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April 5, 2013

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Anthony Herman, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Advisory Opinion Request; Expedited Request

Dear Mr. Herman:

On behalf of Dan Winslow, a candidate for the United States Senate in Massachusetts, we request an advisory opinion pursuant to the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 437f, and Federal Election Commission ("FEC" or "the Commission") regulations, 11 C.F.R. § 112. Specifically, we request that the Commission answer the following question: Do 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 (11 C.F.R. § 110.1(i))?

As explained below, this request is on behalf of a candidate and pertains to a primary election that will be held on April 30, 2013. Accordingly, we request an opinion within 20 days under the Commission's expedited review procedure set forth in 11 C.F.R. § 112.4(b).

Background

We are legal counsel to State Representative Dan Winslow, a candidate for the United States Senate in Massachusetts' upcoming special election. The primary contest for this election will take place on April 30, 2013. Same-sex couples who are legally married under various states' laws are sending checks made payable to Mr. Winslow's campaign to Arent Fox. These couples want to contribute to his campaign for the April 30th primary contest through a single check, and they would like his campaign to attribute their contributions equally to each spouse so that their contributions count separately toward each of their contribution limits.

Specifically, a same-sex couple making these contributions fall under one of the following scenarios:

1. Only one spouse earns income;
2. One spouse contributes all, or almost all, of the funds to their joint banking account from which the contribution will be drawn;

3. Their contribution will be drawn from a bank account that belongs to only one of the spouses.

In addition, if the contributions exceed $400 total ($200 each), Mr. Winslow's campaign must itemize these contributions on its FEC disclosure report. We will send these checks to Mr. Winslow's campaign or return them to the donors once the Commission advises us on the legality of his campaign depositing, attributing, and reporting these donations.[1]

Discussion

The Commission's contributions limits apply separately to contributions "made by each spouse even if only one spouse has income." 11 C.F.R. § 110.1(i); *see also, e.g.*, FEC Advisory Opinions 1985-25 and 1975-31. The Commission has further advised that spouses can contribute to a campaign via a single contribution so long as the spouses indicate the contribution is to be attributed to each spouse and the check or accompanying document is signed by both spouses. FEC Advisory Opinion 1980-11.[2]

Because "spouse" is not defined in FECA or the Commission's regulations, and the Commission has not issued an advisory opinion regarding the meaning of this term, we seek guidance as to whether the Commission's spouse contribution rule covers same-sex partners who are legally married in jurisdictions that recognize same-sex marriages.

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[1] For example, Gerard R. Gershonowitz and his spouse Howard P. Johnson, a same-sex couple who were legally married in Massachusetts – and who are members of Log Cabin Republicans and supporters of the Liberty Education Forum – have sent Arent Fox a $500 check from their joint banking account. Their written instructions are to attribute the contribution equally between them. While the funds will be drawn from Mr. Gershonowitz and Mr. Johnson's joint account, one spouse has contributed almost all of the funds to this joint account. Mr. Gershonowitz has also written a check drawn from his individual checking account and instructed the campaign to attribute the contribution equally between him and Mr. Johnson.

[2] As noted, the same-sex couple who sent us a check want their contributions to Mr. Winslow's campaign to count separately toward each of their contribution limits. For the 2014 election cycle, an individual can contribute up to $2,600 to a candidate or candidate committee per each election (primary and general). Thus, as applied to the 2014 election cycle, a single-income married couple can contribute up to $10,400 to a candidate committee via a single contribution ($5,200 per person and per election) so long as it is properly attributed to each spouse and the candidate runs in both the primary and general elections.

We believe there are two distinct ways to analyze this question and these analyses lead to different conclusions. Importantly, neither of these analyses require the Commission to judge the constitutionality of any statute or comment on the practices of states or individuals. Instead, we are asking for an interpretation of FECA.

Under the first analysis – which the candidate believes is the proper way to analyze this issue – the Commission could follow its long-standing practice of relying on state law to supply the definition of undefined terms in FECA and its regulations. If the Commission followed this practice, same-sex partners who are legally married in jurisdictions that recognize same-sex marriages would be covered by the Commission's spouse contribution rule. Thus, under this analysis, Mr. Winslow's campaign committee could abide by the contributors' requests and attribute the checks to each spouse even if only one spouse earns income; only one spouse contributes all, or almost all, of the funds to their joint banking account from which the contribution will be drawn; or the contribution will be drawn from an account that belongs to only one spouse.

