



The Potential Federal Tax Implications of *United States v. Windsor* (Striking Section 3 of the Defense of Marriage Act (DOMA)): Selected Issues

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Contents

Scope of the Report	1
<i>United States v. Windsor</i>	1
Same-Sex Marriage Recognition and the Internal Revenue Code (IRC)	1
Tax Issues.....	2
Estate Tax	3
Income Tax	4
Tax Filing Status and Tax Brackets	4
Other Selected Income Tax Issues.....	7
Potential Income Tax Consequences of the <i>Windsor</i> Decision	9
Amending Tax Returns	10

Tables

Table 1. Example of Marriage Penalties and Bonuses Among Same-Sex Couples.....	5
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Contacts

Author Contact Information.....	11
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Scope of the Report

This report will provide an overview of the potential federal tax implications for same-sex married couples of the U.S. Supreme Court ruling in *United States v. Windsor*, with a focus on the federal income tax.¹ Estate tax issues are also discussed.² Importantly, this report focuses on changes in the *interpretation and administration* of federal tax law resulting from the Court's decision. The decision itself did not amend federal tax law. This report is not intended to address *all* tax-related issues that may arise as a result of the *Windsor* decision. Such discussion is beyond the scope of this report.

United States v. Windsor

On June 26, 2013, the U.S. Supreme Court held that Section 3³ of the Defense of Marriage Act (DOMA)⁴ is unconstitutional. Section 3 requires that, for purposes of federal enactments, marriage is limited to the union of one man and one woman and the word spouse is defined as someone of the opposite-sex who is a husband or wife.⁵ Hence, prior to the *Windsor* decision, same-sex marriages were not recognized by the federal government for the receipt of federal benefits or for federal tax purposes. The Government Accountability Office (GAO) estimated in 2004 (the most recent estimates available) that there were 1,138 statutory provisions in the U.S. Code in which marital status was a factor in determining benefits.⁶ Of these, almost 200 were statutory provisions of the Internal Revenue Code (IRC).⁷

Same-Sex Marriage Recognition and the Internal Revenue Code (IRC)

On August 29, 2013, the Department of the Treasury and Internal Revenue Service (IRS) ruled that all legal same-sex marriages will be recognized for federal tax purposes.⁸ The ruling applies regardless of whether the couple resides in a state or jurisdiction that recognizes same-sex

¹ *United States v. Windsor*, 570 U.S. ____; 133 S. Ct. 2675 (2013). No. 12-307, slip op. available at http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf.

² Although the estate tax was the motivating issue in the *Windsor* decision, as discussed later in this report, few married same-sex couples will be affected by changes in the administration of the estate tax.

³ 1 U.S.C. § 7.

⁴ P.L. 104-199.

⁵ According to Section 3 of the Defense of Marriage Act (DOMA), “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite-sex who is a husband or a wife.” 1 U.S.C. § 7.

⁶ U.S. General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO-04-353R, January 23, 2004.

⁷ Using tables provided by GAO, CRS found that in 2004, there were 198 sections of the Internal Revenue Code (IRC) in which marital status was a factor. See Appendix 1 and Appendix 2 in GAO-04-353R and Enclosure II in U.S. General Accounting Office, *Defense of Marriage Act*, OGC-97-16, January 31, 1997.

⁸ See Rev. Rul 2013-17. Available at <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf>. There is a possibility that some provisions in the U.S. Code or the respective regulations implementing them may need modification of wording so that they can apply to married same-sex couples.

marriage.⁹ Thus, for federal tax purposes, same-sex couples who were legally married in one state, but reside in a state that does not recognize the marriage, will be treated as married.¹⁰ The ruling does not apply to civil unions, registered domestic partnerships, or other formal relationships not denominated as a marriage under state law.¹¹

Among same-sex couples who identify as married, more than half (56% or approximately 94,000 couples) reside in states that do not recognize same-sex marriage.¹² While the August 29, 2013, ruling provides certainty regarding federal tax filing status for these couples, the ruling may complicate tax filing at the state level. There are 24 states that do not recognize same-sex marriage but do require taxpayers to reference federal tax returns in the process of preparing state tax returns.¹³

