Comment on AOR 2007-09

By Electronic Mail

July 2, 2007

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

RECEIVED
FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
2007 JUL -2 P 12:05

Re: Comment on AOR 2007-09 (Kerry-Edwards Campaign)

Dear Ms. Duncan:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to AOR 2007-09, a request by Kerry-Edwards 2004, Inc. ("KE04"), and Kerry-Edwards 2004 General Election Legal and Accounting Compliance Fund ("GELAC") (collectively, the "Kerry-Edwards Campaign") seeking guidance from the Commission as to whether GELAC may reimburse KE04 for a portion of the $43.7 million KE04 spent to purchase broadcast time for political advertising.

Specifically, the Kerry-Edwards Campaign asks: "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)?"[1] AOR 2007-09 at 6.

The list of permissible uses of GELAC funds at 11 C.F.R. § 9003.3(a)(2) is exhaustive and exclusive,[2] and makes *no mention* of broadcast advertising costs. For this simple reason, as well as other important legal and policy reasons detailed below, we urge the Commission to advise the Kerry-Edwards Campaign that it *may not treat any portion* of the costs of its broadcast political advertisements as a compliance expense reimbursable by GELAC.

---

1 The Kerry-Edwards Campaign further asks, if the answer to the first question is "yes," whether various allocation methods would be acceptable. *See* AOR 2007-09 at 6-7. Since we urge the Commission to answer the first question in the negative, we do not comment on any of the proposed allocation methods.

2 "Contributions to the GELAC shall be used *only* for the following purposes . . . ." 11 C.F.R. § 9003.3(a)(2)(i)(emphasis added).

1. The Presidential Election Campaign Fund Act Prohibits Participants from Using Private Contributions to Further Their Elections.

The Presidential Election Campaign Fund Act provides that in order to be eligible to receive presidential general election public funding under 26 U.S.C. § 9006, the candidates of a major party "shall certify to the Commission, under penalty of perjury, that . . . no contributions to defray *qualified campaign expenses* have been or will be accepted by such candidates or any of their authorized committees except to the extent necessary to make up any deficiency in payments received out of the fund on account of the application of section 9006(d) . . . ." 2 U.S.C. § 9003(b)(emphasis added).

The term "qualified campaign expense," in turn, is defined to mean an expense:

> incurred (i) by the candidate of a political party for the office of President *to further his election* to such office or *to further the election* of the candidate of such political party for the office of Vice President, or both (ii) by the candidate of a political party for the office of Vice President *to further his election* to such office or to further the election of the candidate of such political party for the office of President, or both, or (iii) by an authorized committee of the candidates of a political party for the offices of President and Vice President *to further the election* of either or both of such candidates to such offices . . . .

26 U.S.C. § 9002(11)(A)(emphasis added).

The policy goals that led to the Presidential Election Campaign Fund Act were set forth by the Supreme in *Buckley v. Valeo*, 424 U.S. 1, 91 (1976):

> Congress was legislating for the "general welfare" – to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising.

According to the Court, Congress "properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions." *Id.* at 96.

Commissioner Weintraub recently commented on the importance of the statutory prohibition on the receipt and use of private contributions by publicly financed general election candidates. In the context of rejecting the notion that broadcast advertising for publicly financed general election candidates may be paid for with private contributions, Commissioner Weintraub explained that candidates participating in the general election public financing program in 2004 received "almost $75 million in taxpayer funds," but that:

> [T]he Government does not hand out such a large public grant without strings attached. In return for the Government's largesse, the candidate must agree not to

> use additional funds (26 U.S.C. § 9003(b)(2)), beyond the roughly $16 million in coordinated expenditures that the candidate's national party committee was permitted to make (2 U.S.C. § 441a(d)).

Statement of Commissioner Ellen L. Weintraub On the Report of the Audit Division on Bush-Cheney '04, Inc. ("Weintraub Statement") (Mar. 22, 2007) at 1.[3]

Presidential candidates who wish to receive general election public funding make a commitment to forego private contributions in exchange for the public funds. This commitment is vital to the legislative purposes of the Presidential Election Campaign Fund Act: "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Buckley*, 424 U.S. at 91. The Commission's duty is to ensure that publicly funded candidates honor their commitment.

2. The Commission Created an Extremely Narrow Exception to the General Prohibition on Use of Private Funds By Publicly Financed Presidential General Election Candidates.

