

October 26, 2004

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-38 is available for public comments under this procedure. It was requested by Steve Hoersting and Tim McKeever, on behalf of George Nethercutt and the Nethercutt for Senate committee

Proposed Advisory Opinion 2004-38 is scheduled to be on the Commission's agenda for its public meeting of Thursday, October 28, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on October 27, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2004-38, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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2004 OCT 26 A 11: 56

October 26, 2004

MEMORANDUM

AGENDA ITEM
For Meeting of: 10-28-04
SUBMITTED LATE

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Mai T. Dinh *MD*
Assistant General Counsel

J. Duane Pugh Jr. *JDP*
Attorney

Margaret G. Perl *MGP*
Attorney

Subject: Draft AO 2004-38 – Alternative Drafts

The Office of General Counsel has prepared two draft Advisory Opinions related to the request by Representative Nethercutt and Nethercutt for Senate. The request asks how the requestors may raise and spend funds for a recount connected to the 2004 general election. Draft A concludes that because election recount expenses are "in connection with" a Federal election, Representative Nethercutt is subject to 2 U.S.C. 441i(e), which prohibits any candidate or Federal officeholder from soliciting, raising or spending any funds that are not subject to the limitations, prohibitions, and reporting requirements of FECA. Draft B concludes that Representative Nethercutt may raise and spend recount funds so long as he complies with Commission regulations that do not

impose the amount limitations or reporting requirements of FECA, but do prohibit recount funds from including money from prohibited sources.

OGC recommends Draft A.

Attachment

Drafts A and B

1 **ADVISORY OPINION 2004-38**

2 **Stephen M. Hoersting, Esq.**
3 **General Counsel**
4 **National Republican Senatorial Committee**
5 **425 Second Street, N.E.**
6 **Washington, DC 20002**

DRAFT A

7 **Tim McKeever, Esq.**
8 **Counsel**
9 **Nethercutt for Senate Committee**
10 **330 112th Avenue, N.E.**
11 **Suite 101**
12 **Bellevue, Washington 98004**

13 **Dear Messrs. Hoersting and McKeever:**

14 **We are responding to your inquiry on behalf of Representative George R.**
15 **Nethercutt and Nethercutt for Senate (collectively, "the requestors"), regarding efforts to**
16 **raise and spend funds for any election recount expenses that might arise from**
17 **Representative Nethercutt's campaign for United States Senator under the Federal**
18 **Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations.**
19 **Because a recount of the votes cast in a Senate election is in connection with a Federal**
20 **election, the requestors must pay for election recount expenses with funds that comply**
21 **with the limitations, prohibitions, and reporting requirements of the Act. In addition,**
22 **Representative Nethercutt's solicitation of funds that will be used to pay election recount**
23 **expenses must also comply with the Act and Commission regulations.**

24 **Representative George R. Nethercutt currently represents the Fifth Congressional**
25 **district of Washington and is seeking election to the United States Senate. His principal**
26 **campaign committee is Nethercutt for Senate. In preparing for the possibility that the**
27 **2004 general election of the United States Senator from Washington may give rise to one**
28 **or more recounts, the requestors raise at least five questions concerning election recount**

1 expenses.¹ These questions involve (1) the requestors' establishing and controlling a
2 fund to raise and spend funds to pay election recount expenses; (2) Representative
3 Nethercutt's soliciting funds for election recount expenses for the non-Federal account of
4 a State party committee; (3) Representative Nethercutt's making a "general solicitation"
5 of funds for election recount expenses for 501(c) tax-exempt organizations that are not
6 registered as political committees; (4) Representative Nethercutt's soliciting funds for
7 election recount expenses for 527 tax-exempt organizations that are not registered as
8 political committees; and (5) Representative Nethercutt and Nethercutt for Senate
9 engaging in joint fundraising with other entities in order to meet election recount
10 expenses.

11 ***Legal Analysis and Conclusions***

12 ***Question 1: May the requestors establish and control an election recount fund? If so,***
13 ***how can the requestors comply with the Act and Commission regulations as they raise***
14 ***and spend money for election recount expenses, which are expenses incurred solely with***
15 ***respect to participating in a recount of the votes cast in a Federal election?***

16 The requestors may establish an election recount fund as a separate bank account
17 of Nethercutt for Senate or they may establish this fund as a separate entity. In either
18 case, an election recount fund established by a candidate or Federal officeholder is
19 subject to 2 U.S.C. 441i(c)(1)(A), and therefore any funds solicited, received, directed,
20 transferred or spent by the election recount fund are subject to the limitations,
21 prohibitions, and reporting requirements of the Act.

¹ The Commission understands that "election recount expenses" would include legal fees and expenses, fees for payment of staff, expenses for administrative overhead and office equipment incurred solely with respect to participating in a recount related to the November 2004 election for United States Senator from Washington.