Tax Issues

With respect to federal tax-related issues, the ruling on Section 3 of DOMA will primarily affect married same-sex couples' federal income taxes. For the limited number of married same-sex individuals who have sufficient assets to be subject to the estate tax, potential estate tax liability may also be affected. Treating same-sex couples as married for federal tax purposes could have

⁹ Similarly, guidance from the Office of Personnel Management indicates that, for purposes of eligibility for specific federal employee benefits, legal same-sex marriages will be recognized “regardless of an employee’s or annuitant’s state of residency.” OPM, Benefits Administration Letter, No. 13-203 (Jul. 17, 2013). Available at <http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf>. As of June 2013, 13 states (California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington), and the District of Columbia recognized same-sex marriages. Additionally, some counties in New Mexico and one in Pennsylvania have been issuing marriage licenses to same sex couples. Some of the counties in New Mexico are doing so pursuant to court order, while in at least one other county, the county clerk began issuing marriage licenses without court order. Associated Press, “New Mexico judge upholds county same-sex marriage ruling, orders issuing of licenses,” *Washington Post*, September 4, 2013. Available at http://www.washingtonpost.com/national/new-mexico-judge-upholds-county-same-sex-marriage-ruling-orders-issuing-of-licenses/2013/09/04/bc6dc7a2-158a-11e3-961c-f22d3aaf19ab_story.html. In Pennsylvania, the Montgomery County clerk began issuing the licenses despite state law to the contrary. The Pennsylvania Health Department filed a case against the clerk. The judge hearing the case has indicated that he will rule quickly. Miranda Leitsinger, *Pa. judge hears arguments in landmark gay marriage case*, Sept. 4, 2013, NBC News. Available at http://usnews.nbcnews.com/_news/2013/09/04/20311916-pa-judge-hears-arguments-in-landmark-gay-marriage-case?lite&preview=true.

¹⁰ This ruling clarifies previous uncertainty, where it was unclear if recognition of same-sex marriage for federal tax purposes would depend on recognition of same-sex marriage in a couple’s state of residence. The Court in the *Windsor* decision wrote, “The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those people as living in marriages less respected than others, the federal law is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.” *U.S. v. Windsor*, 570 U.S. ____; 133 S.Ct. at 2696. No. 12-307, slip op. at 25-26 available at http://www.supremecourt.gov/opinions/12pdf/12-307_6j37.pdf.

¹¹ It is important to note that a civil union is a legal protection conferred at the state, not the federal, level. As such a variety of benefits discussed in this report may not apply to civil unions.

¹² This calculation is based on the 2011 American Community Survey (ACS)—the most recent data available—which asks respondents their sex as well as the sex of their partner. The respondent can identify a potential partner as a husband, wife, or an unmarried partner—although the question does not require the respondent to specify whether the partner is legally recognized as a spouse. For more information, see American Community Survey, http://www.census.gov/acs/www/about_the_survey/forms_and_instructions/. For ACS data see <http://www.census.gov/hhes/samesex/data/acs.html>.

¹³ See Lydia Beyoud, “Legal Same-Sex Marriage Recognized for Federal Tax Purposes, IRS, Treasury Says,” *Bloomberg BNA Daily Tax Report*, Aug. 30, 2013.

substantial financial implications for some affected couples. The budgetary impact from the perspective of the federal government, however, is likely small.¹⁴ Currently, the U.S. Census Bureau estimates that there are 605,472 same-sex couples in the United States (less than one-half of one percent of all tax returns filed), of which approximately 168,000 (27.8%) self-identify as married.¹⁵ It is not known whether all who self-identified as married were legally married in a jurisdiction recognizing same-sex marriage.¹⁶

Estate Tax

The unlimited marital deduction under the estate tax was at issue in *Windsor*.¹⁷ Under current law, a deceased spouse's estate can transfer all of assets to the surviving spouse without incurring any estate tax.¹⁸ Prior to the decision in *Windsor*, a married same-sex couple was not eligible for this spousal tax exemption. (The exemption amount is the amount of the estate which, when bequeathed to an heir, is tax-free. If the heir is a spouse, the exemption amount is unlimited.) Thus, for some couples, the *Windsor* decision could result in a reduced estate tax liability.¹⁹

