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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

July 19, 2007

**AGENDA ITEM**  
For Meeting of: 07-26-07

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Ron Katwan *RK*  
Assistant General Counsel

J. Duane Pugh *JDP*  
Senior Attorney

Subject: Draft AO 2007-09

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 26, 2007.

Attachment

1   ADVISORY OPINION 2007-09

2   Marc E. Elias, Esq.  
3   Caroline P. Goodson, Esq.  
4   Perkins Coie  
5   607 Fourteenth Street, N.W.  
6   Washington, D.C. 20005-2011

**DRAFT**

7   Dear Mr. Elias and Ms. Goodson:

8           We are responding to your advisory opinion request on behalf of Kerry-Edwards  
9   2004, Inc. (“KE04”), and Kerry-Edwards 2004 General Election Legal and Accounting  
10   Compliance Fund (“KE-GELAC”) (collectively the “Kerry-Edwards Campaign”)  
11   regarding whether, under the Federal Election Campaign Act of 1971, as amended  
12   (“FECA”), the Presidential Election Campaign Fund Act, as amended (the “Fund Act”),  
13   and Commission regulations, KE-GELAC may reimburse KE04 for a portion of  
14   broadcast time purchased during the 2004 general election.

15           The Commission concludes that KE-GELAC may reimburse KE04 for the  
16   compliance expense of the broadcast time in each advertisement that is devoted to the  
17   disclaimers required under FECA.

18   ***Background***

19           The facts presented in this advisory opinion are based on your letter received on  
20   June 13, 2007 as supplemented by an email received on June 21, 2007.

21           KE04 is the authorized committee of 2004 presidential and vice presidential  
22   candidates Senators John F. Kerry and John R. Edwards. KE04 received public funds  
23   under the Fund Act, and it established the KE-GELAC pursuant to 11 CFR 9003.3.

1           During the 2004 general election campaign, KE04 purchased \$43,794,095 of  
2 broadcast time for its political advertisements.<sup>1</sup> You state that the “vast majority” of  
3 these media buys were for thirty second “spots” of broadcast time. Each of the KE04  
4 advertisements included a minimum of four seconds devoted to compliance with the  
5 disclaimer requirements set forth in 2 U.S.C. 441d and 11 CFR 110.11. In addition to the  
6 broadcast time devoted to complying with FECA’s disclaimer requirements, a portion of  
7 the media vendor’s time was devoted to ensuring that legal requirements were met, with  
8 respect to both the content and presentation of the advertisements’ disclaimers and the  
9 necessary accounting. For example, the media vendor ensured that every advertisement  
10 contained the necessary disclaimers, coordinated with KE04’s counsel to ensure that the  
11 disclaimers complied with FECA, and provided detailed documentation for all production  
12 costs and broadcast time purchases.

13 ***Questions Presented***

- 14 1.       *May the Kerry-Edwards Campaign treat some portion of the costs of*  
15 *broadcasting the advertisements described above as a compliance expense reimbursable*  
16 *by KE-GELAC pursuant to 11 CFR 9003.3(a)(2)?*
- 17 2.       *If the answer to question 1 is yes, is a 4/30 (or 13%) attribution of such costs as a*  
18 *compliance expense a reasonable attribution, based on the four-second disclaimer rule in*  
19 *11 CFR 110.11(c)(3), and may 4/30 (or 13%) of such costs be reimbursed by KE-*  
20 *GELAC?*

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<sup>1</sup> KE04 made these purchases through its media buyer, Riverfront Media SMLLC (“Riverfront”). The \$43,794,095 amount represents the total KE04 paid to Riverfront less refunds paid to KE04, as determined in the Commission’s audit of KE04. See Report of the Audit Division on KE04 and KE-GELAC, 24 (June 14, 2007).