Alternatively, the Commission could disregard its long-standing practice of relying on state law and instead rely on the Defense of Marriage Act ("DOMA"). DOMA is a federal statute that, for purposes of federal law, defines "spouse" as only a person of the opposite sex who is a husband or wife. If the Commission were to rely on DOMA, same-sex partners who are married in jurisdictions that recognize same-sex marriages would not be covered by the spouse contribution rule. Thus, under this analysis, Mr. Winslow's campaign could not attribute the contributions to each spouse.

We discuss these two analyses in turn.

A. <u>The Commission's Practice of Relying on State Law to Interpret Undefined Terms in FECA and Its Regulations</u>

The Commission's long-standing practice has been to rely on state law to supply the definition of terms that are not defined under FECA or the Commission's regulations. For instance, the Commission has relied on the law of the applicable state to define "corporation" and "partnership," which are undefined in FECA and the Commission's regulations. *See* 11 C.F.R. § 114.17 ("The question of whether a professional organization is a corporation is determined by the law of the State in which the professional organization exists."); Advisory Opinion 2008-05 at 1-2 (explaining that FECA's legislative history and the Commission's regulations rely on state law to distinguish a partnership from a corporation).

Another example is the undefined term "outstanding debt or obligations." For this term, the Commission has relied on applicable state law to determine "whether an alleged debt in fact exists, what the amount of the debt is and which persons or entities are responsible for paying a

debt." Advisory Opinion 1989-02 at 2; *see also Karl Rove & Co. v. Thornburgh*, 39 F.2d 1273, 1280-81 (5th Cir. 1996) (finding that state law supplies the answer to the question of who may be liable for campaign committee debts).

Likewise, the Commission has relied on state law to determine when a candidate's "assets" constitute "personal funds." *See* 11 C.F.R. § 100.33 (defining "personal funds" as "[a]ny assets which, under applicable State law, at the time he or she became a candidate, the candidate had legal right of access to or control over . . ."); *cf.* Advisory Opinion 1993-2 at 3 (Potter, Vice Ch., dissenting) (relying on state law for interpretation of "general election" which is not defined in FECA).

And in some instances, the Commission has relied on state law to resolve issues related to terms that are undefined in FECA and its regulations even though there are potentially conflicting federal laws bearing on these issues – for example, IRS regulations relating to the classification of business entities. *Compare* Advisory Opinion 2008-05 at 1-2 (explaining that FECA's legislative history and the Commission's regulations rely on state law to distinguish a partnership from a corporation) *with* 26 C.F.R. § 301.7701—1 ("Whether an organization is an entity separate from its owners for federal tax purposes is a matter of federal tax law and does not depend on whether the organization is recognized as an entity under local law."), *and* 26 C.F.R. § 301.7701—2-3 (providing that an "association" can elect to be classified as a corporation for federal tax purposes regardless of whether it is organized as a corporation under state law).[3]

If the Commission followed its long-standing practice of relying on state law to interpret "spouse" under 11 C.F.R. § 110.1(i), the answer to our question would be that same-sex couples married in accordance with the laws of states that recognize same-sex marriage would be covered by the spouse contribution rule. And because the same-sex couples who wish to contribute to Mr. Winslow's campaign are married in accordance with such laws, Mr. Winslow's campaign committee could attribute their contribution to each spouse as they have requested.[4]

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[3] The Commission's limited liability company (LLC) rules are one exception to its general practice of relying on applicable state law. 11 C.F.R. § 110.1(g). Under these rules, the Commission relies on IRS regulations, rather than applicable state law, to determine whether an LLC is a "person" under FECA. *Id.* However, when the Commission issued these rules, it made clear that they are "a *narrow exception* to its general practice of looking to State law to determine corporate status." Treatment of Limited Liability Companies Under the Federal Election Campaign Act, 64 Fed. Reg. 37397, 37398 (July 12, 1999) (emphasis added).