In addition to being eligible for unlimited spousal transfers, same-sex couples may also benefit from transferability of exemption amounts to non-spouse beneficiaries. Unlike the unlimited spousal exemption, there is a limit on the amount of an estate which can pass to a non-spouse heir tax-free. As enacted, the estate tax is structured so that the first \$5 million per individual or \$10 million per federally recognized married couple (adjusted for inflation) of the estate and inter vivos gifts (gifts made prior to death) are exempt from federal taxes when bequeathed to non-spouse beneficiaries, like children or non-relatives.²⁰

In 2013, once adjusted for inflation, the exemption amount per individual is \$5.25 million. Since any unused exemption amounts are transferable between spouses, if one spouse leaves an estate of \$3 million upon death in 2013 to a non-spouse beneficiary, the remaining \$2.25 of that deceased spouse's exemption amount would be transferred to the surviving spouse.²¹ Hence, the surviving spouse's exemption amount would increase from \$5.25 million (or, the amount of the exemption in the year the second spouse dies) to \$7.5 million. Prior to the *Windsor* decision, the surviving same-sex spouse could only use his or her own exemption amount to make a tax-free

¹⁴ Lydia Beyoud, "Domestic Partners: Practitioners Say Major Guidance Needed from Federal Agencies for Same-Sex Couples," *BNA Daily Tax Report*, July 1, 2013.

¹⁵ From the ACS, *supra* footnote 12. These data are reported as the percentage of same-sex households where the partners are reported as spouses. It does not necessarily reflect those spouses who are legally married. For ACS data see <http://www.census.gov/hhes/samesex/data/acs.html>.

¹⁶ Partners in same-sex couples may consider themselves "spouses" even if they are not legally married if, for example, they are in a civil union or a domestic partnership. Hence these statistics should not be interpreted as the number of same-sex couples who are legally married.

¹⁷ When Edith Windsor's wife died, her wife's estate was obligated to pay approximately \$363,000 in federal estate taxes. Had Edith Windsor been married to a man, she would have qualified for the spousal exemption and the estate would not have been taxed at the time of her spouse's death.

¹⁸ For an overview of the estate tax, see CRS Report R42959, *The Estate and Gift Tax Provisions of the American Taxpayer Relief Act of 2012*, by Jane G. Gravelle.

¹⁹ Recognition of same-sex marriages for the purposes of the federal estate tax can only result in a reduction in estate taxes: "marriage tax bonuses."

²⁰ This exemption amount is adjusted annually for inflation.

²¹ An estate tax return must be timely filed to affect this transfer *even if* the estate would not otherwise be required to file a return.

bequest to a non-spouse beneficiary (\$5.25 million in 2013). Hence, the surviving spouse of a same-sex marriage may, as a result of the *Windsor* decision, be able to bequeath a greater amount tax-free to a non-spouse beneficiary.

While the estate tax may have been at issue in *Windsor*, most married same-sex couples will not be affected because most people generally are not subject to the estate tax. In 2012, roughly 3,600 estates, representing less than 0.2% of all deaths in 2012, are subject to the estate tax.²² Given that so few estates are subject to the estate tax, and that the estate tax is a small portion of overall federal tax revenues,²³ the federal budgetary impact of recognizing same-sex marriages for estate tax purposes is small.²⁴

Income Tax

The *Windsor* decision could affect married same-sex couples' federal income taxes in a variety of ways. All taxpayers in federally recognized same-sex marriages will be required to file as married on any return filed after September 15, 2013,²⁵ which may affect their marginal tax rates.²⁶ Other tax effects of the decision may include changes in eligibility for a variety of tax credits, as well as changes in the tax treatment of certain forms of employee compensation. These changes will, in many cases, change married same-sex couples' tax liabilities, as discussed below. There are other changes not discussed which are beyond the scope of this report.

Tax Filing Status and Tax Brackets

Before *Windsor*, married same-sex couples were generally considered single for federal income tax purposes. In cases where the couple had children, one partner would claim any children as dependents and file federal income taxes using the head of household status. The other spouse would file as single.

