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Tax Time and Preserving Your Federal Rights

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It is tax time again and some of you may have questions about filing your federal taxes. GLAD would like to share general information about how you might preserve your rights. GLAD urges you to contact your own attorney or tax professional for assistance specific to your situation. The following discussion is not intended as advice, but can provide you information for discussing these issues with a qualified professional. We are also happy to consult with attorneys, and individuals should be certain to obtain qualified legal opinions from their own tax professional.

Filing this year's federal taxes. GLAD continues to recommend that married same sex couples file their federal income tax returns as "Single" or "Head of Household" until DOMA Section 3 is conclusively overturned or repealed. GLAD also recommends that you consider designating in some way that your marriage has occurred. Ideas are discussed in GLAD's publication, *Navigating Income Taxes for Married Same-Sex Couples*, at: <http://www.glad.org/uploads/docs/publications/navigating-taxes-married-couples.pdf>.

What about past year's federal taxes? But what if you would be due a refund if you were able to file your federal taxes as married? There are steps you can take to preserve your rights if you act within the time permitted by law. Generally, refund claims must be filed within three years from the time the original return was filed or two years from the time the tax was paid, whichever is later. (If you filed your original return early, for example March 1, your return is considered filed on the due date, generally April 15.) See the instructions for IRS Form 1040X for more information: <http://www.irs.gov/pub/irs-pdf/i1040x.pdf>.

What one should do has to be determined on a situation-by-situation basis. For example, with respect to federal income taxes already paid for past tax years, married same-sex couples in Massachusetts who would benefit financially if their filing status were "Married Filing Jointly" or "Married Filing Separately" may want to consider amending the returns they filed as "Single" or "Head of Household." The IRS will likely deny the refund claim, but taxpayers then have two years from the notice of disallowance in which to file suit for their refund in federal court. 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 the burden, expense and uncertainty of litigation.

Of course, applicability of these issues to any particular person should be determined through consultation with a tax professional.

If we file an amended return, what should we say about DOMA and why we are filing?

There are three tax forms you might need to submit to amend your return to “Married Filing Jointly”: the 1040X, the 8275, and the 8275-R. On each form you will be asked to provide an explanation of the changes. On the 1040X you can use the sample language provided below. For the other two forms, you can simply indicate that you have provided an attached form with an extended explanation. This extended explanation should also be appended to Form 1040X.

Additionally, when you submit these materials to the IRS, you may want to include a cover letter explaining the changes.

Links to the tax forms

1040X: <http://www.irs.gov/pub/irs-pdf/f1040x.pdf>

8275: <http://www.irs.gov/pub/irs-pdf/f8275.pdf>

8275-R: <http://www.irs.gov/pub/irs-pdf/f8275r.pdf>

Sample Cover letter

Re: [Name] and [Name]
[Social Security #] and [Social Security #]
Form 1040X (year)

To Whom It May Concern:

We are amending our individual income tax returns for the year 20__ prospectively pending the challenge to the constitutionality of Section 3 of the Defense of Marriage Act in *Gill v. Office of Personnel Management*, First Circuit Nos. 10-2207 and 10-2214.

Sincerely,

[Name]

[Name]

Sample Explanation of Changes for Form 1040X

Taxpayers amend their filing status from [head of household OR single] and single respectively to married filing jointly based upon a challenge to the Defense of Marriage Act. Amounts shown in Column A of this amended return reflect the combined amounts show on the taxpayers' individually filed returns. Amounts in column C reflect amounts under married filing joint status, forms 8275 and 8275R are attached. Please see statement titled "Refund claim based on the unconstitutionality of the Defense of Marriage Act."

Sample Explanation of Changes for Forms 8275 and 8275-R

For the 8275 and 8275-R you may simply write: "See Attached Statement" in the Detailed Explanation field and attach the statement below.

Sample Attached Explanation

**Attachment to
Form 1040X, Part III, Explanation of Changes
Form 8275, Disclosure Statement
Form 8275-R, Regulation Disclosure Statement
20__ Tax Year**

**REFUND CLAIM BASED ON UNCONSTITUTIONALITY OF
THE "DEFENSE OF MARRIAGE ACT"**

The taxpayer, [name] (#Social Security), a spouse in a same-sex couple, was married under the laws of Massachusetts as of December 31, [tax year]. For the tax year of this amended return, taxpayer filed a joint Massachusetts income tax return with her spouse, [spouse name] (#Social Security). However, in accordance with the federal law known as the Defense of Marriage Act ("DOMA"), the taxpayer filed an individual federal tax return as she was unmarried. The taxpayer believes that being required to file as though she were unmarried amounts to unequal treatment compared to other married persons in Massachusetts. The taxpayer believes that her marriage, which is valid under Massachusetts law, should be respected for federal tax purposes, just like the Massachusetts marriages of heterosexual couples. Although this position is contrary to DOMA, the taxpayer believes that DOMA is unconstitutional and that she should be allowed to file this amended joint return with her spouse and receive the refund shown herein. The taxpayer's filing position is supported by the following decisions from the U.S. District Court - District of Massachusetts: *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010) and *Commonwealth of Massachusetts v. U.S. Dept. of Health and Human Services*, 698 F. Supp. 2d 234 (D. Mass. 2010). The decisions in these cases, which found Section 3 of DOMA to be unconstitutional, have been stayed pending the government's appeals to the U.S. Court of Appeals for the First Circuit.

In particular, if the taxpayers were able to file as married filing jointly, the taxpayers are due a refund of \$____.

Does GLAD want to know if we file an amended return? Yes! GLAD would like to track who has filed an amended return, for what tax year(s), the date you submitted the amended return, and the date the IRS denies the amended return (from which GLAD can calculate the date by which you would need to file suit to pursue your refund).

NOTE: If the IRS sends you a refund check, do not cash it. Please contact GLAD's Legal InfoLine at 800-455-GLAD (4523) or at <http://www.glad.org/rights/infoline-contact> for information about what to do in that situation or if you have any questions about the information in this publication.