



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**MEMORANDUM**

**TO:** THE COMMISSION  
STAFF DIRECTOR  
GENERAL COUNSEL  
CHIEF COMMUNICATIONS OFFICER  
FEC PRESS OFFICE  
FEC PUBLIC DISCLOSURE

**FROM:** COMMISSION SECRETARY

**DATE:** JULY 23, 2007 *Miss*

**SUBJECT:** COMMENT ON DRAFT AO 2007-09

Transmitted herewith is a timely submitted comment from Marc Elias and Caroline P. Goodson, Counsel for Kerry-Edwards 2004, Inc. and Kerry-Edwards 2004 General Election Legal and Accounting Compliance Fund.

Proposed Advisory Opinion 2007-09 is on the agenda for Thursday, July 26, 2007.

Attachment

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July 19, 2007

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FEDERAL ELECTION  
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OFFICE OF GENERAL  
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**Re: Advisory Opinion Request**

Dear Ms. Duncan:

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"), we wish to address several issues raised in the comments filed by Democracy 21 and Campaign Legal Center regarding Advisory Opinion request 2007-09. See Letter, dated July 2, 2007, from Fred Wertheimer, J. Gerald Hebert and Paul S. Ryan to the Office of General Counsel (the "July 2 comments").

While the July 2 comments provide a helpful overview of the history of public funding, they do not appear to address the particular facts at hand, which are specific to the post-McCain-Feingold state of regulatory requirements for television advertisements. The July 2 comments state, "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." July 2 comments, p. 7.

The commenters appear to miss the point of the advisory opinion request. For each advertisement, there were at least 4 seconds of media time in which the Kerry-Edwards campaign was NOT at liberty to advance its election. That time was instead required to be dedicated to the disclaimer requirements of Title 2. But for the dictates of

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2 U.S.C. § 441d and 11 C.F.R. § 110.11, KE04 would unquestionably have devoted those precious seconds of airtime to an electoral, not a compliance, message, and derived a benefit from the content that it could not derive when it could not shape its own, campaign-related message.

The July 2 comments express concern that "[o]nce 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." July 2 comments, p. 8.

There are several flaws in this reasoning. First, under this rationale, we would be seeking to have 100% of the costs allocated to GELAC, since the ads comply with the law in their entirety. While we would certainly be amenable to such allocation, there does not appear to be any basis for treating the discretionary political speech of the candidate, which was not compelled by McCain-Feingold's disclaimer requirements and did not impose other regulatory burdens on the Committee, as an allocable GELAC expense. Second, if this advisory opinion request were to extend beyond the specific facts before the Commission and establish a general rule, as the July 2 comments fear that it would, that would contravene 2 U.S.C. § 437f(b) and 11 C.F.R. § 112.4(e), and is therefore not likely to be the Commission's interpretation of this advisory opinion going forward. Finally, this area of the law only potentially affects the narrow subset of candidates who (1) become presidential nominees of major political parties, and (2) accept public funding during the general election. To the extent there are concerns raised in the future about using this advisory opinion as a justification for rampant GELAC spending, this small segment of the regulated community, to the extent it continues to exist, could be admonished to stay within the boundaries of the facts of this advisory opinion.

As a final note, the July 2 comments do not appear to understand how the audit process has functioned at the Commission in the past. During its field work, the Audit Division exercises wide discretion over what does and does not constitute an allocable GELAC expense. Given the Audit Division's proclivity for regulation, there is not any real concern that the Audit Division has taken action during its field work that would upset the authors of the July 2 comments, but as a factual matter, there is no real way to determine, based on the public record, what types of expenses have been acceptable as

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GELAC expenses under the "common law" of the Audit Division. It is only when the Audit Division has an objection that a GELAC issue eventually makes it to the public record.

Here, the Commission has a unique opportunity to interpret, first-hand, the regulations governing GELAC. We trust that the Commission will do so in a more thoughtful manner than what is proposed in the July 2 comments.

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