FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM
For meeting of July 25, 2013
[SUBMITTED LATE]

July 23, 2013

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson
Deputy General Counsel

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Acting Associate General Counsel

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Subject: Draft AO 2013-06 (DSCC)

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 5:00 pm (Eastern Time) on July 24, 2013.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to http://www.fec.gov/law/draftaos.shtml.

Attachment

ADVISORY OPINION 2013-06

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Tyler J. Hagenbuch, Esq.
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Dear Messrs. Elias, Werbrock, Berkon, and Hagenbuch:

We are responding to the advisory opinion request you submitted on behalf of the Democratic Senatorial Campaign Committee ("DSCC") concerning how the terms "spouse" and "family" apply to legally married same-sex spouses under certain provisions of the Federal Election Campaign Act of 1971, as amended ("FECA"), and Commission regulations.

Background

The facts presented in this advisory opinion are based on your letter dated July 1, 2013.

The DSCC is a national committee of the Democratic Party. Some of the DSCC's contributors and prospective contributors are same-sex couples legally married under state law. As to some of these couples, only one spouse has income, which is deposited into the income-earning spouse's bank account (rather than into a joint account). The DSCC wishes to solicit and accept contributions from each spouse in such couples, even when the contributed funds are drawn from the income and bank account of only one member of the couple.

The DSCC also recruits and advises candidates for the United States Senate. The DSCC expects to recruit and advise candidates who are legally married to same-sex

spouses. The DSCC wishes to advise these candidates as to the permissible campaign-related uses of assets that such candidates hold jointly with their spouses.

Finally, the DSCC states that its representatives will from time to time appear before the restricted classes of corporations and labor unions. During such appearances, the DSCC wishes to communicate with and solicit contributions from same-sex spouses of these organizations' executive and administrative employees, stockholders, and members.

Based on these facts, the DSCC asks three questions, which are addressed below.

Legal Analysis and Conclusions

1. *May the DSCC apply separate contribution limits, under 11 C.F.R. § 110.1(i), to a contribution it receives from legally married same-sex spouses, even if only one spouse has income?*

Yes, the DSCC may apply 11 C.F.R. § 110.1(i) to such contributions from legally married same-sex couples. 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 the 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) at 2 (applying prior version of 11 C.F.R. § 110.1(i)).

When the Commission last considered the application of section 110.1(i) to same-sex couples married under state law, the Commission was required to conclude that section 3 of the Defense of Marriage Act ("DOMA")[1] precluded applying 11 C.F.R. § 110.1(i) to contributions from spouses who are not "of the opposite sex." Advisory Opinion 2013-02 (Winslow I). The Commission noted, however, that "[i]f DOMA [were] held to be unconstitutional by the Supreme Court . . . the Commission [would], upon request, revisit this issue." *Id*. at 3. The Supreme Court has since found section 3 of DOMA unconstitutional. *See United States v. Windsor*, No. 12-307, 2013 WL 3196928, at *18 (June 26, 2013). The Commission therefore now revisits the question. *See also* Advisory Opinion 2013-07 (Winslow II).

The term "spouse" is not defined in FECA or the Commission's regulations. The Commission has previously relied on state law to supply the meaning of terms not explicitly defined in the Act or Commission regulations. *See, e.g.*, 11 C.F.R. § 100.33(a) (defining "assets" by reference to "applicable state law"); Advisory Opinion 2008-05

[1] Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7). Section 3 of DOMA provided 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." *Id*.

(Holland & Knight) (noting that Commission relies on state law to distinguish partnerships from corporations); Advisory Opinion 1995-07 (Key Bank of Alaska) (noting long history of Commission applying state law to determine amount and existence of debts). Such an approach here would also be consistent with how other federal agencies have defined the term "spouse." *See, e.g.*, 45 C.F.R. § 237.50(b)(3) (Department of Health and Human Services regulation defining "spouse" by reference to "legal marriage as defined under state law"); Dep't of Commerce, Fisheries Off West Coast States and in the Western Pacific, 71 Fed. Reg. 10614, 10620 (Mar. 2, 2006) (defining "spouse" as "a person who is legally married to another person as recognized by state law").

In light of the foregoing, the Commission concludes same-sex couples married under state law are "spouses" for the purpose of Commission regulations. The Commission therefore determines that for purposes of 11 C.F.R. § 110.1(i), the term "spouse" includes same-sex couples married under state law. Thus, the Committee may apply 11 C.F.R. § 110.1(i) to the contributions it receives from such persons. Advisory Opinion 2013-02 (Winslow I), which reached the opposite conclusion on this issue, is hereby superseded in relevant part.[2] *See also* Advisory Opinion 2013-07 (Winslow II).

2. May the DSCC advise a Senate candidate who is legally married to a same-sex spouse to utilize "jointly held assets" under 11 C.F.R. §§ 100.33(c) and 100.52(b)(4) to the same extent as a Senate candidate who is married to an opposite-sex spouse?

[2] This opinion does not affect the attribution principles applied to contributions from joint accounts pursuant to 11 C.F.R. § 110.1(k). *See* Advisory Opinion 2013-02 (Winslow I) at 2 n.2.

Yes, a Senate candidate who is legally married to a same-sex spouse may utilize "jointly owned assets" under 11 C.F.R. §§ 100.33(c) and 100.52(b)(4) under the same conditions as a Senate candidate who is married to an opposite-sex spouse.

