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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 13-27
AGENDA ITEM
For meeting of July 25, 2013
SUBMITTED LATE

July 19, 2013

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
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Assistant General Counsel

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Subject: Draft AO 2013-07 (Winslow II)

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 12:00 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

1 ADVISORY OPINION 2013-07

2
3 Dan Winslow, Esq.
4 Dan Winslow for US Senate Committee
5 P.O. Box 1035
6 Wrentham, MA 02035

DRAFT

7
8 Craig Engle, Esq.
9 Arent Fox LLP
10 1717 K Street NW
11 Washington, DC 20036-5342

12
13 Dear Messrs. Winslow and Engle:

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

18 ***Background***

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

22 Dan Winslow was a candidate in the April 30, 2013, Massachusetts special
23 primary election for United States Senate. The Committee is his principal campaign
24 committee. Although Winslow lost the primary election, the Committee is actively
25 raising contributions to retire outstanding debts. The Committee’s most recent report,
26 dated May 20, 2013, indicates outstanding debt of \$150,050, a loan from Winslow to the
27 Committee in the same amount as the debt, and cash on hand of \$142,243.45.

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

1 Same-sex couples legally married under state law have sent contribution checks to
2 the Committee. The Committee seeks to attribute these contributions to each member of
3 the couple per the contributors' requests, even when the contributed funds are drawn
4 from the income of only one of them, pursuant to 11 C.F.R. § 110.1(i).

5 ***Question Presented***

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

8 ***Legal Analysis and Conclusions***

9 Yes, the Committee may apply 11 C.F.R. § 110.1(i) to such contributions. The
10 Federal Election Campaign Act of 1971, as amended ("FECA"), provides that "[n]o
11 person shall make a contribution in the name of another person or knowingly permit his
12 name to be used to effect such a contribution, and no person shall knowingly accept a
13 contribution made by one person in the name of another person." 2 U.S.C. § 441f; *see*
14 *also* 11 C.F.R. § 110.4(b). A "contribution in the name of another" includes "[m]aking a
15 contribution . . . and attributing as the source of the money . . . another person when in
16 fact the contributor is the source." 11 C.F.R. § 110.4(b)(2)(ii).

17 Notwithstanding the prohibition on contributions in the name of another, a
18 Commission regulation governing "[c]ontributions by spouses" provides that "limitations
19 on contributions . . . shall apply separately to contributions made by each spouse even if
20 only one spouse has income." 11 C.F.R. § 110.1(i). Thus, under section 110.1(i), a
21 spouse with no separate income may make a contribution in his or her own name
22 "through the checking account of the other spouse." Advisory Opinion 1980-11

1 (Phillips) at 2 (applying prior version of 11 C.F.R. § 110.1(i)).

2 When the Commission last considered the application of section 110.1(i) to same-
3 sex couples married under state law, the Commission was required to conclude that
4 section 3 of the Defense of Marriage Act (“DOMA”)² precluded applying 11 C.F.R. §
5 110.1(i) to contributions from spouses who are not “of the opposite sex.” Advisory
6 Opinion 2013-02 (Winslow I). The Commission noted, however, that “[i]f DOMA
7 [were] held to be unconstitutional by the Supreme Court . . . the Commission [would],
8 upon request, revisit this issue.” *Id.* at 3. The Supreme Court has since found Section 3
9 of DOMA unconstitutional. *See United States v. Windsor*, No. 12-307, 2013 WL
10 3196928, at *18 (June 26, 2013). The Commission therefore now revisits the question.

11 The term “spouse” is not defined in FECA or the Commission’s regulations. The
12 Commission has previously relied on state law to supply the meaning of terms not
13 explicitly defined in the Act or Commission regulations. *See, e.g.*, 11 C.F.R. § 100.33(a)
14 (defining “assets” by reference to “applicable state law”); Advisory Opinion 2008-05
15 (Holland & Knight) (noting that Commission relies on state law to distinguish
16 partnerships from corporations); Advisory Opinion 1995-07 (Key Bank of Alaska)
17 (noting long history of Commission applying state law to determine amount and
18 existence of debts). Such an approach here would also be consistent with how other
19 federal agencies have defined the term “spouse.” *See, e.g.*, 45 C.F.R. § 237.50(b)(3)
20 (Department of Health and Human Services regulation defining “spouse” by reference to

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.*

1 “legal marriage as defined under state law”); Dep’t of Commerce, Fisheries Off West
2 Coast States and in the Western Pacific, 71 Fed. Reg. 10614, 10620 (Mar. 2, 2006)
3 (defining “spouse” as “a person who is legally married to another person as recognized
4 by state law”).

5 In light of the foregoing, the Commission concludes same-sex couples married
6 under state law are “spouses” for the purpose of Commission regulations. The
7 Commission therefore determines that for purposes of 11 C.F.R. § 110.1(i) the term
8 “spouse” includes same-sex couples married under state law. Thus, the Committee may
9 apply 11 C.F.R. § 110.1(i) to the contributions it receives from such persons.³ Advisory
10 Opinion 2013-02 (Winslow I), which reached the opposite conclusion on this issue, is
11 hereby superseded in relevant part.⁴

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

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.

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

6 On behalf of the Commission,
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9

10 Ellen L. Weintraub
11 Chair