1 **The Act and Commission Regulations**

2 The Act and Commission regulations define the terms "contribution" and
3 "expenditure" to include any gift, loan, or payment of money or anything of value for the
4 purpose of influencing a Federal election. 2 U.S.C. 431(8)(A)(i) and (9)(A)(i);
5 11 CFR 100.52(a) and 100.111(a). Commission regulations promulgated before the
6 enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116
7 Stat. 81 (2002) ("BCRA"), make exceptions from the cited definitions for gifts, loans, or
8 payments made with respect to a recount of the results of a Federal election.
9 11 CFR 100.91 and 100.151.² These recount regulations recognize that the Act's
10 definition of "election" does not specifically include recounts. *See* 2 U.S.C. 431(1); *see*
11 *also* 11 CFR 100.2. Nonetheless, these recount regulations expressly bar the receipt or
12 use of funds prohibited by 11 CFR 110.20 (foreign nationals) and Part 114 (corporations,
13 labor organizations, and national banks), thereby implementing the Act's prohibitions on
14 corporations, labor organizations, national banks, and foreign nationals making
15 contributions or expenditures "in connection with" Federal elections. *See* 2 U.S.C.
16 441b(a) and 441e(a)(1)(A); *see also* 11 CFR 110.20 and Part 114. Because these source
17 prohibitions apply to election recount funds under the recount regulations, those
18 regulations recognize that funds received or spent for recounts of the votes cast in Federal
19 elections are funds received or spent "in connection with" these elections under 2 U.S.C.
20 441b and 441e.

² These regulations were recodified without substantive change from 11 CFR 100.7(b)(20) and 100.8(b)(20), effective November 6, 2002. *See* 67 Fed. Reg. 50582 (Aug. 5, 2002). Prior to 1980, similar provisions appeared at 11 CFR 100.4(b)(15) and 100.7(b)(17). *See* 45 Fed. Reg. 15080 (Mar. 7, 1980).

1 **Previous Advisory Opinions**

2 The Commission has applied the statutory and regulatory provisions existing prior
3 to BCRA to issues related to election recounts in two advisory opinions. First, in
4 Advisory Opinion 1978-92, the Commission concluded that any funds received by a
5 separate organizational entity established by the candidate's authorized committee solely
6 for the purposes of funding the election recount effort would not be subject to the
7 contribution limitations of 2 U.S.C. 441a, and would not trigger political committee
8 status or reporting obligations for the separate election recount entity. The Commission
9 also concluded that the source prohibitions applicable to funds raised for the separate
10 election recount entity were those applicable to corporations, labor organizations, and
11 national banks, which were included in 11 CFR 100.4(b)(15) and 100.7(b)(17).³ The
12 Commission noted that involvement of current officers and staff of the authorized
13 committee as organizers and principals in a separate election recount entity would not
14 change these conclusions.

15 In Advisory Opinion 1998-26, the Commission considered a candidate's principal
16 campaign committee that established, as a wholly separate entity, a contested election
17 trust fund. The Commission reiterated that the trust fund was not subject to reporting
18 requirements, could accept amounts in excess of the contribution limitations in
19 2 U.S.C. 441a, but could not accept funds from prohibited sources, as specified in the
20 predecessors to the recount regulations, 11 CFR 100.7(b)(20) and 100.8(b)(20).
21 Advisory Opinion 1998-26.

³ In the recodification of 11 CFR 100.4(b)(15) and 100.7(b)(17) as 11 CFR 100.7(b)(20) and 100.8(b)(20), respectively, the prohibition on funds from foreign nationals was added to the regulation. See 45 Fed. Reg. 15080, 15102 (Mar. 7, 1980).

1 **The Bipartisan Campaign Reform Act of 2002**

2 BCRA took effect after these advisory opinions were issued. Under BCRA,
3 candidates and Federal officeholders may not solicit, receive, direct, transfer, or spend
4 funds "in connection with an election for Federal office" unless the funds are subject to
5 the limitations, prohibitions, and reporting requirements of the Act. 2 U.S.C.
6 441i(e)(1)(A). These restrictions apply to candidates and Federal officeholders, their
7 agents, and entities directly and indirectly established, financed, maintained, or controlled
8 by, or acting on behalf of, any such candidates or officeholders. *Id.*; *see also* 11 CFR
9 300.60 and 300.61.

