

June 13, 2007

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Federal Election Commission
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Washington, DC 20463

AOR 2007-09

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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Re: Advisory Opinion Request

Dear Ms. Duncan:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of Kerry-Edwards 2004, Inc. ("KE04"), and Kerry-Edwards 2004 General Election Legal and Accounting Compliance Fund ("GELAC") (collectively, the "Kerry-Edwards Campaign") to confirm that GELAC may reimburse KE04 for a portion of the compliance costs KE04 incurred in connection with its media program during the 2004 general election expenditure report period.

The Kerry-Edwards Campaign recognizes that expedited review under 2 U.S.C. § 437f and 11 C.F.R. § 112.4 is only mandated during the 60-day period before a federal election, and that these provisions do not, on their face, address the deadlines set forth within the repayment process for a publicly funded presidential campaign. *See* 11 C.F.R. § 9007.2(c)(2)(i). Nonetheless, the Kerry-Edwards Campaign respectfully requests that the Commission issue its advisory opinion on this matter prior to its "repayment determination upon review" under section 9007.2(c)(3). We interpret the requirement under 11 C.F.R. § 9003.3(a)(2)(ii)(G) that "[r]eimbursement from the GELAC . . . must be made prior to any repayment determination by the Commission pursuant to 11 C.F.R. § 9007.2" to reference the Commission's final repayment determination at the conclusion of the repayment process set forth in 11 C.F.R. § 9007.2, not at the beginning of the process. *See* Final Rules and Explanation and Justification for Public Financing of Presidential General Election Campaigns, 45 *Fed. Reg.* 43371, 43374 (June 27, 1980) ("This provision allows committees some flexibility in deciding what portion, if any, of the costs of compliance services, [a committee] may wish to pay from federal funds. However, the reimbursement [from GELAC] must occur before the Commission makes a *final* repayment determination for that committee" (emphasis added)). If the Commission

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interprets section 9003.3(a)(2)(ii)(G) differently, however, we note that we have not yet received the issuance of the notification referenced in 11 C.F.R. § 9007.2, and we would respectfully request that the Commission treat this request as a motion to stay the issuance of such notice, pending the resolution of this advisory opinion request.

BACKGROUND

During the 2004 general election, the net amount of broadcast time purchased for KE04 political advertisements through KE04's media buyer, Riverfront Media SMLLC ("Riverfront") was \$43,794,095, net of refunds. The vast majority of these KE04 media buys were for 30 second slots. Each of the KE04 advertisements that ran during these spots had a minimum of four seconds devoted to compliance with the disclaimer requirements imposed by the Bipartisan Campaign Finance Reform Act ("BCRA"). See 2 U.S.C. § 441d and 11 C.F.R. § 110.11.¹ In addition, a portion of the media vendors' time was devoted to ensuring legal requirements were met, both in the content of the advertisements and in the accounting that underlay each advertisement, including the tracking of production costs.

As a publicly funded presidential campaign committee for the 2004 general election, the Kerry-Edwards Campaign was permitted to raise private funds for its general election legal and accounting compliance fund, in order to defray certain costs that had little to do with furthering the campaign and thus were not required to be paid for with public funds. See 11 C.F.R. § 9003.3.

To date, GELAC has not reimbursed KE04 for any of the compliance costs associated with its media program during the expenditure report period.² The Kerry-Edwards Campaign seeks the Commission's guidance concerning whether the percentage of media costs that may be reasonably allocated to GELAC is 4/30 (or

¹ KE04 ads were provided to the Commission during the fieldwork phase of the Commission's audit of the Kerry-Edwards Campaign. If additional copies of the ads are needed, please let us know.

² Riverfront was paid additional sums to assist KE04 with the FEC's audit after the expenditure report period; those costs are not the subject of this advisory opinion request.

13%), based on time/space, or if some other percentage is more accurate for determining the proper allocation of broadcast and other media-related compliance costs.

