

By Electronic Mail

July 25, 2007

Ms. Mary Dove
Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463

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

Dear Ms. Dove:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to Draft AO 2007-09 (Agenda Doc. No. 07-52), to be considered by the Commission at its July 26, 2007 meeting.

The Campaign Legal Center and Democracy 21 filed comments with the Commission on July 2, 2007, in response to AOR 2007-09, arguing that the list of permissible uses of GELAC funds at 11 C.F.R. § 9003.3(a)(2) is exhaustive and exclusive,¹ and makes no mention of using GELAC funds to pay any portion of the costs of broadcasting a campaign ad. Indeed, none of the permitted “uses” of GELAC funds specified in the regulation is even remotely related to the payment of broadcast costs, covering instead, *inter alia*, costs relating to legal and accounting “services” (including payroll and overhead), payment of penalties, payment of repayments, solicitation costs for the GELAC fund itself, costs of computer operations for compliance purposes, and winding down compliance costs. *Id.* at § 9003.3(a)(2)(i)(A)-(I). None of these permissible uses covers paying for broadcasting a campaign ad.

For this simple reason, as well as other important legal and policy reasons detailed in our July 2 comments, we urged 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 its GELAC fund.

Nevertheless, with little explanation or analysis, Draft AO 2007-09 concludes that Kerry-Edwards GELAC fund may reimburse the Campaign “for the compliance expense of the

¹ “Contributions to the GELAC shall be used *only* for the following purposes” 11 C.F.R. § 9003.3(a)(2)(i)(emphasis added).

broadcast time in each advertisement that is devoted to the disclaimers required under FECA.” Draft AO 2007-09 at 1. For example, a publicly financed presidential campaign can use private GELAC contributions to pay more than 13 percent of the costs of broadcasting a 30-second ad. Draft AO at 6.

The sole justification for this position set forth in the Draft Opinion is based on a mischaracterization of the purpose of the GELAC rules. The Draft Opinion states that the “purpose of GELAC is to permit publicly funded presidential campaigns *to preserve their public funds for campaign expenses* by allowing them to pay their legal compliance expenses with private contributions.” Draft at 4 (emphasis added). In support of this assertion, the Draft cites the 1995 Explanation and Justification for the GELAC rules, *see* Public Financing of Presidential Primary and General Election Candidates, Final Rule and E&J, 60 Fed. Reg. 31854 (June 16, 1995), but the E&J contains no such justification for GELAC funds. The GELAC rules were promulgated not to ensure that candidates had sufficient funds to pay campaign expenses, but rather, to ensure that candidates had sufficient funds to pay legal and accounting compliance expenses. The alleged problem addressed by the GELAC rules is that, in the absence of allowing candidates to raise private contributions for compliance purposes, “committees would face extraordinary pressure to minimize the amount spent on compliance so as to devote as much money as possible to campaigning.” *Id.* at 31855.

The Draft Opinion turns this justification for the GELAC rules on its head. The Kerry-Edwards Campaign has a surplus – not a shortage – of funds to pay for accounting and compliance expenses, a fact the Campaign nowhere mentions. Rather than explaining how its request to use GELAC funds to pay for its campaign ads comports with the public policy supporting the GELAC rules, the Campaign instead glibly asserts that our comments “miss the point” of the advisory opinion request. The Campaign offers hollow assurances that the presidential public financing system will not be undermined in the manner detailed in our July 2 comments, arguing first, that it is not requesting a general rule of law, and second, that in any event approval of its request would affect only a “narrow subset of candidates.” Suppl. Kerry-Edwards Campaign Comments at 2.

As to the first point, there is little doubt that this advisory opinion will set a precedent for the future – and if approved as drafted, will be relied on as a routine matter by every future publicly financed general election presidential candidate as authority to use private funds from the campaign’s GELAC account to pay a portion of the costs of broadcasting campaign ads. As a practical matter, this amounts to modifying the regulation through the advisory opinion process to expand the list of permissible uses of GELAC funds to cover the disclaimer portion of broadcast ads, a practice that is contrary to 2 U.S.C. § 437f(b) and 11 C.F.R. § 112.4(e).

As to the second point, the Campaign’s “narrow subset of candidates” argument is a red herring. The Commission’s advisory opinion here will set a precedent that will impact *every* future publicly-financed general election candidate. That may affect a “narrow” subset of all Federal candidates, but it will affect the entire set of candidates subject to the Presidential Election Campaign Fund Act.

As we pointed out in our earlier comments, the Draft Opinion opens a door that has potentially far-reaching consequences for the expansion of GELAC funding of presidential campaign activities. On the basis of the same reasoning as set forth in the Draft, publicly financed candidates will say that the portion of every campaign solicitation mailing devoted to gathering contributor information, 2 U.S.C. 434(b)(3), is a “compliance” cost that can be paid for with GELAC funds, and all direct mail costs should be so allocated and subsidized. On the basis of the same reasoning, a publicly funded candidate will argue that GELAC funds should be used not only for that portion of broadcast ads that contain the “stand by your ad” disclaimer of section 441d(d), but also for that portion of *all* public communications by the campaign that contain the basic “paid for by” disclaimer of section 441d(a).

Campaign ads and campaign solicitations have always been treated as “qualified campaign expenses” that are incurred “to further the election” of a presidential candidate. 26 U.S.C. § 9002(11). The presidential public financing law is clear that “no contributions” may be used “to defray qualified campaign expenses” – only public funds. *Id.* at 9003(b)(2). The proposal before the Commission is to start deconstructing ads, and by logical extension, solicitations as well, to allow an allocated portion of virtually all campaign communications to be subsidized with private contributions from a GELAC fund. Opening this door represents a major expansion of the use of GELAC funds and undermines the public financing laws by dramatically increasing the role of private fundraising in a system that is intended to be wholly publicly financed. Once a publicly financed candidate can start paying for a portion of every campaign ad and every campaign mailing with private contributions, the goals of the presidential public financing system will have been materially weakened. This use of GELAC funds has never been permitted in the past, and the Commission should not start now.

For these reasons, and those detailed in our July 2 comments, the Commission should reject Draft AO 2007-09 and should instead 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

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