A Senate candidate may make unlimited expenditures from his or her "personal funds" and unlimited contributions to his or her authorized committee. 11 C.F.R. § 110.10; *see, e.g.*, Advisory Opinion 2010-15 (Pike for Congress); Advisory Opinion 1990-09 (Mueller). "Personal funds" include, *inter alia*, "the candidate's share" of "assets that are jointly owned by the candidate and the candidate's spouse." 2 U.S.C. § 431(26)(C); 11 C.F.R. § 100.33(c); *see* Candidate's Use of Property in Which Spouse Has an Interest, 48 Fed. Reg. 19019, 19020 (Apr. 27, 1983) (explaining that the rule "permit[s] a candidate to use the full value of his or her share of assets jointly owned with a spouse without the spouse being considered a contributor.").[3] In addition, although the Commission normally considers a guarantor of a loan as making a contribution subject to the Act's limits, *see* 11 C.F.R. § 100.52(b)(3), Commission regulations allow for a spouse of a candidate to co-sign a loan and not be a contributor under certain circumstances. *See* 11 C.F.R. § 100.52(b)(4) ("A candidate may obtain a loan on which his or her spouse's signature is required when jointly owned assets are used as collateral . . . . The spouse shall not be considered a contributor . . . if the value of the candidate's share of the . . .

[3] The Commission first promulgated this definition of "personal funds" at 11 C.F.R. § 110.10(b) in 1983, and Congress codified it by statute in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, § 304(c), 116 Stat. 81, 100. *See* Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates, 68 Fed. Reg. 3970, 3972 (Jan. 27, 2003) (noting that BCRA's statutory definition "seems to be based largely on the previous definition contained in former 11 CFR 110.10(b)."). The Commission then moved the definition from section 110.10(b) to section 100.33(c) "to give general applicability to the definition in all of the Commission's regulations to Title 2." *Id*.

collateral equals or exceeds the amount of the loan . . . ."); *see also* Advisory Opinion 1991-10 (Guernsey).

For the reasons discussed in response to Question 1 above, the Commission will look to state law to define "spouse" under 11 C.F.R. §§ 100.33(c) and 100.52(b)(4). *See also* Advisory Opinion 2013-07 (Winslow II). Thus, a Senate candidate who is legally married to a same-sex spouse under state law may utilize "jointly owned assets" pursuant to 11 C.F.R. §§ 100.33(c) and 100.52(b)(4) under the same conditions that those regulations impose on a Senate candidate who is married to an opposite-sex spouse.

3. May DSCC representatives appear at restricted-class events, pursuant to 11 C.F.R. § 114.3(c)(2),[4] at which legally married same-sex spouses are present as "families" of other restricted-class members under 11 C.F.R. § 114.1(j)?

Yes, DSCC representatives may appear at restricted-class events, pursuant to 11 C.F.R. § 114.3(c)(2), at which legally married same-sex spouses are present as "families" of other restricted class members under 11 C.F.R. § 114.1(j).

A party committee is prohibited from knowingly accepting any contribution from a corporation or labor organization in connection with a Federal election. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(a). Prohibited contributions include giving anything of value to such a committee in connection with a Federal election. 2 U.S.C. § 441b(b)(2); 11 C.F.R. § 114.1(a)(1); *see also* 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.52(a). However, certain activities "specifically permitted by [11 C.F.R.] part 114" are not

[4] Although the request references "11 C.F.R. § 114.2(c)(2)," it is clear from context that the question is intended to refer to 11 C.F.R. § 114.3(c)(2).

"contributions" for purposes of the ban on contributions by corporations and labor organizations. 11 C.F.R. § 114.1(a)(2)(x); *see also* 2 U.S.C. § 441b(b)(2).

Part 114 permits a corporation or labor organization to allow a representative of a political party to "address" and "ask for contributions" from the corporation's or union's "restricted class at a meeting, convention, or other function." 11 C.F.R. § 114.3(c)(2)(i)-(ii). A corporation's "restricted class" comprises the corporation's (and its subsidiaries') "stockholders and executive or administrative personnel, *and their families*." 11 C.F.R. § 114.1(j) (emphasis added). A labor organization's "restricted class" comprises its "members and executive or administrative personnel, *and their families*." *Id.* (emphasis added). Thus, the question of whether the DSCC may appear before and solicit at restricted-class events that include same-sex spouses turns on whether such spouses are members of the restricted class as "families" of other members of the restricted class.

Neither FECA nor Commission regulations define "families" for the purposes of part 114, but the Commission has never stated that a spouse is not included in the term "family" for purposes of part 114. Moreover, family is, for purposes of other Commission regulations, explicitly defined to include spouses. *See* 11 C.F.R. §§ 100.93(g)(4) (defining "immediate family member" of a candidate to include "husband, wife" and others), 113.1(g)(7) (stating that a candidate's family includes the "spouse of the candidate"); 9003.2(c)(1) (defining "immediate family" to include "a candidate's spouse"), 9035.2(b) (same); *see also* 11 C.F.R. §§ 100.153 (incorporating by reference definition from section 113.1(g)(7)), 113.5(c)(3) (incorporating by reference definition

from section 100.93(g)(4)). The Commission can see no reason why the term "family" as used in part 114 would not similarly include spouses.

For the same reasons that the Commission looks to state law to define "spouse" in 11 C.F.R. § 110.1(i), as discussed in response to Question 1 above, the Commission will look to state law to determine who is a spouse for purposes of familial membership in a restricted class. *See also* Advisory Opinion 2013-07 (Winslow II). Because spousal status is determined by state law, the Commission concludes that a corporation's or labor organization's restricted class, as defined in 11 C.F.R. § 114.1(j), includes same-sex spouses legally married under state law. Thus, DSCC representatives may appear at restricted-class events, pursuant to 11 C.F.R. § 114.3(c)(2), at which legally married same-sex spouses of other restricted class members are present.

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 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,

Ellen L. Weintraub
Chair