Late Comment on AOR 2013-02

DB CAPITOL STRATEGIES
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April 24, 2013

Mr. Anthony Herman
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

RE: Comment on Advisory Opinion Request 2013-02 (Winslow)

Dear Mr. Herman:

DB Capitol Strategies PLLC ("DBCS") submits this comment regarding AOR 2013-02, an advisory opinion request submitted by Mr. Dan Winslow, which requests guidance on whether same-sex spouses "lawfully married under the law of a state that recognizes same-sex marriage each have their own separate contribution limits under the Commission's spouse contribution rule," codified at 11 C.F.R. § 110.1(i). AOR 2013-02 at 1. DBCS submits this public comment as a law firm that represents several candidates and political committees and regularly advises clients on compliance with the Federal Election Campaign Act ("FECA"). This comment represents our own views on the law, not those of any particular client.

The Defense of Marriage Act ("DOMA") defines marriage as "a legal union between one man and one woman." 1 U.S.C. § 7. An increasing number of states and the District of Columbia, however, recognize marriage to include to same-sex spouses. Moreover, the Obama administration has declared its intent to refrain from enforcing DOMA. This disparity between federal and state law, the extent that DOMA is or will be enforced, and the concordant inconsistencies among the several states all have substantial implications for campaign finance law. And the Federal Election Commission ("FEC") has not identified who is a spouse or family member for campaign finance law purposes.

With the legal definitions of "spouse" and "family member" currently in flux, uncertainty exists regarding precisely which solicitations and contributions are permitted, and which are forbidden. This ambiguity in the law persists to the detriment of individuals wishing to exercise their highly protected First Amendment rights of speech and association. Putative speakers, in an effort to "steer far wide of the unlawful zone," may simply refrain from speaking. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

As the single entity responsible for issuing and explaining campaign finance regulations, the FEC has a statutory duty to explain the laws it enforces. *See* Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443 (Oct. 15, 1974). To enable compliance with the law and avoid potential First Amendment harms, DBCS respectfully requests the FEC address the following issues in its forthcoming Advisory Opinion: 1) Whether same-sex spouses residing in a state that recognizes same-sex marriage are included in the restricted class of incorporated entities' Separate Segregated Funds ("SSFs") based on their status as family members, and whether same-sex spouses may make joint contributions to such SSFs; and 2) Whether the same holds true for same-sex spouses who relocate to a state that does not recognize same-sex marriage.

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I. The FEC has a Duty to Issue Advice on Campaign Finance Regulations

Congress created the FEC to interpret and enforce federal election and campaign finance law. As a consequence of various developments outside the election law context, that law is now unclear.

Though FEC regulations employ the terms "spouse" and "family member,"[1] nowhere does the FEC define either term. Looking to federal law, Congress defined marriage as only between a man and a woman in DOMA, but the current administration has stated its intent not to enforce DOMA, arguing that it is unconstitutional. In the meantime, increasing numbers of states allow same sex-marriage. These shifting definitions of marriage, spouse, and family member have profound implications for campaign finance law, and only the FEC can provide much-needed guidance.

II. Relevant Law

A. Permissible Solicitation of Spouses as Family Members

Under current regulations, the connected political action committees ("PACs") of corporations or labor organizations, or SSFs,[2] may only solicit contributions from a specifically enumerated class of persons within their respective organizations. 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. § 114.3(a)(1). A corporation's restricted class includes its stockholders, executive or administrative personnel, and their families, and the executive and administrative personnel of its subsidiaries, branches, divisions, and departments and their families. 11 C.F.R. § 114.1(j). A labor organization's restricted class includes its members, executive or administrative personnel, and their families. *Id.*[3] Accordingly, a connected PAC may permissibly solicit contributions from the spouse of a restricted class member because the spouse is, by operation of law, also a member of the restricted class. *See id.*

B. Spouses and Joint Contributions

Individuals may contribute in amounts up to $5,000 per year to connected PACs. 11 C.F.R. §110 (d). An individual must use his or her own funds to make such contributions. 2 U.S.C. §441f ("[n]o person shall make a contribution in the name of another. . ."). The regulations recognize that even if only one spouse has an income, each spouse has his or her own separate $5,000 limit. 11 C.F.R. §110.1(i).

Further, spouses may make joint contributions. 11 C.F.R. §110.1(k). A joint contribution is made by more than one person using a single check or other written instrument that represents the personal funds of each contributor. *Id.* For the purposes of contribution limits, a joint contribution is attributed equally to each contributor, unless an accompanying statement indicates the funds should be divided differently. *Id.*

III. The Defense of Marriage Act

DOMA defines marriage as only between a man and a woman, and requires the term "spouse" be interpreted in all federal statutes, regulations, and rulings as only "a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7. Under DOMA, same-sex couples legally married under the laws of their domiciliary state are not recognized as married under federal law, and other states are not compelled to recognize their marriage. *See id*; *see* 1 U.S.C. § 1738C ("But states cannot be required to give effect to a same-sex relationship that is treated as a valid marriage under the laws of another state.").

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[1] *See, e.g.*, 11 C.F.R. § 110.1 (permitting "spouses" to make joint contributions).

