



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
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ADVISORY OPINION 2013-07

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Dear Messrs. Winslow and Engle:

We are responding to your advisory opinion request concerning whether the Dan Winslow for US Senate Committee (“Committee”) may apply 11 C.F.R. § 110.1(i) to contributions it receives from legally married same-sex couples. The Commission concludes that the Committee may do so.

Background

The facts presented in this advisory opinion are based on your letter dated July 3, 2013, public disclosure reports filed with the Commission, and facts presented in Advisory Opinion 2013-02 (Winslow I).¹

Dan Winslow was a candidate in the April 30, 2013, Massachusetts special primary election for United States Senate. The Committee is his principal campaign committee. Although Winslow lost the primary election, the Committee is actively raising contributions to retire outstanding debts. The Committee’s most recent report,

¹ Advisory Opinion 2013-02 (Winslow I) and related materials are available at <http://www.fec.gov/searchao>.

dated July 15, 2013, indicates outstanding debt of \$161,610.82 (including loans from Winslow to the Committee in the amount of \$154,050), and cash on hand of \$3,474.29.

Same-sex couples legally married under state law have sent contribution checks to the Committee. The Committee seeks to attribute these 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, pursuant to 11 C.F.R. § 110.1(i).

Question Presented

May the Committee apply 11 C.F.R. § 110.1(i) to joint contributions made by lawfully married same-sex couples?

Legal Analysis and Conclusions

Yes, the Committee may apply 11 C.F.R. § 110.1(i) to such contributions. 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")² 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.

² 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.*

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 FECA 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 (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.³ Advisory Opinion 2013-02 (Winslow I), which reached the opposite conclusion on this issue, is hereby superseded in relevant part.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 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.

³ Because Winslow is not a candidate for a future election, the Committee may accept such contributions designated for the 2013 special primary election only to the extent that the contributions do not exceed the Committee’s net debts outstanding from that election. *See* 11 C.F.R. § 110.1(b)(3)(i).

⁴ 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.

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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