FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 25, 2013

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2013-02

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Dear Messrs. Engle, Kappel, and Brand:

We are responding to the advisory opinion request you submitted on behalf of Dan Winslow ("Requestor"), a candidate for United States Senate. Requestor asks whether his principal campaign committee may apply 11 C.F.R. 110.1(i) to contributions the committee receives from same-sex couples married under state law. The Commission concludes that Section 3 of the Defense of Marriage Act ("DOMA")[1] prohibits applying 11 C.F.R. 110.1(i) to these couples.

Background

The facts presented in this advisory opinion are based on your letter dated April 5, 2013, and your email of April 9, 2013 (collectively "AOR"), and public disclosure reports filed with the Commission.

Mr. Winslow is a candidate in the April 30, 2013, Massachusetts special primary election. Dan Winslow for U.S. Senate Committee ("Committee") is Mr. Winslow's principal campaign committee.

The advisory opinion request states that same-sex couples married under state law have sent contribution checks to the Committee. (AOR at 1.) For example, Requestor states that the Committee has received a contribution check drawn on Mr. Gerard R. Gershonowitz's individual bank account with instructions to attribute the contribution

[1] Pub. L. 104-199, § 3, 110 Stat. 2419, 2419 (codified at 1 U.S.C. 7).

separately and equally between him and Howard P. Johnson, the man to whom he is married under Massachusetts law. (*See* AOR at 2 n.1.)[2] Requestor seeks an opinion from the Commission as to whether, pursuant to 11 C.F.R. 110.1(i), the Committee may attribute this and similar contributions to each member of the couple per the contributors' requests, even when the contributed funds are drawn from the income of only one of them.

Question Presented

When a candidate's committee receives contributions from same-sex couples married under state law, may the committee apply 11 C.F.R. 110.1(i) to these contributions?

Legal Analysis and Conclusions

No. As discussed below, so long as the relevant provisions of DOMA remain in effect, the Committee may not apply 11 C.F.R. 110.1(i) to contributions from same-sex couples married under state law.

The Federal Election Campaign Act of 1971, as amended ("FECA"), provides that "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." 2 U.S.C. 441f; *see also* 11 C.F.R. 110.4(b). A "contribution in the name of another" includes "[m]aking a contribution . . . and attributing as the source of money . . . another person when in fact the contributor is the source." 11 C.F.R. 110.4(b)(2)(ii).

Notwithstanding the prohibition on contributions in the name of another, a Commission regulation governing "[c]ontributions by spouses" provides that "limitations on contributions . . . shall apply separately to contributions made by each spouse even if only one spouse has income." 11 C.F.R. 110.1(i). Thus, under Section 110.1(i), a spouse with no separate income may make a contribution in his or her own name "through the checking account of the other spouse." Advisory Opinion 1980-11 (Phillips) (applying prior version of 11 C.F.R. 110.1(i)); Advisory Opinion 1980-67 (Long) at 3-4 (noting that

[2] The Committee has also received contributions from the joint bank account of a same-sex couple married under state law with written instructions to attribute the contribution equally between each member of the couple. (*See* AOR at 2 n.1.) A contribution from a joint account is attributed in accordance with 11 C.F.R. 110.1(k), regardless of the marital status of the contributors, "since the political committee receiving the contribution may not know whether or not contributors are married." Explanation and Justification for Final Rules on Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Committees, 52 Fed. Reg. 760, 766 (Jan. 9, 1987) (explaining that the attribution regulations do not require each contributor to "ha[ve] sufficient personal funds in the joint account to cover his or her portion of the joint contribution because each account holder enjoys the right to draw upon the entire amount in the account"). As such, under existing Commission regulations, same-sex couples (whether married under state law or not) may as joint account holders make contributions in a manner similar to that afforded spouses under 11 C.F.R. 110.1(i).

separate spousal contributions are permissible "even in a single income family," but that if such contributions do not satisfy all requirements for spousal attribution, they are unlawful contributions in the name of another).

The term "spouse" is not defined in FECA or the Commission's regulations. DOMA, however, provides that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various . . . agencies of the United States, . . . the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. 7. That definition controls Requestor's question and requires the Commission to conclude that the Committee may not apply 11 C.F.R. 110.1(i) to contributions from spouses who are not "of the opposite sex."

Requestor correctly notes that the Commission has previously relied on state law to supply the meaning of terms not explicitly defined in FECA or Commission regulations. *See, e.g.*, Advisory Opinion 2008-05 (Holland & Knight) (noting that the Commission relies on state law to distinguish a partnership from a corporation). The Commission is, however, precluded from looking to the law of a state that permits same-sex marriage to define or interpret the word "spouse" as used in 11 C.F.R. 110.1(i), for such an interpretation is precisely what Congress intended to foreclose in Section 3 of DOMA. *See* H.R. Rep. 104-664 at 10-11, 29-30 (1996) ("If . . . [a] State eventually recognizes homosexual marriage, Section 3 will mean simply that that marriage will not be recognized as a marriage for purposes of federal law.").

While the Commission is aware that several courts have found DOMA to be unconstitutional,[3] the legal effect of those decisions has been stayed pending the Supreme Court's consideration DOMA in *United States v. Windsor*, No. 12-307 (S. Ct.) (argued Mar. 27, 2013). If DOMA is held to be unconstitutional by the Supreme Court – or is otherwise modified or repealed – the Commission will, upon request, revisit this issue.[4]

This response constitutes an advisory opinion concerning the application of FECA and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the

[3] *See Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (finding Section 3 of DOMA unconstitutional), *cert. granted*, 133 S. Ct. 786 (2012) (thereby staying mandate of Second Circuit pending Supreme Court review), No. 12-307 (S. Ct.) (argued Mar. 27, 2013); *Massachusetts v. Dep't of Health & Human Servs.*, 682 F.3d 1, 17 (1st Cir. 2012) (finding Section 3 of DOMA unconstitutional but staying mandate in anticipation of Supreme Court review); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), appeal No. 12-15388 (9th Cir. Dec. 11, 2012) (held in abeyance pending Supreme Court decision in *Windsor*).

[4] Another case presently before the Supreme Court, *Hollingsworth v. Perry*, No. 12-144 (S. Ct.) (argued Mar. 26, 2013), could affect the Commission's approach to future requests addressing this issue.

transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. The cited advisory opinions are available from the Commission's Advisory Opinion searchable database at http://www.fec.gov/searchao.

On behalf of the Commission,

(signed)
Ellen L. Weintraub
Chair