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September 7, 2004

Lawrence M. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

AOR 2004-35
(20 day)

Re: Advisory Opinion Request

Dear Mr. Norton:

Pursuant to 2 U.S.C. § 437f (2004), I seek an advisory opinion on behalf of presidential candidate John Kerry, vice presidential candidate John Edwards, Kerry-Edwards 2004, Inc., and Kerry-Edwards 2004 General Election Legal and Accounting Compliance Fund ("GELAC") (collectively, the "Kerry-Edwards Campaign"). In preparation for the possibility of one or more recounts arising from the 2004 presidential election, the Kerry-Edwards Campaign seeks the Commission's opinion as to how to comply with the prohibitions, limitations and reporting requirements of the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission regulations in connection with the raising and spending of funds to be used to pay for recount expenses.

DISCUSSION

Commission regulations state that "[a] gift, subscription, loan, advance, or deposit of money or anything of value made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election, is not a contribution except that the prohibitions of 11 CFR 110.20 and part 114 apply." 11 C.F.R. § 100.91. A similar exemption from the definition of "expenditure" exists for recount expenses. *See* 11 C.F.R. § 100.151. In previous election cycles, federal candidates raised and spent funds in accordance with these regulatory requirements, either through a separate banking account established by the candidate's principal campaign committee or through a separate entity. *See* Advisory Opinions 1998-26 and 1978-92. If funds were raised through the candidate's principal campaign

committee, then the reporting requirements for political committees also applied. *See* MUR 5199 and 11 C.F.R. part 104.

As a result of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), however, there is some uncertainty as to whether additional restrictions apply. BCRA prohibits candidates and entities established, financed, maintained or controlled by candidates from raising or spending funds "in connection with an election for Federal office" unless those funds are "subject to the limitations, prohibitions, and reporting requirements of the Act." 2 U.S.C. § 441i(e). Thus, it is unclear whether recount funds raised and spent in accordance with 11 C.F.R. §§ 100.91 and 100.151 would be in full compliance with BCRA.

In order to avoid any question of whether its recount funds comply with BCRA, the Kerry-Edwards Campaign seeks the Commission's opinion as to how it may permissibly pay for recount expenses. Specifically, the Kerry-Edwards Campaign asks whether contributions to the Kerry-Edwards 2004 GELAC may be used to pay for recount expenses, should a recount occur. GELAC contributions comply with the prohibitions, limitations and reporting requirements for federal candidates; therefore, the use of such funds to pay for recount expenses would be consistent with BCRA's soft money prohibitions that apply to federal candidates. *See* 2 U.S.C. § 441i(e).

The use of GELAC contributions to pay for recount expenses would also be consistent with the purposes for which GELAC contributions may be used under 11 C.F.R. § 9003.3(a)(2), such as winding down costs. Winding down costs are not specifically identified in the Presidential Election Campaign Fund Act, but are defined in Commission regulations as "costs associated with the termination of the candidate's general election campaign," examples of which include post-election compliance and administrative costs. *See* 11 C.F.R. § 9004.11(a). In its most recent rulemaking regarding publicly funded presidential candidates, the Commission rejected a proposal to more precisely delineate the types of winding down costs that are permissible. *See Public Financing of Presidential Candidates and Nominating Conventions; Final Rule,* 68 Fed. Reg. 47386, 47393 (2003). In the event of a recount, it is hard to imagine expenses more central to winding down a campaign than those necessary to determine whether the candidate actually won.

If the Commission concludes that winding down costs may include recount expenses, practical considerations would require a departure from the temporal restriction placed on winding down costs in 11 C.F.R. § 9003.3(a)(2)(i)(I). Ordinarily, winding down costs are not incurred until after the end of the expenditure report period, which occurs 30 days after the presidential election. *See* 11 C.F.R. § 9002.12(a). However, many, if not all, activities in connection with a recount would be likely to occur between November 2, 2004 and December 2, 2004.