LEGAL ANALYSIS

The permissible uses for GELAC funds include, among other uses, "the cost of legal and accounting services provided solely to ensure compliance with 2 U.S.C. 431 *et seq.* and 26 U.S.C. 9001 *et seq.*" and "that portion of expenditures for payroll, overhead, and computer services related to ensuring compliance with 2 U.S.C. 431 *et seq.* and 26 U.S.C. 9001 *et seq.*," including "data entry services not performed by committee personnel." 11 C.F.R. § 9003.3(a)(2)(i)(A),(B) and (D).

The Commission's regulations do not specifically address the allocation between a publicly funded presidential campaign committee and its compliance fund of broadcasting and other advertising costs with a compliance component. However, Commission precedent supports reasonable allocation of costs when an advertisement serves multiple purposes, even in the absence of a specific regulation. In the case of former Senator Gore's 1988 primary committee, President Bush's 2000 and 2004 general committees, and KE04 itself, the allocation of media costs for multiple purposes has been permitted, despite the absence of a specific regulation. *See* FEC Advisory Opinion 1988-6, and Final Audit Reports of Bush-Cheney 2000, Bush-Cheney '04, and Kerry-Edwards 2004. The rationale for this was summarized by the Office of General Counsel during the Bush-Cheney 2000 audit, in response to the first-time allocation of phone bank costs between a principal campaign committee and state party committees:³

In the past, the Commission has permitted allocations that were not provided for in the regulations with respect to expenditures involving multiple purposes [footnote omitted]. In Advisory Opinion ("AO") 1988-6, the Albert Gore, Jr. for President Committee requested advice on whether a portion of the costs of a broadcast advertisement featuring the candidate discussing trade policy along with a visual listing of the words "Vote – Volunteer – Contribute" could be considered as an exempt fundraising expense pursuant to 11 C.F.R. §

³ This practice was later codified in 11 C.F.R. § 106.8.

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100.8(b)(21). The Commission answered the question in the affirmative and agreed that a 50% allocation of the costs was reasonable.⁴

In this matter, the phone bank communication appears to have had the multiple purpose of benefiting then-Governor Bush as well as "our great Republican team" . . . Under the circumstances, this Office believes that it would be reasonable for the Commission to recognize the apparent multiple purposes for which the phone bank expenditures were made, and to accordingly permit allocation of the costs . . . This allocation percentage is consistent with the Commission's treatment of other expenditures involving two purposes. *See* Advisory Opinion 1988-6.

Memorandum from Lawrence H. Norton to Robert J. Costa (Dec. 2, 2002) at 4-5 (Final Audit Report on Bush-Cheney 2000, Inc. and Bush-Cheney 2000 Compliance Committee, Inc.).

This rationale for permitting the allocation of media costs is equally applicable under these circumstances. During the 2004 general election, KE04 bought broadcast time for communications that in part expressly advocated the election of the Kerry-Edwards ticket and/or the defeat of the Bush/Cheney ticket, and in part satisfied the four-second disclaimer requirement, the stand-by-your-ad disclaimer requirement, and other Title 2 disclaimer requirements for political advertisements. *See* 2 U.S.C. § 441d and 11 C.F.R. § 110.11. In light of the broadcast time that KE04 was required to purchase for the purpose of broadcasting mandatory disclaimers, the Kerry-Edwards Campaign seeks the Commission's guidance on the calculation of GELAC's reimbursement to KE04 for these compliance-related media costs. Specifically, the Kerry-Edwards Campaign seeks confirmation that a 4/30 (or 13%) time/space percentage may be applied to KE04's broadcast advertisements, so that GELAC may reimburse KE04 for the broadcast time required to broadcast the disclaimers required under 2 U.S.C. § 441d and 11 C.F.R. 110.11.

⁴ The Commission wrote: "Because these provisions recognize that expenditures within the purview of the Act may be made for multiple purposes, the Commission believes that expenditures for broadcast time to run an advertisement which includes a fundraising solicitation may be allocated on a 'reasonable basis' to the fundraising exclusion for presidential candidates who accept matching funds." AO 1988-6 at 4.

