September 16, 2004

Lawrence M. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Comments on AOR 2004-35

Re: Comments on Advisory Opinion Request 2004-35

Dear Mr. Norton:

These comments are filed on behalf of Democracy 21, the Campaign Legal Center and the Center for Responsive Politics in regard to AOR 2004-35, an advisory opinion request submitted by the Kerry-Edwards campaign, seeking the Commission's opinion on the rules that apply to the raising and spending of funds to pay for recount expenses.

The AOR presents two central questions. The first is whether provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) affect the longstanding Commission rule that money raised and spent by a federal candidate with respect to a recount is neither a "contribution" nor an "expenditure." The second question is whether funds from a presidential campaign GELAC account can be used to pay recount expenses.

1. The application of BCRA. The Commission has long taken the position that a federal candidate can raise donations from individuals for recount expenses without those funds being subject to the contribution limits in 2 U.S.C. § 441a. The Commission has, however, treated funds raised for recount purposes as subject to 2 U.S.C. § 441b, which prohibits corporate or union contributions, and to 2 U.S.C. § 441e, which prohibits contributions from foreign nationals. This position is set forth in 11 C.F.R. § 100.91 (stating that money donated "with respect to a recount of the results of a Federal election is not a contribution except that the prohibitions of 11 C.F.R. 110.20 and part 114 apply).[1]

BCRA, however, provides that a federal candidate or officeholder, or any entity directly or indirectly established, financed, maintained or controlled by a candidate or officeholder shall not "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office" unless the funds "are subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. § 441i(e)(1)(A).

[1] A comparable provision exempts recount funds from the definition of "expenditure," again with the proviso that the prohibitions on corporate or union funds, and funds from foreign nationals, apply. 11 C.F.R. § 100.151.

This provision applies to recount funds. And it applies for reasons that the general counsel's office set forth at length in late 2002, when the provisions of BCRA had just gone into effect.

On October 30, 2002, one week before the effective date of BCRA, the four congressional campaign committees – the DSCC, DCCC, NRSC and NRCC – all submitted an unusual joint request for an advisory opinion, seeking advice on the impact of BCRA on recount funds. The general counsel prepared two draft opinions for consideration by the Commission at its meeting on November 14, 2002, and publicly released those drafts on November 12, 2002. The next day, November 13, 2002, the campaign committees withdrew their AOR, so the Commission never ruled on the matter. *See* In the Matter of AOR 2002-13 (Nov. 14, 2002).

In a memorandum accompanying the two draft opinions, Agenda Document 02-79 (Nov. 12, 2002), the general counsel's office recommended one of the opinions – Draft A – over the other. We believe the analysis in this Draft is correct under BCRA, and should be followed by the Commission in this matter.

The Draft explains the existing regulation, which dates back to 1977, as based on the position that while recount funds are not "for the purpose of influencing" a federal election, and thus not subject to section 441a, they are "in connection with" a federal election, and thus subject to sections 441b and 441e. The Draft notes:

> These regulations implicitly recognize that while payments for a recount or election contest are not "for the purpose of influencing a Federal election" and therefore such payments are not "contributions" or "expenditures" under the Act, payments for a recount are "in connection with a Federal election," and therefore trigger the prohibitions on being funded by national banks, corporations and labor organizations in 2 U.S.C. 441b and foreign nationals in 2 U.S.C. 441e....
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> The rationale for the Commission's long-standing regulation is revealed by a close examination of the relevant statutory provisions. Contributions that are subject to the 2 U.S.C. 441a limits are by definition funds provided "for the purpose of influencing" a Federal election. Contributions and expenditures that are subject to the 2 U.S.C. 441b prohibitions on corporate or labor organization funds or the 2 U.S.C. 441e prohibition on foreign national funds need only be "in connection with" a Federal election. Consequently, the Commission concluded that while funds for recount expenses are "in connection with" a Federal election so they cannot include corporate or labor organization funds, they are not "for the purpose of influencing" the election, so they are not subject to the contribution limits or reporting requirements.
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> Agenda Doc. 02-79 (Draft A) at 6-7.

Although we believe that the Commission's 1977 regulation is incorrect – and that recount funds always should have been considered "for the purpose of influencing" a federal election and thus subject to the contribution limits of section 441a – the point is now moot because of section 441i(e) of BCRA, which requires that funds raised and spent by a Federal candidate "in connection with" an election must be subject to all of the prohibitions and limitations of the Act, including the section 441a contribution limits. Since the Commission's existing regulation is based on the view that recount funds are "in connection with" an election, the requirements imposed by BCRA in section 441i(e) necessarily apply to recount funds, and thus the contribution limits in section 441a now necessarily apply to such funds.

