Comment on AOR 2013-02

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VIA FAX DELIVERY

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Re: Comments on AOR 2013-02 (Dan Winslow)

Dear Mr. Herman:

Pursuant to 11 C.F.R. 112.3(a), I submit these comments on the request for an advisory opinion filed recently by Dan Winslow. The Commission released the Winslow request to the public on April 10, 2013 and designated it as AOR 2013-02.

AOR 2013-02 asks the Commission to interpret "spouse" as used in 11 CFR 110.1(i) to distinguish or clarify contributions from same-sex couples residing in states which recognize same-sex marriage.

As the requestor points out, Federal Law (the Defense of Marriage Act "DOMA") unambiguously precludes Federal Agencies from interpreting the word "spouse" to include same-sex couples regardless of the law of their state of residence.[1] Unless either Congress repeals this law or the Supreme Court finds it Unconstitutional, the FEC's hands are tied, and must abide by DOMA in those instances which call for an interpretation of the word "spouse."

Thus, AOR 2013-02 appears to present a situation whereby DOMA would preclude same-sex married couples from making joint contributions as heterosexual married couples can.

AOR 2013-02 presents three scenarios:

1. Only one spouse earns income;
2. One spouse contributes all, or almost all, of the funds to their joint banking account from which the contribution will be drawn

1 1 U.S.C. § 7 "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 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

3. Their contribution will be drawn from a bank account that belongs to only one of the spouses.

While subsequent emails between the Commission and the requestor seek to limit the scope of the request to a simple question of "When a candidate's committee receives a contribution from same-sex spouses lawfully married under the law of a state that recognizes same-sex marriage, may the committee apply 11 CFR 110.1(i) to that contribution?" § 110.1(i) simply cannot be read in a vacuum; for instance, no one would argue that § 110.1(i) would act to allow contributions from a spousal couple where both spouses are otherwise precluded from contributing (e.g. both spouses are foreign nationals) or would allow a contribution to be attributed equally among spouses where one spouse is otherwise precluded from contributing (e.g. one spouse is a foreign national). The scenarios provided in the original request must be analyzed in order to give any meaningful opinion.

Understanding the necessity of specific facts to the formation of an opinion, this public comment letter will analyze each of the three factual scenarios provided in the initial request.

Undoubtedly, if the situations presented by AOR 2013-02 are viewed solely through the lens of DOMA and 11 CFR 110.1(i), the Commission can reach only one conclusion with respect to each scenario: that the proposed joint contributions from same-sex married couples cannot be attributed as spousal contributions are under 11 CFR 110.1(i). However, Federal campaign finance law neither begins nor ends with 11 CFR 110.1(i). There are alternative lenses through which to view this situation. Under these alternatives, DOMA is not implicated and Federal Law would allow most contributions from same-sex married couples (and actually, regardless of the sexuality or relationship status of the contributors) to be attributed equally between the contributors. A full analysis of these scenarios requires the application of additional sections of the code, specifically §§ 110.1(k), 110.4(b), and 110.19.

Scenarios 1 and 2 can be analyzed together, and can be resolved to allow contributions to be attributed equally to same-sex married couples without implicating either § 101.1(i) or DOMA. Scenario 3 presents a situation which cannot avoid conflict with DOMA and § 101.1(i) and thus the contribution cannot be attributed equally to same-sex married couples. Note that recognition, vel non, by any state, of same sex marriage is immaterial to the questions presented.

Joint Contributions – Irrespective of Marriage (Scenarios 1 and 2)

11 CFR 110.1(k) provides that "[a]ny contribution made by more than one person, except for a contribution made by a partnership, shall include the signature of each contributor on the check, money order, or other negotiable instrument or in a separate writing."[2], and further clarifies that "if a contribution made by more than one person does not indicate the amount to be attributed to each contributor, the contribution shall be attributed equally to each contributor."[3]

2 11 CFR 110.1(k)(1).

3 11 CFR 110.1(k)(2).

The very existence of § 110.1(k) proves that the law contemplates joint contributions; and combined with § 110.1(i) – by enunciating specific treatment of spousal joint contributions – proves that the law contemplates that not all joint contributions will be made by spouses.

There is nothing in the text or the application of § 110.1(k) relating to marriage or spousal relations. Thus "Any" joint contribution should be reviewed pursuant to § 110.1(k).

