Comment on AOR 2013-02

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April 23, 2013

Shawn Woodhead Werth
Secretary and Clerk
Federal Election Commission
Assistant General Counsel
999 E Street NW
Washington, D.C. 20463

Re: Comments on Advisory Opinion Request No. 2013-02: Contributions by Same-Sex Spouses

Dear Secretary Werth:

I write on behalf of the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee (collectively, the "Democratic Committees") to comment on Advisory Opinion Request 2013-02.

The Democratic Committees urge the Commission to allow the Dan Winslow for U.S. Senate Committee and other committees to apply 11 C.F.R. § 110.1(i) to contributions received from lawfully married same-sex spouses, as the requestor asks. We also believe the Commission should make clear that same-sex couples in legally recognized civil unions may also take advantage of this principle. The Democratic Committees support marriage equality and believe that same-sex couples — like all Americans — are entitled to equal treatment under the law.

Under the Federal Election Campaign Act, each individual has his or her own contribution limit.[1] The Commission has long interpreted the Act to mean that that even when only one individual in a marriage has income, both members of the couple may make contributions from their assets because those assets are jointly shared.[2] This concept is so well-settled that the Commission once considered deleting the regulation altogether. "Should the Commission decide to eliminate § 110.1(i)(1), contributions by both spouses in a single income family would still be allowable."[3] The rule was spared solely to underscore the fact that two people making a contribution from joint assets do, in fact, have two separate contribution limits. According to the Commission, "deletion might create the misleading impression that both spouses would no longer enjoy

[1] 2 U.S.C. § 441a(a)(1).
[2] *See* FEC Adv. Op. 1975-31 (Nov. 28, 1975).
[3] Contribution and Expenditure Limitations and Prohibitions: Contributions by Persons and Multicandidate Political Committees, 50 Fed. Reg. 15,169-01, 15,173 (proposed Apr. 17, 1985) (to be codified at 11 C.F.R. pt. 110).

separate contribution limits."[4] Thus, the provision is neither complex nor controversial; rather, it is merely an exercise of common sense.

The Commission now has the opportunity to apply this common sense principle to joint contributions from all couples who share assets in legally sanctioned relationships, inclusive of legally-married same-sex couples and members of civil unions. Commission regulations have never defined the word "spouse," and the term is likewise undefined in the Federal Election Campaign Act. Accordingly, the Democratic Committees agree with the Advisory Opinion Request analysis concluding the Commission should keep with longstanding practice and look to state law to supply the definition of an undefined term. In states where the designation of "marriage" or "spouse" includes same-sex couples, the Commission should borrow that definition for purposes of determining contribution limits under 11 C.F.R. § 110.1(i).

The Commission should place no interpretive weight in Section 3 of the federal Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7. As an initial matter, nothing in Section 3 of DOMA purports to invalidate same-sex marriages in states that allow them. Second, according to the Attorney General, the President has determined that Section 3 of DOMA is unconstitutional as applied to same-sex couples who are legally married under the laws of their state.[5] At the President's urging, the Department of Justice no longer defends the constitutionality of the law in court.[6]

Courts that have considered the constitutionality of DOMA have reached similar conclusions. In October 2012, the U.S. Court of Appeals for the Second Circuit considered the case of the surviving spouse of a same-sex couple whose marriage was recognized under New York state law.[7] The court set aside the DOMA defenders' stated goal of achieving uniformity in federal law and instead found DOMA to be "an unprecedented breach of longstanding deference to federalism."[8] In addition, the Second Circuit found a violation of the Equal Protection Clause.[9]

In February 2012, the U.S. District Court for the Northern District of California likewise found that DOMA fails constitutional scrutiny.[10] The court held same-sex spouses who were legally married under the laws of California were also entitled to marriage benefits under federal law.[11]

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[4] Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 Fed. Reg. 760-01, 765 (Jan. 9, 1987) (to be codified at 11 C.F.R. pt. 110).
[5] U.S. Dept. of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-222.html.
[6] *Id.*
[7] Windsor v. U.S., 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 133 S.Ct. 786 (2012).
[8] *Id.* at 186.
[9] *Id.* at 188.
[10] Golinski v. U.S. Office of Personnel Mgmt., 824 F. Supp. 2d 968, 997 (N.D. Cal. 2012).
[11] *Id.* at 1002.