[2] Corporations and labor unions cannot make campaign contributions, but they may set up a SSF to do so. The FEC refers to such funds as connected PACs. *See* FEC Campaign Guide for Corporations and Labor Unions (2007), available at http://www.fec.gov/pdf/colagui.pdf.

[3] The restricted class of an incorporated membership organization, incorporated trade association, incorporated cooperative or corporation without capital stock includes its members and executive or administrative personnel, and their families. 11 C.F.R. § 114.1(j).

DOMA does not recognize same-sex spouses as legal "spouses." Thus, DOMA would preclude a connected PAC from lawfully soliciting contributions from a same-sex spouse, who would not be considered a member of the restricted class. *See* 11 C.F.R. § 114.1(j). Moreover, DOMA treats same-sex spouses as not legally "married." This lack of legal status would bar them from making joint contributions. 11 C.F.R. §110.1(k)(1). If one spouse of a same-sex couple earned no income but made contributions from the joint account he or she shared with his or her spouse, the FEC could deem the contributing spouse to have made a prohibited contribution with the funds of another. *See* 2 U.S.C. §441f. To avoid such unlawful conduct, a same-sex spouse may refrain from contributing at all, to the detriment of his or her highly protected First Amendment rights.

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As attorneys advising clients on compliance with campaign finance regulations, DBCS is forced to guess at the extent of same-sex spouses' First Amendment freedoms. Such uncertainty cautions responsible attorneys to advise clients to steer far clear of the potential trouble zone, with a single inevitable result: many individuals, fearing prosecution, will end up sacrificing core constitutional rights. To avoid this potential harm, the FEC must clarify whether DOMA applies to bar recognition of same-sex spouses as "spouses" and "family members" for purposes of campaign finance regulations.

IV. States Permitting Same-Sex Marriage

If DOMA no longer operates to prohibit recognizing same-sex couples as legal spouses, no federal law would exist to define marriage, leaving state law to classify marital relationships. Accordingly, if a state permitted same-sex marriage, spouses legally married (and residing) in such a state would be "family members." A connected PAC could thus presumably solicit contributions from the same-sex spouse of a restricted class member. Further, even if one spouse had no income, he or she could seemingly make a joint contribution together with his or her spouse without running afoul of the law.

But without guidance from the FEC, connected PACs remain unsure about same-sex spouses' legal rights. Specifically, connected PACs are uncertain if they can solicit contributions from the legally married—but same-sex—spouse of a member of their restricted class. Legally married same-sex couples with one wage earner cannot make joint contributions, and committees cannot accept these contributions, without potentially facing severe penalties.

As Mr. Winslow's advisory opinion request notes, the FEC has frequently relied on state law to define otherwise ambiguous terms susceptible to multiple definitions. AOR 2013-02 at 3-4. But like Mr. Winslow, attorneys, PACs, and individuals cannot simply assume such is the case, and thereby risk acting contrary to the law.

V. States Excluding Same-Sex Couples from Marriage

Even if the FEC relies on relevant state law to define marriage, however, further FEC guidance is required. If a same-sex couple living in a state recognizing same-sex marriage could be solicited and contribute to the same extent as heterosexual couples, questions remain regarding the same-sex couple's legal status should they relocate to a state that refused to recognize their marriage. Further uncertainty exists concerning a same-sex couple's legal status should a state recognize their marriage, then subsequently ban same-sex marriage.

For example, suppose a same-sex couple living in Washington, D.C., could lawfully make joint contributions to a connected PAC where one spouse was a member, but the couple relocated to Virginia,

which does not recognize same-sex marriages—even those legally performed in another state.[4] Under these circumstances, if the FEC based its definition of "spouse" on the state where a couple resided, a connected PAC could no longer solicit funds from one spouse, who would cease to be a "family member" once the couple relocated to Virginia. Further, if only one spouse earned income, he or she would become the sole owner of the funds in their joint bank account. Any contribution of the funds in their joint account by the non-wage earner could thus be considered an unlawful contribution with the funds of another under 2 U.S.C. §441f. And the same events would logically occur should Washington, D.C. revoke a same-sex married couple's marital status.

VI. Conclusion

Politically active same-sex married couples residing anywhere in the United States remain unsure of the scope of their highly protected First Amendment rights. Candidates and committees are equally uncertain regarding the extent to which they can lawfully associate with married same-sex spouses. The ultimate effect of such widespread confusion has just one certain but inevitable result: in order to avoid engaging in potentially unlawful activity, potential speakers and prospective political participants will simply refrain from contributing their unique viewpoints to the marketplace of ideas and avoid discussing pressing matters of public interest. To avoid further impairment to First Amendment rights, and so we may correctly advise our clients on compliance with campaign finance law, we respectfully request the FEC clarify these issues in its forthcoming Advisory Opinion.

Though the Supreme Court is currently considering a challenge to DOMA's constitutionality in *United States v. Windsor*, No. 12-307 (U.S. Mar. 27, 2013), this ruling may not bring total clarity, and no statute or regulation exists that allows the FEC to defer its statutory duties in the meantime.

Sincerely,

/s/

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[4] Va. Code Ann.§ 20-45.2.