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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2004 SEP 24 P 2:31

September 24, 2004

MEMORANDUM

**AGENDA ITEM**  
For Meeting of: 9-30-04  
**SUBMITTED LATE**

TO: The Commission

THROUGH: James A. Pehrkon *JAP*  
Staff Director

FROM: Lawrence H. Norton *LHN*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Mai T. Dinh *MTD*  
Assistant General Counsel

J. Duane Pugh Jr. *JDP*  
Senior Attorney

Subject: Draft AO 2004-35

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Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 30, 2004.

Attachment

1 **ADVISORY OPINION 2004-35**

2 **Marc E. Elias, Esq.**  
3 **Perkins Coie**  
4 **607 14th Street, NW**  
5 **Washington, DC 20005-2011**

**DRAFT**

6 **Dear Mr. Elias:**

7 **This responds to your letter dated September 7, 2004, on behalf of Senator John**  
8 **Kerry, Senator John Edwards, Kerry-Edwards 2004, Inc., and the Kerry-Edwards 2004**  
9 **General Election Legal and Accounting Compliance Fund (the "GELAC"), concerning**  
10 **the application of the Federal Election Campaign Act of 1971, as amended (the "Act"),**  
11 **and Commission regulations to whether the GELAC may pay any recount expenses that**  
12 **might arise.**

13 ***Background***

14 **Kerry-Edwards 2004, Inc. ("Kerry-Edwards"), is the authorized committee of**  
15 **presidential and vice presidential candidates Senators Kerry and Edwards. Kerry-**  
16 **Edwards is a recipient of public funds under the Presidential Election Campaign Fund**  
17 **Act, and it has established the GELAC pursuant to 11 CFR 9003.3. Kerry-Edwards**  
18 **inquires about the use of the GELAC to pay recount expenses, which it anticipates would**  
19 **include legal fees and expenses, fees for payment of staff, expenses for administrative**  
20 **overhead and office equipment. Thus, recount expenses would be incurred solely with**  
21 **respect to recount efforts related to the November 2004 presidential election.**

22 ***Legal Analysis and Conclusions***

23 **The requestors seek the Commission's opinion on two alternative questions.**

24 **(1) May contributions to the GELAC be used to pay recount expenses?**

1           (2)     Alternatively, if GELAC contributions may not be used to pay all recount  
2 expenses, what additional restrictions, if any, apply to the raising and spending of funds  
3 to be used to pay for recount expenses?

4           With regard to the first question, the Commission concludes that using  
5 permissible contributions made to the GELAC for recount expenses arising from the  
6 November 2004 presidential general election is consistent with 11 CFR 9003.3(a)(2).  
7 While this regulation does not specifically refer to such recount expenses, it does provide  
8 that GELAC funds may be used for certain legal and accounting compliance expenses  
9 and winding down expenses, which are expenses “associated with the termination of the  
10 candidate’s general election campaign.” *See* 11 CFR 9003.3(a)(2)(i)(A),  
11 9003.3(a)(2)(i)(I), and 9004.11(a). The Commission agrees that the types of recount  
12 expenses you would like to pay using GELAC funds generally fit within the permissible  
13 uses of GELAC funds specified in 11 CFR 9003.3(a)(2).

14           All receipts and disbursements from the GELAC account must be reported in a  
15 separate report in accordance with 11 CFR 9006.1(b)(2). 11 CFR 9003.3(a)(3)(ii). These  
16 reporting requirements apply to GELAC receipts and disbursements related to any  
17 recount of the presidential election. Further, all GELAC receipts must also comply with  
18 the amount limitations and source prohibitions of FECA. *See* 11 CFR 9003.3(a)(1)(i).

19           Regulations promulgated by the Commission prior to the enactment of the  
20 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002)  
21 (“BCRA”), address receipts and disbursements related to a recount of the results of a  
22 Federal election. 11 CFR 100.91 and 100.151. These recount rules expressly bar the  
23 receipt or use of funds prohibited by 11 CFR 110.20 (foreign nationals) and Part 114

1 (corporations, labor organizations, and national banks). 11 CFR 100.91 and 100.151.

2 Given that the GELAC may not accept any impermissible funds, these recount rules are  
3 not implicated by your proposed activity.

4 Because the Commission concludes that GELAC funds may be used for recount  
5 expenses associated with the presidential election, this advisory opinion does not address  
6 any of the alternative questions raised in your advisory opinion request, which are  
7 premised on a negative answer to your question regarding the use of GELAC funds.

8 This response constitutes an advisory opinion concerning the application of the  
9 Act and Commission regulations to the specific transaction or activity set forth in your  
10 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
11 of the facts or assumptions presented, and such facts or assumptions are material to a  
12 conclusion presented in this advisory opinion, then the requestors may not rely on that  
13 conclusion as support for their proposed activity.

14 Sincerely,

15 Bradley A. Smith  
16 Chairman