In May 2012, the First Circuit also struck down the law.[12] Basing its decision both on "disparate impact on minority interests and federalism concerns," the court invalidated the statute as applied to a number of Massachusetts plaintiffs, who — like the campaign donors identified in the present Request — stood to lose federal rights despite their state's recognition of same-sex marriage.

Most recently, the question of the constitutionality of DOMA reached the U.S. Supreme Court. By the time the Court heard the case, 172 members of the U.S. House of Representatives and 40 U.S. Senators from both political parties had signed an amicus brief calling for an end to implementation of the law.[13] At oral argument, the justices expressed open skepticism as to the law's veracity. Justice Kennedy, for example, commented that DOMA poses a "real risk of running in conflict" with the states' power to regulate marriage.[14] Justice Ginsburg remarked that DOMA improperly relegates same-sex spouses to something less than "full marriage" as defined by each state — in her words, it improperly limits them to "skim milk marriage."[15]

In the end, there is little left of DOMA for the Commission to rely on. It is, by its own terms, a law that was written and passed because of a now outmoded "moral disapproval of homosexuality."[16] The Supreme Court has repeatedly held that such laws based on animus are unconstitutional.[17] Accordingly, there is no role for such "moral disapproval" in the federal election campaign finance arena.

Moreover, even if DOMA were not unconstitutional, its interpretive rule would carry no weight here, because the Commission's regulation at 11 C.F.R. § 110.1(i) is only an example of a larger principle. Whenever a couple is in a legally sanctioned relationship such that assets are shared — whether a member of that couple is called a "spouse" or not — the plain application of the Federal Election Campaign Act's contribution limits permit each member of that couple to make contributions from marital assets, whether or not they are made from a joint banking account. As the Commission once noted, the rule itself "does not add anything."[18] Because the regulation is only an example, the use of the term "spouse" does not affect "the meaning of any Act of Congress, or of any ruling, regulation, or interpretation."[19]

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[12] Mass. v. U.S. Dept. of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012).
[13] Brief of 172 Members of the U.S. House of Representatives et al. as Amici Curiae in Support of Respondent Edith Schlain Windsor, United States v. Windsor, ___ S.Ct. ___ (2013) (No. 12-307), 2013 WL 840029.
[14] Transcript of Oral Argument at 59, United States v. Windsor, ___ S.Ct. ___ (Mar. 27, 2012) (No. 12-307), 2013 WL 1232726.
[15] *Id.* at 71.
[16] H.R. Rep. No. 104-664 at 15-16 (1996).
[17] Lawrence v. Texas, 539 U.S. 558, 578 (2003); Romer v. Evans, 517 U.S. 620, 624 (1996).
[18] Contribution and Expenditure Limitations and Prohibitions, *supra* note 3, at 15,173.
[19] *See* 1 U.S.C. § 7.

This is why the Commission has the power to extend the application of 11 C.F.R. § 110.1(i), and the Commission's prior rulings on the treatment of spousal contributions,[20] to members of civil unions even in states that reserve the term "spouse" for marriage. These rules do not turn on the precise definition of "spouse"; they instead turn on the fact that the contributors are in a legally sanctioned relationship through which income and assets are shared. The Commission should make clear that the principle behind 11 C.F.R. § 110.1(i) would also apply to members of civil unions.

The Democratic Committees urge the Commission to take the correct and common sense approach and look to state law to determine that legally married same-sex spouses are covered by the explicit wording of 11 C.F.R. § 110.1(i). Moreover, the Commission should make clear that the rationale behind this regulation applies equally to members of civil unions. Both same-sex spouses and members of civil unions should enjoy the same right as all married couples to make contributions to federal candidates.

We appreciate the opportunity to comment on this request.

Very truly yours,

Marc E. Elias
Robert F. Bauer
Ezra W. Reese
Tyler J. Hagenbuch
Counsel to the Democratic National Committee, the Democratic Senatorial Campaign Committee, & the Democratic Congressional Campaign Committee

[20] *See* FEC Adv. Op. 1980-11 (Mar. 10, 1980).