As a result of the ruling on Section 3 of DOMA, same-sex couples who are recognized as married under the IRC will be required to file their taxes in the same manner as married opposite-sex couples—generally either jointly (“married filing jointly”) or separately (“married filing separately”). However, very few married taxpayers file separately (less than 5% of married taxpayers in 2010)²⁷ because it generally results in higher tax liabilities than if income taxes are

²² See Tax Policy Center analysis of 2013 Budget Proposals, available at <http://www.taxpolicycenter.org/taxtopics/2013-Restore-the-Estate-Gift-and-Generation-Skipping-Transfer-Tax.cfm>.

²³ In 2012, 1.2% of total federal revenue was collected through the estate tax.

²⁴ This was the conclusion reached in a 2004 Congressional Budget Office (CBO) report. CBO also noted that same-sex spouses may be more likely than opposite-sex spouses to make charitable bequests from their estates, although no specific evidence was given in support of this claim. See Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, Washington, DC, June 21, 2004, <http://www.cbo.gov/publication/15740>.

²⁵ September 16, 2013, is the effective date of Rev. Rul. 2013-17.

²⁶ 26 U.S.C. §§1(a), (d); 6013; 7703.

²⁷ In 2010, 56.1 million married taxpayers filed income tax returns, of which 2.5 million were filed as married filing separately. See the IRS Statistics of Information (SOI), Table 1.2, <http://www.irs.gov/uac/SOI-Tax-Stats—Individual-Statistical-Tables-by-Size-of-Adjusted-Gross-Income>.

filed jointly.²⁸ Hence, the remainder of this report will generally describe situations where married same-sex couples, as a result of the *Windsor* decision, will file their returns jointly.

For some same-sex couples, filing status changes resulting from the *Windsor* decision may result in increased or decreased income tax liabilities. Some married same-sex couples may face a “marriage penalty,” having a higher tax liability when filing taxes as a married couple than their combined tax liability when filing as two single taxpayers. Other married same-sex couples may benefit from a “marriage bonus,” whereby they have a lower tax liability when filing as a couple than their combined tax liability when filing individually.

Various circumstances may make it more or less likely that couples incur a marriage penalty or a marriage bonus when filing their income taxes.²⁹ Marriage penalties are more likely among couples where both partners earn similar incomes. Couples with a greater disparity in earnings are more likely to experience a marriage bonus. Most couples in which one spouse earns less than 5% (or none) of the family’s total income will experience a marriage bonus.³⁰

Marriage tax penalties and bonuses are consequences of a progressive tax system, whereby higher ranges of income are subject to higher tax rates. Tax brackets refer to the range of income subject to a particular tax rate. For example, under current law, the first \$17,850 of taxable income for all married joint filers is subject to a 10% tax rate (the “10% bracket”). Taxable income above \$17,850 but less than \$72,500 is taxed at a 15% rate (the “15% bracket”). All tax brackets for 2013 for single and married joint filers are given in the text box on the following page.

Table 1 provides an illustrative example of how the distribution of a combined income of \$200,000 between partners can result in a marriage bonus or penalty. A couple where both partners earn \$100,000, having a combined income of \$200,000, would experience a marriage tax penalty of \$879. A couple where one partner earns \$50,000 and the other \$150,000, also having a combined income of \$200,000, would have a marriage tax bonus of \$557.

Table 1. Example of Marriage Penalties and Bonuses Among Same-Sex Couples

Ordinary Income Split between Partners	Combined Tax Liability		Change in Tax Liability
	Unmarried Partners	Married Partners	
Partner A: \$50,000 Partner B: \$150,000	\$38,422	\$37,866	\$557 (bonus)
Partner A: \$100,000 Partner B: \$100,000	\$36,987	\$37,866	-\$879 (penalty)

²⁸ Filing separately tends to be least advantageous to married couples, since they are denied a variety of tax benefits or receive smaller benefits. See Leslie A. Whittington and Updated by James Alm, “Marriage Penalty,” in *The Encyclopedia of Taxation and Tax Policy*, ed. Joseph J. Cordes, Robert D. Ebel and Jane G. Gravelle, 2nd ed. (Washington, D.C.: The Urban Institute Press, 2005), p. 252.