[4] While FECA expressly preempts state law "with respect to election to Federal office," 2 U.S.C. § 453(a), FECA's preemption clause does not bear on our question because it narrowly relates to

B. The Defense of Marriage Act (DOMA)

Section 3 of DOMA provides that, "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and 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. If the Commission relied on this statute, the Commission would seemingly have to conclude that its spouse contribution rule does not cover same-sex partners who are married in jurisdictions that recognize same-sex marriages. Thus, if the Commission relied on DOMA rather than applicable state law, Mr. Winslow's campaign committee could not attribute the contributions to each spouse.

The Supreme Court is currently considering a challenge to the constitutionality of Section 3 of DOMA and is expected to issue an opinion in late June or early July 2013. While the Court's opinion could require the Commission to revisit its advisory opinion – or, alternatively, reinforce it – we nonetheless request that the Commission resolve our question within 20 days as required under 11 C.F.R. § 112.4(b). As noted above, we are receiving these contributions for the primary contest in Massachusetts, which will take place on April 30, 2013. Because it is highly unlikely that the Supreme Court will issue its opinion before then, we request that the Commission issue an advisory opinion under its expedited procedures set forth in 11 C.F.R. § 112.4(b).[5]

Additionally, we request that the Commission explicitly state in its advisory opinion that the contributors, Mr. Winslow's campaign, and Mr. Winslow will be held harmless – and the

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state laws establishing systems for campaign funding and expenditures. *See Weber v.* Heaney, 995 F.2d 872, 876 (8th Cir. 1993) ("§ 453 could be read narrowly, referring primarily to candidates' behavior, and preempting state laws regarding contributions only to the extent the federal law prohibited certain kinds of contributions."). Accordingly, FECA's preemption clause does not preclude reliance on state law to help interpret undefined terms in FECA and the Commission's regulations. *See Rove*, 39 F.2d at 1280 (citing the Commission's practice of relying on state law to determine when a debt exists and holding that FECA's preemption clause does not preclude reliance on state law to resolve this issue).

[5] On May 31, 2012, the United States Court of Appeals for the First Circuit – the circuit with jurisdiction over Massachusetts – held that Section 3 of DOMA was unconstitutional. *Massachusetts v. United States Dept. of Health & Hum. Servs.*, 682 F.3d 1 (1st Cir. 2012). The court, though, stayed its decision pending review of this issue by the Supreme Court. *Id.* at 17. Since the First Circuit's decision is currently stayed, we still need the Commission's advice to determine whether Mr. Winslow's campaign committee can accept the contributions described in this letter and attribute them as requested.

contributions can be refunded without penalty – if the Commission advises us that the proposed attribution is permissible, but it is later determined that the attribution is not permissible. *See* 2 U.S.C. § 437f (providing that a person involved in the specific transaction or activity to which an advisory opinion is rendered may rely on an advisory opinion so long as they act in good faith with the provisions and findings of the advisory opinion).

Conclusion

DOMA is a controversial legal issue, but campaign contribution limits are an important legal issue, too. We are not asking the Commission to pass judgment on the wisdom or constitutionality of any law, nor should anyone interpret our request as an invitation for the Commission to take sides on a social issue. Instead, we request that the Commission answer a narrow question related to DOMA's or a state law's applicability to federal election law: As explained above, the answer to this question depends on the Commission's resolution of an apparent conflict between DOMA and the Commission's practice of relying on applicable state law to interpret undefined terms in FECA and its regulations.

We urge the Commission to follow its long-standing practice of relying on state law to interpret undefined terms in FECA and its regulations. In this case, reliance on this long-standing practice would preclude the Commission from treating same-sex couples married in accordance with the laws of states that recognize same-sex marriages differently than other married couples. But regardless of whether the Commission agrees with our position, it is important that the Commission resolve this issue so Mr. Winslow, and frankly all other federal candidates across the United States, have clarity on whether they can accept these types of contributions.

Sincerely,

Craig Engle
Brett Kappel
Aaron Brand

cc: Gregory Angelo, Executive Director, Log Cabin Republicans