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DOMA DEFEAT AND THE AMERICAN TAXPAYER
RELIEF ACT OF 2012: PERFECT TOGETHER

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On Wednesday, June 26, 2013, in a pair of landmark 5-4 decisions, the Supreme Court struck down a portion of the Defense of Marriage Act (DOMA), holding that its definition of marriage was unconstitutional, and allowed gay marriage to resume in California by declining to decide a separate case.

Under DOMA, same-sex couples who were legally married in their states were not considered married in the eyes of the federal government, and were ineligible for the federal benefits that come with marriage. Not counting California, 12 states (Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington) and the District of Columbia have authorized same-sex marriage.

DOMA had limited to heterosexual married couples certain rights, privileges and obligations available under more than 1,000 federal laws, programs and benefits that are now applicable to same-sex couples. Significant among these from a tax perspective is that same-sex couples may now file joint income tax returns and utilize the marital deduction to make unlimited asset transfers through gifts or bequests to a same-sex spouse free of federal estate and gift taxes.

Following are some federal tax planning benefits, in addition to the marital deduction, that will be available to same-sex couples as a result of this ruling:

- **Portability.** This is the ability of widows and widowers to add the unused estate tax exclusion ($5.25 million in 2013) of the spouse who died most recently to their own exclusion amount. Portability was made permanent by the American Taxpayer Relief Act of 2012 ("ATRA 2012") beginning January 1, 2013. To apply portability, the executor of the deceased spouse's estate must file a federal estate tax return and elect to transfer the unused exclusion to the surviving spouse, who can then use the "enhanced

exclusion" to make tax-free gifts during lifetime or at death. If the executor does not file the return or misses the filing deadline, the surviving spouse loses the right to portability.

- **Gift-splitting.** In 2013, an individual can gift up to $14,000 annually to as many recipients as he or she desires without incurring gift tax. Spouses can combine this annual exclusion – a process called gift-splitting – to jointly give $28,000 to any person tax-free. Spouses can gift-split by giving $14,000 each, $28,000 from a joint account or $28,000 from one of their individual accounts. Avoiding tax on gifts exceeding the annual exclusion amount can be accomplished by the individual electing on a gift tax return to apply her and his lifetime gift tax exclusion amount (which is $5.25 million in 2013 plus the "enhanced exclusion" of a widow or widower if portability was elected). Once the lifetime exclusion amount is depleted, gift tax of up to 40% applies. Pursuant to ATRA 2012, couples can also gift-split their combined applicable lifetime exclusion amount and together transfer up to $10.5 million through lifetime gifts.

- **Company retirement plans.** If the retirement plan is a qualified plan (a category under federal law that includes a defined-contribution plan, defined benefit plan, Keogh plan for the self-employed and 401(k) – but not an IRA), ERISA gives spouses the right to be the sole primary beneficiary of the account. To name anyone else, a spouse needs the other spouse's written consent. This protection is now available to same-sex spouses.

- **Rollover rights.** For IRAs and qualified plans, the law gives special privileges to spouses as account beneficiaries. Unlike other beneficiaries, who generally must begin taking required minimum distributions by December 31st of the year following the account owner's death, a spouse who inherits an IRA or company plan can roll the assets into his or her own IRA and postpone required minimum distributions until the year after he or she turns 70½. This benefit is now available to same-sex spouses.

Importantly, the Supreme Court did not consider the constitutionality of allowing one state to refuse to recognize same-sex marriages performed in another state. Consequently, the question remains whether the federal rights and privileges applying to married couples will apply to same-sex couples married in a state recognizing same-sex marriage if they move to a state not recognizing same-sex marriage. For example, a same-sex couple married in New York retires to Florida, a state not recognizing same-sex marriage. Florida does not have a state estate or gift tax, but if the same-sex couple has marital assets in excess of the federal $5.25 million exclusion, the availability of the federal marital deduction and/or portability could be critically important for them to avoid federal estate and gift tax liability.

For New Jersey residents, the effect of the ruling remains a question. This is because the Supreme Court did not decide whether same-sex partners joined in a state sanctioned relationship providing all of the rights and obligations of marriage (like New Jersey's Civil Union) would be entitled to the same benefits as a married couple. This is further complicated because New Jersey recognizes same-sex marriages from other jurisdictions, but only recognizes them as Civil Unions. Consequently, it appears that if the federal government does not recognize New Jersey Civil Unions as tantamount to legal marriage, then New Jersey same sex couples will not be afforded the federal protections of the Supreme Court ruling.

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