Further, 11 CFR 110.1(k)(3)(ii)(B)(1) clarifies that "[n]otwithstanding paragraph (k)(3)(ii)(A) of this section or any other provision of this section, any excessive portion of a contribution described in paragraph (k)(3)(i) of this section that was made by a written instrument that is imprinted with the names of more than one individual may be attributed among the individuals listed unless a different instruction is on the instrument or in a separate writing..."[4]

A full reading of 11 CFR 110.1(k) thus allows for joint contributions to be attributed among the individuals making the joint contribution, either via a check or other instrument signed by all contributors[5]; or via a check or other instrument with the names of the account owners/contributors imprinted on the face of the instrument[6]; or via an accompanying writing signed by all contributors.[7]

As an example: Tom and Steven, two brothers, maintain a joint checking account for the purpose of paying expenses of a shared vacation property. Tom and Steven decide to contribute $1000 from this account to a federal campaign. The check is imprinted with the names of both Tom and Steven. The check alone dictates that the campaign should attribute the contribution as $500 from each contributor – irrespective of whether Tom or Steven or both sign the check. The result is the same if Tom and Steven are unrelated friends who for whatever reason share a joint account.

Source of Contribution

11 CFR 110.19 provides for contributions from minor children. Specifically, § 110.19(b) allows for contributions from minors so long as the "funds, goods or services contributed are **owned or controlled** by the Minor..." [emphasis added].

The intent of § 110.19(b) seems to be to allow contributions from an individual who may not have income, but still has some form of wealth, perhaps an individual who is the beneficiary of a trust or who has saved up the proceeds of birthday or holiday gifts and now wishes to use that money to make a political contribution.

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4 11 CFR 110.1(k)(3)(ii)(B)(1).

5 11 CFR 110.1(k)(1).

6 11 CFR 110.1(k)(3)(ii)(A).

7 Id.

Nothing in the code or the statutes actually requires an individual who contributes to have income in any form. In fact, the only mention of income in the law or code is in § 110.1(i).

§ 110.4 prohibits contributions made in the name of another. Thus, in the example of Tom and Steve above, Tom could not contribute money from his own checking account, bearing his name alone, and have it attributed to Steven – even with an accompanying writing signed by Steven. Further, a strict reading of § 110.4 prohibits a contribution made from the joint account of Tom and Steven to be attributed solely to Tom, absent an agreement between Tom and Steven that Tom's profits from the account would be deducted by the amount of the contribution, and a writing to that effect provided to the campaign.

However, § 110.4 does not prohibit (nor does it truly touch upon) a situation where two joint owners provide, unequally, the initial funding of the contribution account. Nothing, in § 100.4, nor anywhere else in the Campaign Finance Laws or Regulations, requires that the initial funding of the joint account be equally owned by the joint contributors. Nor in fact does it require the money contributed to have been owned by the contributor before it was deposited into the contributor's bank account. All that is required is that at the time of the contribution, the money contributed be **owned or controlled** by the contributor.

Analogizing to the scenarios 1 and 2 presented by the requestor: a joint account is owned equally by both joint owners; both owners share an equal present interest; and an equal control in the account. Therefore, regardless of who provided the funding of the account, or in what proportions, both account owners share in the contribution equally.

Applying the above to scenarios 1 and 2 provided in AOR 2013-02 it is clear that contributions made by owners of joint accounts (regardless of sex, sexual orientation or geography), shall be attributed equally between the account owners, absent written directions to the contrary.

Contribution From Account that Owned by Only One Person (Scenario 3)

Under Scenario 3, the requestor asks if an account owned by only one person can be attributed to multiple individuals. Under this scenario, § 101.1(i) controls; no other section of the code applies.

Under scenario 3, if the individuals involved were a heterosexual married couple such a contribution could be attributed to each spouse equally so long as there was an accompanying writing signed by both spouses directing the attribution. However, under DOMA, such treatment of same-sex couples is prohibited.

Thus, regardless of jurisdictional treatment of same-sex marriage, contributions made from an account owned by only one same-sex spouse must be attributed solely to the spouse who owns the account. And conversely, but for DOMA, such contributions could be attributed to each same-sex spouse equally in those jurisdictions that recognize same-sex marriage.

Conclusion

As the above analysis shows, with respect to the facts established in Scenarios 1 and 2, the Commission should find that § 101.1(i) and DOMA simply do not apply and thus those contributions should be attributed equally to the individual contributors pursuant to provisions of § 110.1(k); and with respect to the facts set forth in Scenario 3, that § 101.1(i) does apply – and thus implicating DOMA, and that, applying DOMA, that such contribution should not be attributed to the individual same-sex spouses.

Sincerely,

Scott E. Knox,
Commentor