10 Congress's choice of the "in connection with" standard in 2 U.S.C. 441i(e)(1)(A)
11 requires the Commission to conclude that section 441i(e)(1)(A) applies to funds raised or
12 spent on recounts of Federal elections. This conclusion flows from the plain language of
13 BCRA, as well as the Commission's recount regulations dating to 1977 that are premised
14 on the conclusion that recounts are in connection with Federal elections. *See* 2 U.S.C.
15 441b(a), 441e(a)(1)(A); 11 CFR 100.91 and 100.151. Therefore, candidates and Federal
16 officeholders, their agents, and entities directly or indirectly established, financed,
17 maintained or controlled by or acting on behalf of one or more candidates or Federal
18 officeholders, are prohibited by 2 U.S.C. 441i(e)(1)(A) from soliciting, receiving,
19 directing, transferring, or spending funds for expenses related to participating in a recount
20 of the votes cast in a Federal election unless those funds are subject to the limitations,
21 prohibitions, and reporting requirements of the Act. This is true regardless of whether the
22 recount activity is conducted through a separate bank account of a candidate's authorized
23 committee or a separate entity.

1 **Application to Requestors' Proposals**

2 While donations to election recount funds are not contributions, *see*
3 11 CFR 100.91, Representative Nethercutt's receipt of donations in excess of the Act's
4 amount limitations is prohibited by 2 U.S.C. 441i(e)(1)(A). The amount limitation
5 referenced in section 441i(e)(1)(A) is the amount that may be contributed to Federal
6 candidates and their authorized committees "with respect to any election." 2 U.S.C.
7 441a(a)(1)(A) and (2)(A). Recounts are not separate "elections" under 2 U.S.C. 431(1),
8 so donations to recount funds are provided "with respect to" the election that is the
9 subject of the recount, in this instance the November 2004 general election.⁴ Thus,
10 donations to any election recount fund established by the requestors must be aggregated
11 with general election contributions to Nethercutt for Senate from the same source, and the
12 aggregate total must not exceed \$2,000⁵ per person or \$5,000 per multicandidate political
13 committee.

14 Section 441i(e)(1)(A) is not applicable to donors to an election recount fund, nor
15 does that section convert the donations into contributions for purposes of 2 U.S.C. 441a.
16 Consequently, the aggregate bi-annual contribution limits of 2 U.S.C. 441a(a)(3) do not
17 apply to donations to election recount funds. The requestors may advise their prospective
18 donors that donations to election recount funds will not be aggregated with contributions

⁴ In contrast, contributions to a candidate subject to a runoff election are subject to a separate contribution limit from the general election because a runoff is defined as an "election" in 2 U.S.C. 431(1)(A), while a recount is not.

⁵ After January 1, 2005, the contribution amount limitation applicable to contributions to candidates from persons other than multicandidate political committees will increase from \$2,000. However, pursuant to 11 CFR 110.1(b)(3)(iii)(C), contributions may not exceed the limitations in effect on the date of the related election. Thus, the aggregate total of contributions to Nethercutt for Senate for the general election and any election recount donations may not exceed \$2,000.

1 from individuals for purposes of the aggregate bi-annual contribution limits of 2 U.S.C.
2 441a(a)(3).

3 The prohibitions applicable to donations to candidate-established election recount
4 funds are in 2 U.S.C. 441b (national banks, corporations, and labor organizations), 441c
5 (government contractors), 441e (foreign nationals), 441f (in the name of another), and
6 441g (currency in excess of \$100).

7 The reporting requirements applicable to candidate-established election recount
8 funds are as follows. If the candidate-established election recount fund is a separate
9 account of Nethercutt for Senate, then its receipts and disbursements must be reported on
10 Nethercutt for Senate's reports as "other receipts" and "other disbursements,"
11 respectively, and must be itemized if they exceed \$200 in the aggregate. See
12 11 CFR 104.3(a)(3)(x) and (b)(2)(vi). If the candidate-established election recount fund
13 is a separate entity established by Representative Nethercutt, then the separate entity must
14 report as an authorized committee under 11 CFR 100.5(d) in order to comply with the
15 reporting obligations under 2 U.S.C. 441i(e)(1)(A). Under 11 CFR 104.3(f), Nethercutt
16 for Senate, the principal campaign committee, must consolidate in its report any other
17 authorized committee's reports. Therefore, if the election recount fund is a separate
18 entity, then Nethercutt for Senate must report the election recount fund's receipts and
19 disbursements as "itemized other receipts" and "itemized other disbursements,"
20 respectively.

21 To the extent that Advisory Opinions 1978-92 and 1998-26 are inconsistent with
22 this result, they are superseded with respect to candidates. To the extent that 11 CFR
23 100.91 and 100.151 may need clarification in order to reflect 2 U.S.C. 441i(e) with

1 respect to candidates or more generally, the Commission is considering whether to
2 reevaluate these rules in a subsequent rulemaking.

3 *Question 2: May Representative Nethercutt solicit funds for election recount expenses*
4 *for the non-Federal account of a State party committee?*

5 Except in certain limited circumstances, Representative Nethercutt may not do so.

6 As a general matter, candidates and Federal officeholders may not solicit funds in
7 connection with an election where those funds are not subject to the limitations,
8 prohibitions, and reporting requirements of the Act unless the solicitation comes within a
9 specific exception. 2 U.S.C. 441i(e). Funds in a non-Federal account of a State party
10 committee are not subject to the Act's reporting requirements, and they may not be
11 subject to the Act's amount limitations and source prohibitions.

