



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CONCURRING OPINION OF
VICE CHAIRMAN DAVID M. MASON
AND
COMMISSIONER HANS A. von SPAKOVSKY
IN
ADVISORY OPINION 2007-09

On July 26, 2007, the Commission voted unanimously to approve Advisory Opinion 2007-09, concluding that the Kerry-Edwards 2004 General Election Legal and Accounting Compliance Fund (“KE-GELAC”) may reimburse Kerry-Edwards 2004, Inc. (the “Kerry-Edwards Campaign”), up to five percent of the cost of broadcast time purchased during the 2004 general election period. The effect of this conclusion is to permit a GELAC fund to pay for a portion of the time devoted to disclaimers in a broadcast advertisement. The five percent figure is derived from the “default” percentage applicable to payroll and overhead expenses associated with maintaining a national campaign headquarters office, as reflected in the *Financial Control and Compliance Manual*.¹

We support the conclusions reached in Advisory Opinion 2007-09, but would have preferred to adopt Draft Advisory Opinion 2007-09.² The central distinction between the Draft and the final Advisory Opinion as adopted is how disclaimer-related costs are categorized. The Draft treated these costs as exempt compliance costs, whereas

¹ See *General Election Supplement to the Financial Control and Compliance Manual*, 20 (2000) (“Since other national campaign headquarters 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.”); see also 11 CFR 9003.3(a)(2)(ii)(F) (citing the *Financial Control and Compliance Manual*).

² See Agenda Document 07-52 available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=1948&START=932768.pdf>. A motion to approve this version of the advisory opinion failed by a vote of 3-2. Chairman Lenhard, Vice Chairman Mason, and Commissioner von Spakovsky voted in favor of the motion to approve Agenda Document 07-52. Commissioners Walther and Weintraub voted against the motion.

the Advisory Opinion as adopted treats those costs as general, national campaign headquarters overhead expenses.

We supported treating the costs associated with the advertisements' disclaimers as straightforward exempt compliance costs, and permitting KE-GELAC to reimburse the Kerry-Edwards Campaign for the full cost of the broadcast time devoted to including the disclaimers required by the Federal Election Campaign Act.³ Had this view prevailed, the Kerry-Edwards Campaign would have been permitted to determine the portion of the total broadcast time purchase that is a compliance expense by calculating the ratio of the four-second disclaimer to the total time for each advertisement using a method similar to the time/space attribution method in 11 C.F.R. 106.1(a). For example, the Advisory Opinion Request indicated that a thirty-second advertisement included four seconds devoted exclusively to required disclaimers, meaning the ratio would be 4/30 (or 13.33%) for a thirty-second advertisement, or 4/60 (or 6.67%) for a sixty-second advertisements. The Kerry-Edwards Campaign would then multiply this ratio by the total cost of the advertisement to calculate the permissible reimbursement amount for compliance costs.

The view that ultimately prevailed is certainly supportable, but in our opinion does not present the most compelling case for permitting an allocation of the costs of the advertisements at issue. It is undisputed that the advertisements' disclaimers were required by federal law, *see* 2 U.S.C. § 441d, and thus, the cost of including those disclaimers in the advertisements is logically a legal "compliance" cost.⁴

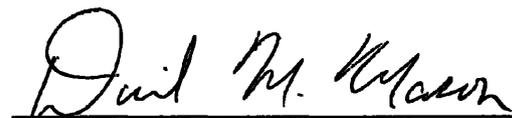
Additionally, to the extent the Advisory Opinion *limits* the permissible allocation to five percent, it deviates from what the *Compliance Manual* permits in other circumstances. The five percent allocation percentage is simply a default percentage. As the *Compliance Manual* states, "[t]o allocate 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)." *General Election Supplement to the Financial Control and Compliance Manual* at 20-21 (2000). It appears from the Advisory Opinion Request that "detailed records" of the costs of the broadcast

³ As the Requestor noted, "[b]ut for the dictates of 2 U.S.C. § 441d and 11 C.F.R. § 110.11, [the Kerry-Edwards Campaign] would unquestionably have devoted those precious seconds of airtime [dedicated to disclaimers] 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." *Comments of Requestor*, July 19, 2007, pages 1-2, available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=1948&START=933309.pdf>.

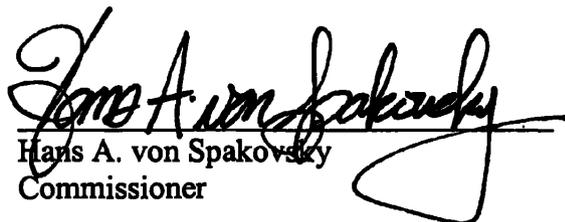
⁴ As the *Compliance Manual* states, "[l]egal and accounting expenses incurred solely for the purpose of insuring compliance with the Act do not count against the expenditure limitation." *General Election Supplement to the Financial Control and Compliance Manual* at 18 (2000).

advertisements exist, yet KE-GELAC is artificially limited to a maximum reimbursement of 5 percent.

September 24, 2007



David M. Mason
Vice Chairman



Hans A. von Spakovsky
Commissioner