



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY *MWD*

DATE: September 29, 2004

SUBJECT: COMMENT: DRAFT AO 2004-35
Kerry-Edwards 2004

Transmitted herewith is a timely submitted comment by Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, and Representative Marty Meehan regarding the above-captioned matter.

Proposed draft Advisory Opinion 2004-35 is on the agenda for Thursday, September 30, 2004.

Attachment

Congress of the United States
Washington, DC 20515

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

September 29, 2004

2004 SEP 29 A 11:43

VIA FAX – (202) 208-3333

Mary Dove
Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Draft Advisory Opinion 2004-35

Dear Ms. Dove:

As the primary sponsors of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), we respectfully submit this comment on Draft Advisory Opinion 2004-35, which is on the agenda for the September 30, 2004 meeting of the Commission.

In its request, the Kerry-Edwards campaign asked a series of questions relating to compliance with the Federal Election Campaign Act ("FECA") and Commission regulations when raising and spending money in connection with recounts that may occur in the upcoming presidential election. In particular, it asked whether it can pay recount expenses from its General Election Legal and Accounting Compliance Fund ("GELAC"). In our view, the draft AO prepared by the General Counsel's office correctly determines that GELACs can be used to pay recount expenses. We believe, however, that the final AO should make clear that BCRA's ban on soft money applies to recounts regardless of whether they are financed from GELACs or some other account.

In past elections, funds could not be raised for recount expenses from foreign nationals or from corporations or labor unions. The limits applicable to individual contributions, however, did not apply to recounts. *See* 11 CFR § 100.91. BCRA requires that any fund from which recount expenses will be paid must also comply with the individual contribution limits in 2 U.S.C. § 441a. 2 U.S.C. § 441i(e) specifically provides that Federal candidates and officeholders may not solicit, receive, or spend funds in connection with a Federal election that are not subject to the limitations of the Federal Election Campaign Act ("FECA"). The intent of that provision was to completely remove federal candidates and officeholders from the solicitation, receipt, and spending of "soft money." To permit candidates to raise money from individuals in unlimited amounts for recount expenses would directly contravene both the letter and intent of the statute.


One commenter on the Kerry-Edwards request suggested that the clause "in connection with an election for Federal office" in 2 U.S.C. § 441i(e) does not apply to recounts because recounts are not included in the definition of "election" in FECA. It also suggested that recounts are akin to redistricting and legal defense funds, which the Commission has held are not subject to FECA. These arguments are wrong. A recount is obviously not a separate election: it is a legal proceeding to determine the outcome of an election. To argue that a recount is not connected to the election it is deciding makes no sense whatsoever. It is connected to an election in the most basic way possible - it will decide the result. There can never be a recount without an election. Redistricting litigation or other legal proceedings for which a candidate or officeholder might use a legal defense fund do not have a similar direct connection to a specific election.

The prospect of a recount in one or more states in the upcoming election is very real. Based on the country's experience in Florida in 2000, such an event would undoubtedly be a wrenching one for the country. The Commission should not compound the problem by leaving open the possibility that soft money will find its way back into our election process to pay for the recount. It is incumbent on the Commission to take this opportunity to firmly close the door on the suggestion that soft money can be used by parties or candidates to fund recount expenses. Leaving this question unanswered would be a disservice to the two campaigns and the American people.

Sincerely,


John McCain
United States Senate


Russell Feingold
United States Senate


Christopher Shays
Member of the House


Marty Meehan
Member of the House

Cc: Office of the General Counsel