Despite the clear statutory prohibition on the receipt of private contributions by publicly funded presidential general election candidates, the Commission saw fit in 1980 to promulgate a regulation permitting such candidates to solicit and receive private contributions for narrowly delimited compliance purposes specifically listed in that regulation. *See* Final Rule and Explanation and Justification ("E&J"), Public Financing of Presidential General Election Campaigns, 45 Fed. Reg. 43371 (June 27, 1980). The regulation (now codified at 11 C.F.R. § 9003.3) provided that a publicly funded general election candidate "may accept contributions to a legal and accounting compliance fund, if such contributions are received and disbursed in accordance with this section." *Id.* at 43380. The regulation went on to provide that "[s]uch contributions shall be used *only* for the following purposes," *id.* at 43381 (emphasis added), and listed five – and only five – permissible uses:

- To defray the cost of legal and accounting services provided solely to ensure compliance with the Federal Election Campaign Act (FECA);
- To defray any civil or criminal penalties imposed pursuant to FECA;
- To make repayments of public funds;
- To defray the costs of soliciting contributions to the legal and accounting compliance fund; and
- To make a loan to the candidate's principal campaign account to pay qualified campaign expenses prior to the candidate's receipt of public funds, so long as the amount loaned is restored to the legal and accounting compliance fund.

See id. at 43381. Subsection (ii) of the regulation provided that permissible "legal and accounting costs" include "payments for personnel, computer services, reproduction, mailing

---

[3] Available at http://www.fec.gov/members/weintraub/audits/statement20070322.pdf.

expenses, and independent audits" but went on to reiterate that "[p]ayments may *not* be made under 11 C.F.R. 9003.3(a)(2)(i) for any legal and accounting services or related costs which are not performed *solely* to ensure compliance with" FECA. *Id.* (emphasis added).

The 1980 compliance fund regulation listed the permissible uses of private contributions – and made no mention of broadcast campaign ads. On the contrary, the regulation made clear that legal and accounting compliance funds may *not* be used for any costs "not performed solely to ensure compliance" with FECA.[4]

The Commission revisited its compliance fund regulations in a 1994-95 rulemaking on "Public Financing of Presidential Primary and General Election Candidates," prompted in part by a Petition for Rulemaking filed by the Center for Responsive Politics (CRP) in March 1994. *See* NPRM 1994-13, 59 Fed. Reg. 51006 (Oct. 6, 1994) (citing CRP Petition for Rulemaking, 59 Fed. Reg. 14795 (Mar. 30, 1994)). (It is in this 1994-95 rulemaking that the Commission first used the acronym "GELAC.")

The Commission noted that CRP requested that the Commission repeal its GELAC regulations because they "undermine the ability of the public financing laws to achieve the objective of reducing the influence of large contributions in Presidential elections"; "permit evasion of the prohibition on accepting contributions to defray qualified campaign expenses established by the Presidential Election Campaign Fund Act"; and "violate the spending limits established by the FECA." 59 Fed. Reg. at 51015.

In response, the Commission articulated its proposed justification for retaining the GELAC provisions:

> Absent evidence supporting the petitioner's claim, the Commission would be reluctant to completely eliminate the GELAC because Presidential campaigns would need to devote some of their public funds for compliance expenses, instead of using public moneys for campaign expenses. The result could be significant difficulty in complying with the public financing statutes and the FECA. The GELAC is also used to make repayments, which would need to be funded from other sources. Moreover, the elimination of monetary contributions of $1000 or less for compliance purposes could force some committees to turn to much larger in-kind donation of legal and accounting services to ensure that their compliance obligations are satisfied.

59 Fed. Reg. at 51015.

The Commission published its final revisions to the GELAC rules in June 1995, rejecting CRP's call for repeal of the rules. *See* Public Financing of Presidential Primary and General

---

4 The "Explanation and Justification" for the 1980 rule in fact provided no justification for the rule and, instead, simply stated that the "legal and accounting compliance fund" provision had "been added to follow past Commission practice, which allowed candidates receiving public funding to solicit private contributions to pay for the costs of services necessary to comply with the requirements of the Act . . . ." *Id.* at 43373. Notwithstanding the lack of any meaningful justification, the rule took effect.