1 3. *If the answer to Question 2 is no, what percentage of the costs of airing the*  
2 *advertisements may be treated as a compliance expense? Would 5% be appropriate,*  
3 *based on the reasoning behind the 5% “default” percentage in the Compliance Manual?*

4 4. *Similarly, if the answer to Question 2 is no, what percentage of the production*  
5 *costs and commission costs for the Kerry-Edwards Campaign’s media program may be*  
6 *reimbursed by GELAC as compliance-related accounting and recordkeeping costs? Is*  
7 *5% permissible? Would a percentage that exceeds 5% require specific documentation?*

8 ***Legal Analysis and Conclusions***

9 1. *May the Kerry-Edwards Campaign treat some portion of the costs of*  
10 *broadcasting its advertisements as a compliance expense reimbursable by KE-GELAC*  
11 *pursuant to 11 CFR 9003.3(a)(2)?*

12 Yes, the portion of the broadcasting costs incurred by the Kerry-Edwards  
13 Campaign in complying with the disclaimer requirements of 2 U.S.C. 441d and  
14 11 CFR 110.11 are compliance expenses that may be paid (and in this case, reimbursed)  
15 by KE-GELAC pursuant to 11 CFR 9003.3(a)(2).

16 Presidential candidates in general elections may receive public funds from the  
17 Presidential Election Campaign Fund established by the Fund Act. In exchange for  
18 receiving public funds, candidates must agree to a spending limit on their “qualified  
19 campaign expenses,” which the Fund Act defines to include expenses incurred by a  
20 candidate to further the candidate’s presidential election campaign. *See*  
21 *26 U.S.C. 9002(11)(A); 9003(b)(2); 11 CFR 9002.11; and 9003.2(a)(1).* In most  
22 circumstances, publicly funded presidential general election candidates may not raise  
23 private contributions to pay for qualified campaign expenses. *See 26 U.S.C. 9002(11)(A)*

1 and 9003(b)(2). However, Commission regulations allow publicly funded presidential  
2 candidates to accept private contributions and deposit them in separate accounts, called  
3 GELACs, to pay for various legal, accounting, and other compliance expenses. *See* 11  
4 CFR 9003.3. Contributions to GELACs must be raised and spent in accordance with the  
5 requirements set forth in 11 CFR 9003.3. The purpose of GELACs is to permit publicly  
6 funded presidential campaigns to preserve their public funds for campaign expenses by  
7 allowing them to pay their legal compliance expenses with private contributions. *See*  
8 Public Financing of Presidential Primary and General Election Candidates: Final Rules,  
9 60 Fed. Reg. 31854, 31855 (June 16, 1995). If a presidential campaign uses public funds  
10 to pay for compliance costs, then the GELAC may reimburse the campaign's public  
11 funds account for such payments. *See* 11 CFR 9003.3(a)(2)(ii)(G).

12 Commission regulations permit the use of GELAC funds for "legal and  
13 accounting services provided solely to ensure compliance with [FECA and the Fund  
14 Act.]" 11 CFR 9003.3(a)(2)(i)(A). Commission regulations also permit the use of  
15 GELAC funds for other enumerated expenses set forth in the regulation. *See*  
16 11 CFR 9003.3(a)(2)(i)(B) – (H). In addition, in Advisory Opinion 2004-35 (KE04), the  
17 Commission determined that recount expenses, although not specifically listed in  
18 11 CFR 9003.3(a)(2), "generally fit within the permissible uses of GELAC funds  
19 specified in 11 CFR 9003.3(a)(2)."

20 The Bipartisan Campaign Reform Act of 2002<sup>2</sup> contains a provision (known as  
21 the "stand-by-your-ad" provision) requiring candidates to devote at least four seconds of  
22 any authorized television advertisements to a written disclaimer, in addition to the

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<sup>2</sup> Pub. L. No. 107-155, sec. 311(2), 116 Stat. 81, 105-06 (2002).

1 general disclaimer requirements applicable to television broadcasts.<sup>3</sup> See

2 2 U.S.C. 441d(a), (c), (d)(1)(B)(ii); 11 CFR 110.11(c)(3)(iii)(B).

3 All of the KE04 advertisements were required to devote a minimum of four  
4 seconds specifically to compliance with the Act's disclaimer requirements. Absent these  
5 disclaimer requirements, KE04 could have used that portion of the broadcast time purely  
6 for campaign purposes. Thus, if the Kerry-Edwards campaign were required to use  
7 public funds to pay for the cost of broadcasting the four-second disclaimer, it would be  
8 able to purchase a measurably smaller amount of broadcasting time that could actually be  
9 devoted to campaign speech than it otherwise would have been able to purchase. By  
10 contrast, if the Kerry-Edwards campaign used KE-GELAC funds to pay for the  
11 broadcasting time devoted to compliance with the Act's disclaimer requirements, the  
12 campaign's public funds would be available to pay for costs of campaign speech. This  
13 would advance the GELAC's purpose of preserving public funds for campaign expenses.