Treating recount expenses that arise during the expenditure report period as winding down costs might raise a concern that the temporal restriction on winding down costs would potentially be waived in other areas. There are several reasons why this should not be a concern. First, an advisory opinion does not establish a broad rule; it is limited in scope to specific transactions or activities that are materially indistinguishable from the specific transaction or activity with respect to which the advisory opinion was rendered. *See* 11 C.F.R. §§ 112.4(e) and 112.5(a)(2). Moreover, because the Commission revises the regulations relating to presidential candidates after every presidential election cycle, the Commission will have an opportunity to fill in gaps in the existing regulations before the next presidential election. In the meantime, the Commission has the responsibility to provide guidance to a presidential candidate as to how recount expenses may be lawfully paid.

If the Commission concludes that GELAC contributions may not be used for all recount expenses, the Kerry-Edwards Campaign requests that the Commission provide guidance as to whether the regulations set forth in 11 C.F.R. §§ 100.91 and 100.151 governing recount expenses are an accurate reflection of the law in this area, and if not, which additional restrictions would apply.

When the phrase "subject to the prohibitions, limitations and reporting requirements of the Act" is applied to funds that do not fall within the definition of "contribution," the particular source and amount restrictions and reporting requirements that apply depend on the context. *See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule* 67 Fed. Reg. 49064, 49096-97 (2002). If the Commission were to conclude that 2 U.S.C. § 441i(e) applies to funds raised and spent pursuant to 11 C.F.R. §§ 100.91 and 100.151, what would that mean in practice? How would the receipts and disbursements need to be reported, if the funds were not raised through a segregated bank account of Kerry-Edwards 2004, Inc.? Which limitations of the Act would apply? Would the aggregate

contribution limit for individuals apply, even though donations for recount expenses are explicitly excluded from the definition of "contribution"? Would there be any restrictions on joint fundraising?

The Commission has not yet imposed additional limitations, prohibitions and reporting requirements on other types of post-election expenses incurred by federal candidates, when the applicable statutory or regulatory provisions do not include all three restrictions. For example, the regulations that allow funds to be raised above and beyond GELAC contributions to pay for civil and criminal penalties apply the source prohibitions of the Act and the reporting requirements of 11 C.F.R. part 104, but impose no amount limitation. *See* 11 C.F.R. § 9004.4(b)(4). Funds raised for an inaugural committee are subject to certain prohibitions and reporting requirements, but the Commission did not suggest in its recent Notice of Proposed Rulemaking that amount limitations be imposed as well. *See Inaugural Committee Reporting and Prohibition on Accepting Foreign National Donations, Notice of Proposed Rulemaking* 69 Fed. Reg. 18301 (April 7, 2004). In the absence of any clear indication as to how the Commission would apply 2 U.S.C. § 441i(e) to post-election expenses, any additional restrictions on recount funds would need to be specifically identified by the Commission.

In conclusion, the Kerry-Edwards Campaign requests that the Commission confirm that GELAC contributions may be used for recount expenses, should such expenses become necessary. Alternatively, if the Commission concludes that GELAC contributions may not be used to pay for recount expenses, or if the Commission concludes that GELAC contributions may only be used to pay for recount expenses after December 2, 2004, then the Kerry-Edwards Campaign requests that the Commission specify which additional restrictions, if any, would apply to the funds that would need to be raised to prepare for the possibility of a recount.

In order to ensure that all funds raised for any recount arising out of the presidential election are in compliance with any applicable restrictions under the Act, the Kerry-Edwards Campaign requests a response from the Commission within 20 days, pursuant to 11 C.F.R. § 112.5(b).

Very truly yours,

Marc E. Elias
General Counsel, Kerry-Edwards 2004, Inc.

cc: Bradley A. Smith, Chairman
Ellen L. Weintraub, Vice Chair
David M. Mason, Commissioner
Danny L. McDonald, Commissioner
Scott E. Thomas, Commissioner
Michael E. Toner, Commissioner