Election Candidates, Final Rule and E&J, 60 Fed. Reg. 31854, 31855 (June 16, 1995). The Commission began by noting that its "reasons for establishing the GELAC are explained below and in the 1980 Explanation and Justification, 45 FR 43371 (June 27, 1980)." 60 Fed. Reg. at 31855. (As noted above, the 1980 E&J actually provided no reasons for the GELAC provisions other than that they had "been added to follow past Commission practice . . . ." 45 Fed. Reg. at 43373.) But the Commission stated:

> To repeal [the GELAC provisions] would force presidential campaigns to devote some of their public funds for compliance expenses, instead of using public monies for campaign expenses. One commenter noted that in the absence of a GELAC, committees would face extraordinary pressure to minimize the amount spent on compliance so as to devote as much money as possible to campaigning. Reducing compliance funds may very well reduce committees' abilities to keep good records, thereby increasing the difficulty and duration of postelection audits. . . . The elimination of monetary contributions of $1,000 or less for compliance purposes could force some committees to turn to much larger in-kind donations of legal and accounting services to ensure that their compliance obligations are satisfied. *See* 2. U.S.C. § 431(8)(B)(ix) and (9)(B)(vii). The GELAC is also used to make repayments, which would still need to be funded from private sources if the campaign had no public funds remaining to pay those amounts.

60 Fed. Reg. at 31855.

Whereas the 1980 rule listed five categories of permissible uses for GELAC funds, the revised 1995 rule added four new categories:

- To defray that portion of expenditures for payroll, overhead, and computer services related to ensuring compliance with FECA;
- To defray the cost of compiling and maintaining computerized campaign finance data;
- To defray unreimbursed costs incurred in providing transportation and services for Secret Service and national security staff; and
- To pay "winding down" salary, overhead and computer expenses incurred after the end of the expenditure report period.

See 60 Fed. Reg. at 31872-75 (codified as 11 C.F.R. § 9003.3(a)(2)(i)(B), (F), (H) and 11 C.F.R. § 9004.4(a)(4)).

The Commission most recently amended its GELAC rules in August 2003, following the passage of the Bipartisan Campaign Reform Act of 2002 (BCRA), but at that time provided no further justification for the GELAC provisions, and made no amendments to the GELAC rules that are materially relevant to the issues raised by this AOR. *See* Public Financing of Presidential Candidates and Nominating Conventions, Final Rules and E&J, 68 Fed. Reg. 47386 (Aug. 8, 2003).

Under current Commission regulations, "[c]ontributions to the GELAC shall be used *only* for the following purposes":

(A) To defray the cost of legal and accounting services provided solely to ensure compliance with FECA;
(B) To defray that portion of expenditures for payroll, overhead, and computer services related to ensuring compliance with FECA;
(C) To defray any civil or criminal penalties imposed pursuant to FECA;
(D) To make repayments under 11 CFR 9007.2, 9038.2, or 9038.3;
(E) To defray the cost of soliciting contributions to the GELAC;
(F) To defray the cost of compiling and maintaining computerized campaign finance data;
(G) To make a loan to an account established pursuant to 11 CFR 9003.4 to defray qualified campaign expenses incurred prior to the expenditure report period or prior to receipt of Federal funds, provided that the amounts so loaned are restored to the GELAC;
(H) To defray unreimbursed costs incurred in providing transportation and services for the Secret Service and national security staff pursuant to 11 CFR 9004.6; and
(I) To defray winding down expenses for legal and accounting compliance activities incurred after the end of the expenditure report period by either the candidate's primary election committee, general election committee, or both committees.

See 11 C.F.R. § 9003.3(a)(2)(i)(emphasis added).

The regulation's use of the phrase "contributions to the GELAC shall be used *only* for the following purposes" makes clear that this is not an illustrative list, but an exhaustive one. If a use is not on the list, then GELAC funds may *not* be used to pay for it.

Campaign advertising is not on the list.

As noted above, the Commission's 1994-95 rulemaking documents provide the only substantive justification for the Commission's decision to allow publicly funded presidential general election candidates to raise private GELAC contributions. The Commission's principal justification is that disallowing such contributions "would force presidential campaigns to devote some of their public funds for compliance expenses, instead of using public monies for campaign expenses," subjecting such campaigns to "extraordinary pressure to minimize the amount spent on compliance so as to devote as much money as possible to campaigning." 60 Fed. Reg. at 31855. As this argument goes, "[r]educing compliance funds may very well reduce committees' abilities to keep good records, thereby increasing the difficulty and duration of postelection audits." *Id.* Further, the "elimination of monetary contributions of $1,000 or less for compliance purposes could force some committees to turn to much larger in-kind donations of legal and accounting services to ensure that their compliance obligations are satisfied." *Id.*

Regardless of what one thinks of the Commission's stated rationales for allowing private GELAC contributions, the Kerry-Edwards Campaigns' proposal to expand the permissible use of GELAC funds to pay for campaign ads advances none of them.