²⁹ For evidence on the tax consequences of marriage for cohabiting couples, see Emily Y. Lin and Patricia K. Tong, “Marriage and Taxes: What Can We Learn from Tax Returns Filed by Cohabiting Couples?” *National Tax Journal*, vol. 65, no. 4 (December 2012), pp. 807-826.

³⁰ *Ibid.*, p. 818. Using 2007 data, it was found that only 3% of cohabiting couples where one spouse earned less than 5% of combined income prior to marriage experienced a marriage tax penalty, 21% saw no change in tax liability, and 77% had a marriage bonus.

Source: 2013 Data from the Tax Policy Center. See <http://taxpolicycenter.org/taxfacts/marriagepenaltycalculator.cfm>.

In the example in **Table 1**, when each taxpayer earning \$100,000 was taxed as a single individual, each had earnings that put them in the lower end of the 28% tax bracket.³¹ Thus, most of their income falls into the 25% bracket or below. A feature of the U.S. income tax system is that the 25% tax bracket for married filing jointly is less than twice as large as the 25% bracket for singles. Thus, when treated as a married couple, a greater proportion of the couples' combined income falls into the higher 28% tax bracket. The marriage tax penalty results from a greater proportion of the couples' combined income being taxed at the 28% rate.

The 2001 and 2003 tax cuts (which were extended permanently for most taxpayers by the American Taxpayer Relief Act of 2012 (P.L. 112-240)) reduced or eliminated marriage penalties for many middle-income taxpayers.³³ One way these laws reduced penalties was by making certain tax brackets for married joint filers twice as large as the equivalent bracket for single filers.³⁴ Specifically, the 2001 and 2003 tax cuts increased the size of 10% and 15% tax brackets for married taxpayers filing jointly such that brackets for married filing jointly became twice the size of single brackets.³⁵ Hence, if two single individuals in the 10% or 15% bracket marry, their combined income would either still be in the 15% bracket (marriage would be tax-neutral) or in the 10% bracket (a marriage bonus since a portion of their income would be taxed at a lower rate, 10% versus 15%).

Bracket (tax rate)	Single	Married Filing Jointly
	Taxable Income (over-but not over)	Taxable Income (over-but not over)
10%	\$0-\$8,925	\$0-\$17,850
15%	\$8,925-\$36,250	\$17,850-\$72,500
25%	\$36,250-\$87,850	\$72,500-\$146,400
28%	\$87,850-\$183,250	\$146,400-\$223,050
33%	\$183,250-\$398,350	\$223,050-\$398,350
35%	\$398,350-\$400,000	\$398,350-\$450,000
39.6%	\$400,000-	\$450,000-

As an example, take a single taxpayer with taxable income of \$1,000. This taxpayer would be in the 10% bracket. Suppose this taxpayer marries an individual with taxable earnings of \$10,000, putting them in the 15% bracket for individuals. With a combined income of \$11,000, this couple would be in the 10% bracket when married filing jointly. With no income being taxed at the 15% rate, this couple would experience a marriage tax bonus. Dual-worker couples with income above the 15% bracket threshold could face a penalty because higher tax brackets for joint filers are less

³¹ For 2013 statutory marginal tax rates and tax brackets, see CRS Report RL32808, *Overview of the Federal Tax System*, by Molly F. Sherlock and Donald J. Marples.

³² See IRS Revenue Procedure 2013-15, <http://www.irs.gov/pub/irs-drop/rp-13-15.pdf>.

³³ For more information on all the provisions of the Bush-era tax cuts, including marriage penalty relief, see Table 1 in CRS Report R42894, *An Overview of the Tax Provisions in the American Taxpayer Relief Act of 2012*, by Margot L. Crandall-Hollick.

³⁴ A tax bracket is a range of income that is subject to a specific tax rate. (For example, if hypothetically income between \$10,000 and \$20,000 was subject to a 7% tax rate, that range of income would be called the 7% tax bracket.)