14 The Commission concludes that, like the recount expenses in Advisory Opinion  
15 2004-35 (KE04), these compliance expenses fit within the permissible uses of GELAC  
16 funds specified in 11 CFR 9003.3(a)(2).

17 2. *If the answer to question 1 is yes, is a 4/30 (or 13%) attribution of such costs as a*  
18 *compliance expense a reasonable attribution, based on the four-second disclaimer rule in*  
19 *11 CFR 110.11(c)(3), and may 4/30 (or 13%) of such costs be reimbursed by KE-*  
20 *GELAC?*

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<sup>3</sup> The Commission assumes for purposes of this advisory opinion that the disclaimer requirements of 2 USC 441d(a) and (c) were satisfied simultaneously with the 4-second stand-by-your-ad disclaimer requirement of 2 USC 441d(d). Thus, the total broadcast time dedicated exclusively to compliance with the Act's disclaimer requirements was 4 seconds per 30-second advertisement.

1 Yes, the Kerry-Edwards Campaign may attribute broadcasting expenses based on  
2 the proportion of broadcasting time required for the disclaimer compared to the total  
3 broadcasting time in each advertisement:

4 Using a method similar to the time/space attribution method in 11 CFR 106.1(a),  
5 the Kerry-Edwards Campaign may determine the portion of the total broadcast time  
6 purchase that is a compliance expense by calculating the ratio of the four-second  
7 disclaimer to the total time for each advertisement. For example, for thirty-second  
8 advertisements, the ratio would be 4/30 (or 13.33%), and for sixty-second  
9 advertisements, the ratio would be 4/60 (or 6.67%). To support any reimbursement from  
10 the KE-GELAC to KE04, the Kerry-Edwards Campaign must determine the portion of  
11 each advertisement devoted exclusively to satisfying the disclaimer requirements of  
12 FECA. Then, the Kerry-Edwards Campaign must apply the appropriate ratio based on  
13 the length of each advertisement to the cost of the broadcast time for each advertisement  
14 to determine the compliance expense for each advertisement. The Kerry-Edwards  
15 Campaign may then reimburse KE04 with KE-GELAC funds for the sum of such  
16 compliance expenses for its advertisements that are documented in accordance with  
17 26 U.S.C. 9003(a), 11 CFR 9003.3(a)(3)(ii), and 9003.5.

18 KE-GELAC receipts are contributions and must comply with FECA's amount  
19 limitations and source prohibitions. *See* 11 CFR 9003.3(a)(1)(i)(B). Further, KE-  
20 GELAC must report all of its receipts and disbursements in a separate report in  
21 accordance with 11 CFR 9006.1(b)(2). *See* 11 CFR 9003.3(a)(3)(ii). These amount  
22 limitations, source prohibitions, and reporting requirements apply to KE-GELAC's  
23 contributions and disbursements related to any reimbursements to KE-04 for the

1 compliance portions of its broadcasting time purchases. Additionally, KE-04 must report  
2 its receipt of any reimbursement from KE-GELAC. *See* 2 U.S.C. 434;  
3 26 U.S.C. 9009(b); and 11 CFR 9006.1(b)(1).<sup>4</sup>  
4 *Questions 3 and 4.*

5 Questions 3 and 4 are premised on a negative response to Question 2. Because  
6 the Commission has answered Question 2 affirmatively, concluding that KE-GELAC  
7 funds may be used to reimburse KE04 for compliance media expenses, Questions 3 and 4  
8 are moot. Therefore, this advisory opinion does not address either Question 3 or 4.

9 This response constitutes an advisory opinion concerning the application of  
10 FECA, the Fund Act, and Commission regulations to the specific transaction or activity  
11 set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is  
12 a change in any of the facts or assumptions presented and such facts or assumptions are  
13 material to a conclusion presented in this advisory opinion, then the requester may not  
14 rely on that conclusion as support for its proposed activity. The advisory opinions cited  
15 herein may be found on the Commission's website at [www.fec.gov](http://www.fec.gov).

16 Sincerely,

17 Robert D. Lenhard  
18 Chairman

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<sup>4</sup> This Advisory Opinion does not alter any of the Commission's determinations in the audit of KE04 and KEGELAC. *See* Report of the Audit Division on KE04 and KE-GELAC (June 14, 2007).