the assets left to a same-sex spouse was fully included in the taxable estate. As a result, these assets ultimately would be subject to the estate tax twice; once when the first spouse dies and again at the death of the other spouse. This is the very issue that affected Edie Windsor and reached the Supreme Court: Edie, as executor of her spouse’s estate, paid a \$363,000 estate tax she would not have had to pay if she had been married to a man.

### HELPFUL RESOURCES

- **General Guides:**

Taxpayer Advocate Service’s basic guide to taxes: [www.taxpayeradvocate.irs.gov/Individuals/Complying-With-Tax-Laws](http://www.taxpayeradvocate.irs.gov/Individuals/Complying-With-Tax-Laws)

and FAQ: [www.taxpayeradvocate.irs.gov/Individuals/FAQ](http://www.taxpayeradvocate.irs.gov/Individuals/FAQ).

IRS publications under “[General Information](#)” ([www.irs.gov/taxtopics/tc300.html](http://www.irs.gov/taxtopics/tc300.html)), including “When, Where, and How to File.”

- **IRS Pub 17/1040 Guide:**

IRS Publication 17 addresses common issues for taxpayers who itemize deductions. English version: [www.irs.gov/pub/irs-pdf/p17.pdf](http://www.irs.gov/pub/irs-pdf/p17.pdf); Spanish version: [www.irs.gov/pub/irs-pdf/p17sp.pdf](http://www.irs.gov/pub/irs-pdf/p17sp.pdf). General instructions on filling out Form 1040: [www.irs.gov/pub/irs-pdf/i1040.pdf](http://www.irs.gov/pub/irs-pdf/i1040.pdf).

- **Life Transitions:**

The IRS also addresses how life events make a significant impact on taxes: [www.irs.gov/Individuals/Did-you-know-life-events-like-marriage-divorce-and-retirement-may-have-a-significant-tax-impact%3F](http://www.irs.gov/Individuals/Did-you-know-life-events-like-marriage-divorce-and-retirement-may-have-a-significant-tax-impact%3F).

“Divorced or Separated Individuals,” at [www.irs.gov/pub/irs-pdf/p504.pdf](http://www.irs.gov/pub/irs-pdf/p504.pdf) and [www.irs.gov/pub/irs-pdf/p1819.pdf](http://www.irs.gov/pub/irs-pdf/p1819.pdf); and

“Exemption, Standard Deduction, and Filing Information,” at [www.irs.gov/pub/irs-pdf/p501.pdf](http://www.irs.gov/pub/irs-pdf/p501.pdf).

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## **FOR MORE INFORMATION, CONTACT**

### **GAY & LESBIAN ADVOCATES & DEFENDERS**

[glad.org](http://glad.org)

### **LAMBDA LEGAL**

[lambdalegal.org](http://lambdalegal.org)

### **AMERICAN CIVIL LIBERTIES UNION**

[aclu.org/lgbt](http://aclu.org/lgbt)

### **NATIONAL CENTER FOR LESBIAN RIGHTS**

[nclrights.org](http://nclrights.org)

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