³⁵ The 2001 and 2003 tax cuts made the standard deduction for married couples twice as large as the standard deduction for individuals and coordinated phase-out thresholds for certain tax benefits. These provisions were made permanent by P.L. 112-240.

than twice as wide as those for single filers. Ultimately for those taxpayers with income above the 15% bracket (\$36,250 for singles and \$72,500 for joint filers in 2013), the distribution of income between both spouses and the presence or absence of children will determine whether marriage results in a penalty or bonus.

Marriage penalties may be more likely for couples with children for several reasons. Many involve tax credits, which are discussed below. However, another reason involves the changes in filing status and resulting changes in tax brackets. Prior to the *Windsor* decision, married same-sex couples with children could not file a federal tax return as a married couple. Instead, one partner would file as a head of household, claiming the children as dependents. The other would file as single. As a result of the *Windsor* decision, couples with children whose marriage is federally recognized will be required to file as married. Although allowed to file joint returns, they may find that they will be in a higher tax bracket than they were when they filed as head of household and single. Since tax brackets above the 15% bracket for married couples filing jointly are less than the combined equivalent levels if one of the taxpayers were filing as head of household and the other as single, married same-sex couples may be subject to a marriage penalty depending on the distribution of earnings between the spouses.

Other Selected Income Tax Issues

As a result of the *Windsor* decision, other aspects of married same-sex couples' income taxes may change, including the amount of or eligibility for credits and the tax treatment of certain forms of employee compensation.

Income Tax Credits

After the *Windsor* decision, the tax liabilities of same-sex couples with children may change since marriage, as recognized for federal tax purposes, can affect the amount of certain tax credits, especially those that benefit taxpayers with children. Generally, tax credits are structured such that the amount of the credit falls when income exceeds a certain threshold, ultimately phasing out to zero. When marriage results in a combined income that is in a credit's phase-out range (or is so high the taxpayers are ineligible for the credit), the credit amount may be reduced resulting in increased tax liability. Some of the credits that are subject to income limitations are described below:

- **The Earned Income Tax Credit (EITC):** The value of the earned income tax credit (EITC) is reduced for many low-income dual earner couples when they are married. Marriage penalties occur when the joint income of the married couple pushes them into the EITC phase-out range or results in the couple being ineligible for the credit.³⁶
- **The Child and Dependent Care Credit:** The amount of the child and dependent care credit is limited to no more than the income of the lower

³⁶ In 2013, a childless taxpayer can receive a maximum credit of \$487, while the maximum values of the credit for taxpayers with children are \$3,250 for a taxpayer with one child, \$5,372 for a taxpayer with two children, and \$6,044 for a taxpayer with three or more children. These levels are adjusted annually for inflation. For more information, see CRS Report RL31768, *The Earned Income Tax Credit (EITC): An Overview*, by Christine Scott. It is possible that low-income couples with children could have a marriage tax bonus if they were in the phase-in range for the EITC.

earning spouse. If one spouse has no income, the couple generally would not qualify for the credit.

- **The Child Tax Credit:** The value of the child tax credit phases out as a taxpayer's income rises above a certain income level.³⁷ The phase-out threshold for married couples is less than twice that for unmarried individuals. As a result, two unmarried individuals might each qualify for the credit but receive a smaller credit or become ineligible for it if married.
- **Education Tax Credits:** The income levels at which taxpayers are ineligible for education tax credits tend to be twice as high for married couples as for singles. The ultimate value of the credit as a result of marriage will depend on the distribution of income among spouses. Marriage is unlikely to affect the overall credit amount among couples whose income is equally distributed between the two partners. However, among couples whose income is less evenly distributed, the value of their education credit will depend on the income level of the individuals who incur education expenses, and could increase or decrease as a result of marriage depending on the taxpayers' particular circumstances.
- **Adoption Credit:** The *Windsor* decision also has implications for same-sex couples claiming the adoption tax credit. The adoption credit is generally not allowed when adopting a spouse's child.³⁸ Therefore, the *Windsor* decision may mean that some same-sex partners who might otherwise have been able to claim an adoption credit will no longer be able to do so.