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In the alternative, if the Commission does not conclude that time/space allocation in this manner is reasonable, the Kerry-Edwards Campaign seeks guidance from the Commission as to what method of allocation would be considered reasonable, and in particular, whether the Kerry-Edwards Campaign may utilize a 5% allocation method, based on the rationale for the "default" GELAC percentage described below, for which no specific documentation regarding allocation is required.

Under Commission regulations, "[t]he Commission's Financial Control and Compliance Manual for General Election Candidates Receiving Public Funding contains some accepted alternative allocation methods for determining the amount of salaries and overhead expenditures that may be considered exempt compliance costs." 11 C.F.R. § 9003.3(a)(2)(ii)(F). According to the Commission's General Election Supplement to the Financial Control and Compliance Manual for Presidential Primary Election Candidates Receiving Public Financing (2000) (the "Compliance Manual"),

Since other national campaign headquarters cost centers [besides the campaign's legal and accounting cost centers] may perform limited exempt compliance functions, portions of the payroll and overhead costs associated with these cost centers may be allocated to exempt compliance. A committee may allocate 5 percent of all payroll, payroll taxes, and overhead associated with the national campaign headquarters office (other than the legal and accounting cost centers discussed above) to exempt compliance. To allocate more than 5 percent of payroll and payroll taxes, and overhead expenses to exempt compliance, a committee must establish individual compliance allocation percentages for each person included in the allocation and maintain detailed records to support the derivation of such percentages. These percentages may then be applied to the individual payroll expenses and an overall campaign headquarters office compliance percentage developed. This percentage may then be applied to overhead costs associated with the national headquarters office (other than the legal and accounting cost centers).

. . . In addition, a committee may allocate 5 percent of State campaign workers' (persons who are permanently or temporarily working in a particular State including advance staff) salaries and payroll taxes to exempt compliance.

If a committee wishes to use a larger percentage for these allocations, then individual allocation percentages must be established for each person. The committee must keep detailed records supporting the derivation of such percentages, and the records must include a description of which duties are considered exempt compliance and the percentage of time spent on these activities, as well as which duties are not considered exempt compliance, and the percentage of time spent on those activities. All records must be made available for audit.

Compliance Manual at 20-21.

Given that the Kerry-Edwards Campaign's media program bore a far greater burden in complying with Title 2's disclaimer and recordkeeping requirements than most other cost centers within the campaign (with the exception of the campaign's legal and accounting cost center), a 5% GELAC allocation for media costs (including broadcast time, production costs, and commissions), would, at a minimum, reflect the reality of the post-BCRA burdens placed on a federal candidate's media program, and the significantly greater accounting and recordkeeping burdens that media vendors face under 11 C.F.R. § 9003.5 than do other cost centers of a national campaign.

QUESTIONS PRESENTED

In light of these issues, the Kerry-Edwards Campaign seeks guidance on the following:

1. May the Kerry-Edwards Campaign treat some portion of the costs of broadcasting the advertisements described above as a compliance expense reimbursable by GELAC pursuant to 11 C.F.R. § 9003.3(a)(2)?
2. If the answer to Question 1 is yes, is a 4/30 (or 13%) allocation of such costs as a compliance expense a reasonable allocation, based on the four-second disclaimer rule in 11 C.F.R. § 110.11(c)(3), and may 4/30 (or 13%) of such costs be reimbursed by GELAC?
3. If the answer to Question 2 is no, what percentage of the costs of airing the advertisements may be treated as a compliance expense? Would 5% be appropriate, based on the reasoning behind the 5% "default" percentage in the Compliance Manual?

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4. Similarly, if the answer to Question 2 is no, what percentage of the production costs and commission costs for the Kerry-Edwards Campaign's media program may be reimbursed by GELAC as compliance-related accounting and recordkeeping costs? Is 5% permissible? Would a percentage that exceeds 5% require specific documentation?

Very truly yours,



Marc E. Elias
Caroline P. Goodson
Counsel, Kerry-Edwards 2004, Inc. and
Kerry-Edwards 2004 GELAC

cc: Chairman Lenhard
Vice Chairman Mason
Commissioner von Spakovsky
Commissioner Walther
Commissioner Weintraub