This is precisely the position taken by the general counsel's office in its recommended draft:

> Congress's choice of the "in connection with" standard in 2 U.S.C. 441i(e) prohibits a Federal candidate's solicitation, receipt, direction, transfer or disbursement of funds not subject to the limits, prohibitions and reporting requirements of the Act, even for recounts. To conclude otherwise, the Commission would have to determine that expenses for recounts are not "in connection with" the Federal election whose results are subject to recount. The Commission's determination that recount expenses are "in connection with" the relevant Federal election is dictated by the logic and the plain language of BCRA, particularly in light of the Commission's regulation dating back to 1977 that is premised on the conclusion that recounts and election contests are in connection with Federal elections. Therefore, Federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained or controlled by or acting on behalf of one or more Federal candidates or officeholders, are prohibited by 2 U.S.C. 441i(e)(1) from soliciting, receiving, directing, transferring, or spending funds for a recount unless those funds are subject to the limitations, prohibitions, and reporting requirements of the Act.
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> Agenda Doc. 02-79 (Draft A) at 15-16
> (emphasis added)[2]

We agree with this analysis, and we urge the Commission to adopt it.[3]

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[2] The Draft further noted that to the extent the existing regulations are inconsistent with this conclusion, "the Commission intends to reevaluate the continuing viability of these rules in a subsequent rulemaking." *Id.*

[3] The alternative analysis set forth in Draft B – and disfavored by the general counsel – should clearly be rejected here. That analysis concludes that "recounts are not elections under the Act" and therefore section 441i(e) of BCRA does not apply to recount funds. Agenda Doc. 02-79 (Draft B) at 13. Of course, if this is right, then there is no statutory basis for applying sections 441b or 441e to recount funds either, as Commission regulations have long done. Thus, this analysis rejects the approach of the Commission's longstanding regulation. Further, the logical conclusion of the Draft B

Furthermore, we agree with the general counsel's conclusion in Draft A that the basic contribution limit on individuals under section 441a(a)(1) would apply to donations to a recount fund, and such donations would thus be capped at $2,000. *Id.* at 17.

2. The use of GELAC funds. In the pending AOR, the Kerry campaign suggests that it be permitted to use funds from its GELAC account to pay for recount expenses. As the campaign notes, GELAC funds are subject to the contribution limits, source prohibitions, and reporting requirements of the Act. 11 C.F.R. § 9003.3(a)(1)(i)(B). They thus meet the requirements imposed by BCRA in section 441i(e).[4]

We believe the Commission should allow GELAC funds to be spent for recount purposes. This would allow candidates to raise funds for use in a potential recount. Under existing regulations, the funds would be subject to the contribution limits of Part 110 and the source prohibitions of Part 114. 11 C.F.R. § 9003.3(a)(1)(i)(B). Further, an individual can make only a single contribution of no more than $2,000 to a candidate's GELAC account. This result is strongly preferable to the alternative of allowing presidential candidates to establish a separate recount fund to which individuals could contribute, in addition to contributing to the candidate's separate GELAC account. The Commission absolutely should avoid multiplying the accounts which can be set up by a publicly financed presidential candidate to receive private contributions.

Moreover, while the existing regulations on GELAC funds do not specifically refer to recount expenses, the general purpose of a GELAC fund closely suggests the Commission should find such costs to be a permissible use. GELAC funds are to be used to pay legal compliance expenses, 11 C.F.R. § 9009.3(a)(2)(i)(A), and "winding down" expenses. *Id.* at (I). Recount expenses typically are predominantly legal costs, and could also be considered part of the process of "winding down" from the election itself.

At bottom, we believe the Commission must avoid any result here which would open the door to publicly funded presidential candidates (or indeed, privately funded presidential candidates) being able to raise and spend funds not subject to the contribution limits. That result would be flatly contrary to BCRA's ban on soft money. Allowing use of GELAC funds for recount purposes is the most orderly and least disruptive way to achieve this goal.

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analysis is that publicly financed presidential candidates could solicit and receive *unlimited corporate and union treasury funds, as well as unlimited donations from individuals, including foreign nationals*. This would be an absurd result that is plainly and flagrantly contrary to BCRA.

[4] It is our view that GELAC accounts themselves are not authorized by the presidential general election funding law. That law's premise is that a publicly funded candidate in the general election should not be permitted to raise any private funds for his or her general election campaign, even funds subject to the contribution limits and source prohibitions of the Act. Although we accordingly believe that there is no statutory basis for the Commission to permit GELAC accounts at all, we recognize that Commission regulations have long permitted these accounts, and continue to do so in this election. 11 C.F.R. § 9003.3.

We appreciate the opportunity to comment on this matter.

Sincerely,

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| */s/Fred Wertheimer* | */s/ J. Gerald Hebert* | */s/ Lawrence Noble* |
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