Non-Taxable Employee Compensation

The *Windsor* decision will affect whether certain forms of employee compensation are nontaxable, including contributions to dependent care flexible spending accounts (DCFSA) and the employer contributions for employer-provided health insurance plans.

Under current law, taxpayers with children may contribute up to \$5,000 to a DCFSA. The total amount of contributions that are tax exempt for any tax return is \$5,000 without regard to the number of children or the number of parents. Hence, a married couple can put a maximum of \$5,000 in a DCFSA, the same maximum amount an individual can put in these accounts. Therefore, any amount in excess of \$5,000 would be included in taxable income for the married couple. Same-sex married couples who each have contributed to a DCFSA may find that part of their account becomes taxable even though their individual incomes make them eligible for the child and dependent care credit. If each partner had a child and each was contributing to a DCFSA, they may have over-contributed in the first year in which they file as a married couple. In subsequent years, they would be limited to putting \$5,000 in the DCFSA, though they could divide that amount between themselves.³⁹

³⁷ Currently, the phase-out threshold is \$110,000 for couples filing jointly and \$75,000 for unmarried individuals.

³⁸ For general background on the adoption tax credit, see CRS Report RL33633, *Tax Benefits for Families: Adoption*, by Christine Scott.

³⁹ Filing separate returns would be the least beneficial because no child care expenses are recognized for married people who file separately.

In contrast to the effect on DCFSA, the *Windsor* decision will provide tax benefits to married same-sex couples who are covered by an employer-sponsored health insurance plan. When an employee elects to purchase employer-provided health insurance, the employer generally pays for part of the premium. The employer's contribution to an individual or family plan generally is not considered taxable income to the employee. However, before the *Windsor* decision, same-sex employees who purchased an employer-sponsored family health plan were taxed on the estimated value of the employer's contribution toward the premiums for the same-sex spouse. Opposite-sex couples are not taxed on the portion of health insurance premiums the employer pays for the opposite-sex spouse. After *Windsor*, the estimated value of the employer's contribution to health-insurance coverage for an employee's same-sex spouse will be nontaxable, reducing tax liability.

Potential Income Tax Consequences of the *Windsor* Decision

Research quantifying the income tax consequences of marriage for opposite-sex couples may be useful for understanding the potential tax consequences of marriage for same-sex couples. Applying the 2007 tax code to cohabiting couples, Lin and Tong (2012) found that roughly half of couples who marry would have a marriage tax penalty.⁴⁰ Most of the remaining couples (38%) were estimated to have marriage tax bonuses. On average, marriage resulted in an increase in tax liability of \$450 per couple. However, since certain research indicates that the demographic characteristics of opposite-sex couples differ from those of same-sex couples (e.g., within-couple distribution of earnings, number of children), marriage tax consequences amongst the population of same-sex couples may not follow the same patterns as found for opposite-sex couples.⁴¹

As discussed earlier in this report, if same-sex couples tend to have two income earners with similar incomes, these couples are likely to face marriage tax penalties, especially if their combined income were to push them above the 15% tax bracket. On the other hand, same-sex couples who marry are less likely to have children than opposite-sex couples which would lead to more marriage tax bonuses, particularly for lower-income couples.⁴² On balance, as indicated by the estimates that suggest same-sex marriage will result in additional federal revenues,⁴³ the value of marriage tax penalties is expected to exceed the total value of marriage tax bonuses for same-sex couples.⁴⁴ Reportedly, the Treasury has noted that data on the proportion of married same-sex couples who would face marriage tax penalties or bonuses is lacking.⁴⁵

Recognizing same-sex marriages for federal income tax purposes would likely result in additional federal income tax revenues, although available estimates suggest the budgetary impact would be

⁴⁰ Emily Y. Lin and Patricia K. Tong, "Marriage and Taxes: What Can We Learn from Tax Returns Filed by Cohabiting Couples?" *National Tax Journal*, vol. 65, no. 4 (December 2012), pp. 807-826.

⁴¹ Differences in demographic characteristics between same-sex and opposite-sex couples are noted in Adam Stevenson, "The Labor Supply and Tax Revenue Consequences of Federal Same-Sex Marriage Legalization," *National Tax Journal*, vol. 65, no. 4 (December 2012), pp. 783-806.