3. The Kerry-Edwards Campaign's Advertising Expenditures Were for the Sole Purpose of Furthering the Candidates' Election and Thus Constitute *Qualified Campaign Expenses* That May Not Be Paid For With GELAC Funds.

As detailed above, publicly funded presidential general election candidates may not use private contributions to pay for "qualified campaign expenditures," defined by statute to include any expense incurred by a candidate to advance the candidate's election. *See* 2 U.S.C. §§ 9002(11)(A) and 9003(b).

The $43.7 million spent by KE04 to purchase political advertisements through its media buyer, Riverfront Media, was undoubtedly and undeniably for the purpose of advancing the Kerry-Edwards Campaign's election. Nothing stated in the AOR suggests otherwise.

The Commission's regulations permit GELAC funds to be used to pay for legal and accounting services *solely* to ensure compliance – *not* advertising services to promote a candidate's campaign. The Kerry-Edwards Campaign acknowledges this, stating: "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 . . . ." AOR 2007-09 at 3.

What the Kerry-Edwards Campaign does not acknowledge is that the Commission has no discretion in the context of an advisory opinion to establish a new rule of law by expanding a delimited, exhaustive list of permissible uses of GELAC funds promulgated by Commission regulation. Any such new rule of law must be established through the rulemaking process, not through issuance of an advisory opinion. Under FECA and Commission regulations, a new rule of law "may be initially proposed by the Commission only as a rule or regulation," not as an advisory opinion. 2 U.S.C. § 437f(b); *see also* 11 C.F.R. § 112.4(e).

Further, the Commission has no justification for establishing such a new rule of law through the rulemaking process. The Commission's stated justification for allowing GELAC funds is to ensure that candidates devote adequate financial resources to obtaining the legal and accounting services necessary to comply with FECA. Permitting publicly financed general election candidates to pay for a portion of their political advertising costs with private GELAC contributions would do absolutely nothing to advance this interest. The Kerry-Edwards Campaign has made no allegation that its ability to comply with FECA was in any way hindered by its inability to pay for political ads with GELAC funds. Indeed, such a claim would be ridiculous. The Kerry-Edwards Campaign possesses a *surplus* of GELAC funds, not a *deficit* of GELAC funds – and it simply seeks the Commission's permission to now use those funds to buy campaign ads, not legal and accounting services. Indeed, rather than ensuring that a campaign devotes adequate funds to compliance, the KE04 proposal seeks instead to convert GELAC funds into a subsidy for campaign advertising.

Finally, if the Commission were to allow this unwarranted expansion of the permissible use of GELAC funds to pay for political advertising, the logic of such an opinion would know no bounds and, by extension, would be employed by publicly funded candidates to pay for a portion of *every* solicitation and public communication disseminated by the candidates that requires the acquisition of donor information (name, occupation, employer, etc.) or that requires a "paid for by" disclaimer. Once this door is opened, almost anything will be able to be characterized as "compliance." After all, any campaign action or communication that does not violate the law "complies" with it. The result would be that, as a routine matter, virtually all campaign communications would be "allocated" and thus in part paid for with GELAC funds, *i.e.*, private contributions.

This would be an enormous expansion of the use of GELAC funds, and one that is totally unmoored not only from the public financing statute itself, but also from the rules promulgated by the Commission and the purposes articulated by the Commission underlying those rules.

Accordingly, the Commission should advise the Kerry-Edwards Campaign it may not use GELAC funds to pay a portion of the costs of its broadcast campaign ads.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer

Fred Wertheimer
Democracy 21

/s/ J. Gerald Hebert

J. Gerald Hebert
Paul S. Ryan
Campaign Legal Center

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry LLP
1425 K Street NW – Suite 600
Washington, DC 20005

Counsel to Democracy 21

Paul S. Ryan
The Campaign Legal Center
1640 Rhode Island Avenue NW – Suite 650
Washington, DC 20036

Counsel to the Campaign Legal Center

Copy to: Each Commissioner
Commission Secretary