CARLTON FIELDS

Treasury and IRS Provide Guidance for Same-Sex Married Couples

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What Same-Sex Couples Need to Know

The IRS and the U.S. Department of the Treasury announced on August 29, 2013, that same-sex couples who validly enter into a marriage in a jurisdiction whose laws authorize the marriage of two individuals of the same sex will be treated as married for federal tax purposes, regardless of whether a couple lives in a jurisdiction that recognizes same-sex marriage or in a jurisdiction that does not recognize same-sex marriage. In other words, the IRS and Treasury have adopted a "state of celebration" standard for determining the status of a marriage for federal tax purposes. Therefore, same-sex couples who marry in jurisdictions such as the District of Columbia or Canada, which permit nonresidents to marry there, may avail themselves of the benefits of marriage even if they reside in jurisdictions like Florida, which do not recognize same-sex marriage. Any same-sex marriage legally entered into in any state, the District of Columbia, a U.S. territory, or a foreign country will be covered by the ruling. However, the ruling does not apply to registered domestic partnerships, civil unions, or similar relationships recognized under certain states' laws. Thirteen states (California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington) as well as the District of Columbia currently allow same-sex couples to marry. Same-sex couples also can marry in Argentina, Belgium, Brazil, Canada, Denmark, England, France, Iceland, Mexico City, the Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, Uruguay, and Wales. Only Argentina, Brazil, Canada, Denmark, Iceland, Mexico City, New Zealand, Norway, South Africa, Sweden, and Uruguay allow same-sex couples to marry there without establishing residency for a certain period of time. None of the states above or the District of Columbia have residency requirements for same-sex couples to get married. However, most states do have residency requirements in order for same-sex couples to divorce, a fact which may put same-sex married couples who reside in a state that explicitly rejects same-sex marriage and who wish to divorce in a serious predicament. The IRS and Treasury's ruling implements the Supreme Court's June 26, 2013, decision in *United States v. Windsor*, in which the

court invalidated Section 3 of the Defense of Marriage Act ("DOMA") which had previously allowed the federal government to deny same-sex married couples the rights and privileges granted to opposite-sex married couples. Under the ruling, same-sex couples will be treated as married for all federal tax purposes, including income, gift, and estate taxes. The ruling applies to any federal tax provision where marriage is a factor, including filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an IRA, and claiming the earned income tax credit or child tax credit. Individuals who were in same-sex marriages before the date of the ruling may, but are not required to, file original or amended returns choosing to be treated as married for federal tax purposes for one or more prior tax years still open under the statute of limitations. Generally, the statute of limitations for filing a refund claim is three years from the date the return was filed or two years from the date the tax was paid, whichever is later. As a result, refund claims can still be filed for tax years 2010, 2011 and 2012. Some taxpayers may be able to file for years prior to 2010 if they signed an agreement with the IRS to keep the statute of limitations open. Additionally, employees who purchased same-sex spouse health insurance coverage from their employers on an after-tax basis may treat the amounts paid for that coverage as pre-tax and excludable from income. It is important to note that the ruling does not affect state tax laws. Therefore, same-sex couples who entered into a marriage in a jurisdiction whose laws authorize same-sex marriages but who reside in a state that does not recognize same-sex marriages will not be entitled to any state law benefits of marriage. For couples residing in states with a state income tax, such couples may have different filing statuses for federal tax purposes and state tax purposes depending on whether their state recognizes same-sex marriages. Additionally, the ruling has no implications on state laws regarding gifts and estates. For example, if a same-sex couple that was lawfully married in New York resides in Florida and one spouse dies, the surviving spouse would not be able to avail himself or herself of the homestead protection granted to surviving spouses nor would that spouse be able to use the elective share statute to make a claim against the decedent's estate. This underscores the importance of estate planning for couples in such situations in order to ensure that the surviving spouse is provided for in the manner that the decedent would have intended had the marriage been recognized under state law. If you have any questions regarding this alert or the impact of this term's Supreme Court decisions regarding same-sex marriage, please contact any member of our Tax Group or contact William D. Rohrer and Arianne R. Plasencia.

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