



American Institute of CPAs  
1455 Pennsylvania Avenue, NW  
Washington, DC 20004-1081

October 30, 2013

Ms. Dianne Grant  
Senior Advisor to Chief Compliance Officer  
Office of the Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

Mr. Richard S. Goldstein  
Special Counsel  
Office of the Chief Counsel  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

Re: Request for IRS Guidance in Response to the U.S. Supreme Court's Ruling on Section 3 of the Defense of Marriage Act

Dear Ms. Grant and Mr. Goldstein:

The American Institute of Certified Public Accountants (AICPA) respectfully submits comments in response to your request for practitioners to identify issues which need additional guidance as a result of the U.S. Supreme Court's June 26, 2013, decision in [United States v. Windsor](#). The AICPA appreciates that the Internal Revenue Service (IRS) worked to expeditiously release the recent new guidance ([Revenue Ruling 2013-17](#)) along with [Notice 2013-61](#) and several pages of Frequently Asked Questions (FAQs) on IRS.gov (regarding [same-sex married couples](#), and [registered domestic partners and individuals in civil unions](#)) on the impact of the Court's decision to rule section 3 of the Defense of Marriage Act (DOMA) as unconstitutional.

We look forward to your release of additional guidance on the appropriate method for tax preparers and taxpayers to implement the Court's decision for both past and future tax filings of married same-sex couples and their employers. Specifically, we would appreciate guidance in regard to the following issues:

*Income Tax Issues:*

1. The IRS should provide guidance on the status of certain civil unions and registered domestic partnerships (RDPs).
  - State law can vary as to whether it views a civil union or RDP as the equivalent of marriage. To avoid inconsistencies and difficult legal interpretations for taxpayers, it would help if the IRS would provide a list of states in which a civil union or RDP is considered a marriage for federal tax purposes. This list will need updating as state laws change.
  - Examples of situations needing interpretation:
    - Vermont permits both civil unions and same-sex marriages.

- Connecticut automatically considers past civil unions as same-sex marriages.
  - The Office of Chief Counsel previously stated that opposite-sex couples who enter into a civil union under Illinois law may file jointly for federal tax purposes. Guidance is now needed on the marital status of same-sex couples who entered into civil unions under Illinois law along with clarification of the status of opposite-sex couples in an Illinois civil union who may have already filed using a married status.
  - Clarification of how the Chief Counsel ruling affects civil unions (between both same-sex and opposite-sex couples) in states whose law is virtually identical to Illinois (such as Nevada).
2. The IRS should advise if any special notations are needed on amended returns to aid in the processing of forms that are filed by couples that choose to amend their returns to convert to joint status. In addition, IRS should clarify if one or two amended returns are needed, and how taxpayers should match the previously paid withholding tax and subsequent tax payments of a “new spouse” to a previously filed single return of the taxpayer. We would also appreciate guidance with regard to late, unfiled tax returns for prior years.
  3. The IRS should consider adding information to the FAQs to indicate that a spouse who amends without his/her spouse also amending is required to use the MFS status. The FAQs should explain if there are any problems with one spouse using MFS and the other using single or head-of-household (because they did not amend).

Revenue Ruling 2013-17 provides (at the section on prospective application): “Except as provided below, affected taxpayers also may rely on this revenue ruling for the purpose of filing original returns, amended returns, adjusted returns, or claims for credit or refund for any overpayment of tax resulting from these holdings, provided the applicable limitations period for filing such claim under section 6511 has not expired. If an affected taxpayer files an original return, amended return, adjusted return, claim for credit, or refund in reliance on this revenue ruling, all items required for reporting on the return or claims that are affected by the marital status of the taxpayer must adjust for consistency with the marital status reported on the return or claim.”

However, this statement or concept does not appear explicitly in the FAQs. For example, FAQ #10 for same-sex married couples states that a taxpayer may file an amended return to claim a refund of taxes paid on benefits that covered the employee’s same-sex spouse. There is no statement included that the amended return must also change to married filing joint (MFJ) or married filing separate (MFS) or if the spouse must also amend (the question does state though that the employee is amending Form 1040 to reflect his/her status as a married individual). Also, the reference to “refund” in the answer implies that “refund” is the effect of amending though it is possible that when other items on the return are changed due to the

required filing status change (and the spouse's return is also amended), the taxpayer might actually owe additional taxes.