⁴² Stevenson, *supra* note 40.

⁴³ Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, Washington, DC, June 21, 2004, <http://www.cbo.gov/publication/15740> and Stevenson, *supra* note 40.

⁴⁴ Over time, as a result of the *Windsor* decision regarding same-sex marriage, the social and economic characteristics of same-sex couples who legally marry may change. For example, more married same-sex couples may choose to have or adopt children. Or one spouse may choose to leave the workforce. Such changes could have an impact on the federal income tax liability of the couple.

⁴⁵ Beyoud, *supra* footnote 13.

small. In 2004, the Congressional Budget Office (CBO) estimated that recognition of same-sex marriages would increase federal income tax revenues by \$200 million to \$400 million per year between 2005 and 2010.⁴⁶ Others contend that the revenue gains would be smaller than CBO's estimates, somewhere in the \$20 million to \$40 million range annually.⁴⁷ Relative to the magnitude of total individual income tax revenues—\$1.1 trillion in 2012—the revenues that might be raised by recognizing same-sex marriages for federal tax purposes represent less than one-tenth of one percent of income tax revenues.⁴⁸

Amending Tax Returns

Before *Windsor*, all same-sex married couples were required to file their federal income tax returns as unmarried individuals. The August 29, 2013, Treasury and IRS ruling made clear that taxpayers who were in same-sex marriages for one or more open prior tax years may file amended returns to change their filing status to that of a married couple. For most taxpayers, this means that amended returns can be filed for tax years 2010, 2011, and 2012.⁴⁹ Filing amended returns is an option, but not a requirement. Thus, taxpayers may choose to file an amended return if doing so will result in a refund. Taxpayers may choose to file amended returns to exclude from income certain fringe benefits, such as health insurance coverage, provided to a same-sex spouse.⁵⁰ Taxpayers in legal same-sex marriages who want to amend prior year's tax returns for reasons other than changing their filing status should proceed with caution since it is unclear whether they would be required to change their filing status if amending the return after September 16, 2013.⁵¹ If such a change were required, it might negate any benefit they would otherwise derive from amending the return depending upon the facts and circumstances involved in their (and their spouses') returns.

The unlimited marital deduction under the estate tax was at issue in *Windsor*. The Court determined that the estate was allowed to transfer all assets to Ms. Windsor, the surviving spouse, without incurring estate taxes. Surviving spouses of same-sex marriages may choose to file an

⁴⁶ Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, Washington, DC, June 21, 2004, <http://www.cbo.gov/publication/15740>.

⁴⁷ Stevenson, *supra* note 40.

⁴⁸ Others have also noted that while recognizing same-sex marriages for federal tax purposes will likely result in additional federal revenues, the effect is expected to be small. See Diana Furchtgott-Roth, "Same-Sex Marriage Decisions Won't Affect Uncle Sam's Bottom Line," *Tax Notes*, July 1, 2013, pp. 75-77.

⁴⁹ Generally, taxpayers may file amended returns within the three years after the filing date of the return or two years after the tax was paid, whichever is later. These are considered "open years." However, there may be other considerations in determining whether to amend a prior year's return. One might be whether one wants to extend the time in which the return can be examined.

⁵⁰ Where health insurance for a same-sex spouse was included in income, the taxpayer may be able to recover excess Social Security and Medicare paid based on the income recognized for the same-sex insurance coverage. Employers will be able to file Form 941-X to claim refunds or adjustments for overpayment of both the employer's and employee's portions of Social Security and Medicare tax. The IRS is expected to provide guidance soon regarding procedures to be followed. *Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law*, Q. 12, Internal Revenue Service. Available at <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples>.

⁵¹ IRS guidance addresses the effect of *Windsor* on original returns filed after September 15, 2013, as well as the option for amending to change the filing status on a return to MFJ or MFS, but does not address whether an amended return filed after September 15, 2013 *must* be filed using a married filing status. *Id.* Q. 2.

amended estate tax return for open years if the decedent's estate was subject to estate taxes as a result of not using the unlimited marital deduction.

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