4. The IRS should clarify if the taxpayer would also need to change the filing status if a same-sex married spouse needs to amend a prior return filed as single or head-of-household to make an adjustment unrelated to marital status. While this form is an amended return filed after September 15, 2013, it is not filed "in reliance on" Rev. Rul. 2013-17.
5. The IRS should clarify that it will not automatically change the filing status of a return filed before September 16, 2013, if the return is examined.
6. The IRS should clarify whether a same-sex married employee who requests that his/her employer file to obtain a FICA tax refund must also amend his/her Form 1040 to change the filing status.
7. The IRS should consider providing relief to same-sex married couples filing as MFJ or MFS for the first time in 2013 who have not fully paid their estimated tax payments, provided the amount paid was tied to their filing status for 2012 and they were married before August 29, 2013.
8. The IRS should provide guidance on the tax treatment of payments that qualify as alimony to/from a former same-sex marriage partner. If one ex-spouse amends a previously filed return to report payments made as a deduction, must the other ex-spouse amend to report payments received as income?
9. The IRS should provide guidance on the tax-free transfer of property between spouses, including the following issues:
  - Requirement for basis adjustments per Internal Revenue Code (IRC) section 1041 for same-sex married couples.
  - Requirement for same-sex married couples to amend returns to recognize that no gain or loss is reported on the transfer of property between same-sex spouses or between former spouses incident to a divorce.
  - How can a taxpayer that should have received the benefit of IRC section 1041 make the basis adjustment? Are amended returns required?

*Estate and Gift Tax Issues:*

10. Guidance is needed on the process for estates to claim portability of the estate tax exemption if they were not required to, and did not previously, file Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, because they were below the filing threshold. Since estates are generally considered ineligible to claim portability on late-filed returns,

guidance on the process for taxpayers affected by the Court's ruling is necessary. Additionally, IRS should clarify how far back an estate can amend if it did file a Form 706. IRS should consider if it is necessary to have an alternative procedure for electing portability for same-sex married couples.

11. The IRS should clarify how taxpayers must report, or track, previously reported gifts that are now eligible for the marital exclusion. Married same-sex couples can share assets without being subject to gift taxes.
12. The IRS should clarify how taxpayers should report, or track, previously reported gifts that are now eligible for gift splitting. Married same-sex couples can elect to split gifts in order to take advantage of the combined annual gift tax exclusion (i.e., \$14,000 for 2013, for a total tax-free gift of \$28,000).
13. The IRS should provide guidance on the number of years (or deadlines) for amending gift tax returns to restore applicable unified credit amounts for previous gifts. If it is too late to amend a return, the IRS should clarify how taxpayers adjust future estate taxes to remedy this problem.

*Other Issues:*

14. The IRS should clarify the application of the related party rules. Same-sex married couples who are considered married for federal income and gift and estate tax purposes are subject to related party rules. This issue could impact the tax consequences of transactions between same-sex spouses. For example, clarification is needed on certain transactions such as selling property between spouses and not recognizing a loss under the related party rules.
15. The IRS should clarify if reference to "Federal tax purposes" in Revenue Ruling 2013-17 means Title 26 only or other tax rules (Title 31, Social Security benefits; Title 39 for ERISA; etc.).
16. The IRS should clarify the [Form TD F-90-22.1](#), Report of Foreign Bank and Financial Accounts (FBAR), filing and signing requirements for current and prior years. Also, the IRS should consider issuing guidance to state that a married same-sex couple where one spouse filed an FBAR before September 16, 2013 without the spouse's signature has properly filed the FBAR.
17. The IRS should coordinate with other agencies within the federal government regarding the issuance of guidance on the tax treatment of federal benefits or protections that are available to married same-sex couples (and would have been available to them earlier) due to the Court's ruling. Please consider addressing the tax treatment of the following issues:
  - Certain veterans benefits, such as pensions and survivor's benefits

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- Military spousal benefits
- Family medical leave rights
- Social Security benefits
- Spousal visas for foreign national spouses
- Private pension benefit options (e.g., survivor annuities)

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We appreciate your consideration of our comments and welcome the opportunity to provide additional input on these issues. Please feel free to contact me at (304) 522-2553, or [jporter@portercpa.com](mailto:jporter@portercpa.com); Jonathan Horn, Chair, AICPA Individual & Self-Employed Tax Technical Resource Panel, at (212) 744-1447, or [jmhcpa@verizon.net](mailto:jmhcpa@verizon.net); or Amy Wang, AICPA Technical Manager – Taxation, at (202) 434-9264, or [awang@aicpa.org](mailto:awang@aicpa.org).

Sincerely,



Jeffrey A. Porter, CPA  
Chair, Tax Executive Committee

cc: Alfred G. Kelley, IRS, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities)  
Janet A. Laufer, IRS, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities)  
Lisa Zarlenga, U.S Department of the Treasury, Tax Legislative Counsel