12 One of the situations in which candidates and Federal officeholders may solicit
13 such funds is a fundraising event for a State party committee. 2 U.S.C. 441i(e)(3). A
14 candidate or Federal officeholder may attend, speak, or be a featured guest at a
15 fundraising event for a State, district or local committee of a political party. 2 U.S.C.
16 441i(e)(3). Commission regulations implementing this provision indicate that the
17 exemption also applies to fundraising events where Levin or non-Federal funds are raised
18 and that candidates and Federal officeholders may speak without restriction or regulation.
19 11 CFR 300.64. Therefore, Representative Nethercutt may attend, speak, and otherwise
20 participate without restriction in any State party committee fundraising event, even if the

1 State party committee raises funds at this event for election recount expenses that are not
2 subject to the amount limitations or reporting requirements of the Act.⁶

3 There is no exception in the Act or Commission regulations, however, for oral
4 (outside a fundraising event) or written solicitations by a candidate or Federal
5 officeholder for the non-Federal account of State party committees in connection with a
6 Federal election. Because the non-Federal account of a State party committee does not
7 comply with the amount limitations, source prohibitions and reporting requirements of
8 the Act, Representative Nethercutt may not make any oral or written solicitations for the
9 non-Federal account of the State party committee other than at a fundraising event
10 described above. In addition, Representative Nethercutt may not sign any solicitations
11 for non-Federal funds or participate in any other "pre-event" activities involving
12 solicitations of non-Federal funds. *See Explanation and Justification for Regulations on*
13 *Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money*, 67 Fed. Reg.
14 49064, at 49108 (July 29, 2002).

15 *Question 3: May Representative Nethercutt make a "general solicitation" of funds for*
16 *election recount expenses for 501(c) tax-exempt organizations that are not registered as*
17 *political committees, where these organizations are not directly or indirectly established,*
18 *financed, maintained, controlled by or acting on behalf of the requestors?*

19 An exception to the prohibitions of section 441i(e)(1) permits candidates and
20 Federal officeholders to solicit funds in certain circumstances on behalf of any
21 organization that is described in section 501(c) and that is exempt from taxation under
22 section 501(a) of the Internal Revenue Code. 2 U.S.C. 441i(e)(4); 11 CFR 300.65; *see*

⁶ State party committees must still comply with the Act and Commission regulations' restrictions on their ability to raise and spend non-Federal funds and Levin funds including funds used for election recount expenses.

1 also Advisory Opinion 2003-05. Under 2 U.S.C. 441i(e)(4)(A), candidates and Federal
2 officeholders may make "general solicitations" for 501(c) organizations whose principal
3 purpose is not to conduct specific types of Federal election activities, consisting of voter
4 identification, voter registration, get-out-the-vote activity, and generic campaign activity.
5 See 2 U.S.C. 431(20)(A)(i) and (ii); 11 CFR 100.24. However, this exception only
6 applies where the general solicitation "does not specify how the funds will be or should
7 be spent." 2 U.S.C. 441i(e)(4)(A).

8 Your request asks whether Representative Nethercutt may solicit funds for such
9 501(c) organizations if he mentions the word "recount" in the solicitation. The answer
10 will turn not on whether a particular word appears in the solicitation, but rather on
11 whether the solicitation specifies how the funds will or should be spent. Thus,
12 Representative Nethercutt may not make a "general solicitation" for 501(c) organizations
13 if the solicitation specifies that the funds will or should be used for election recount
14 expenses.

15 *Question 4: May Representative Nethercutt solicit funds for election recount expenses*
16 *for 527 tax-exempt organizations that are not registered as political committees, where*
17 *these organizations are not directly or indirectly established, financed, maintained,*
18 *controlled by or acting on behalf of the requestors?*

19 Your request also asks whether Representative Nethercutt may solicit funds for
20 election recount expenses for political organizations that are described in section 527 of
21 Internal Revenue Code, 26 U.S.C. 527, but are not registered as political committees with
22 the Commission. Donations to unregistered 527 organizations for election recount
23 expenses are not subject to the Act's amount limitations or reporting requirements.

Candidates and Federal officeholders may not solicit these donations unless permitted under a specific exception. 2 U.S.C. 441i(e). In contrast to the limited exceptions permitting candidates and Federal officeholders to solicit non-Federal funds for 501(c) organizations under certain conditions, BCRA does not create any similar exceptions for candidates or Federal officeholders to solicit on behalf of 527 organizations. Thus, Representative Nethercutt may not solicit funds for election recount expenses for unregistered 527 organizations.

Question 5: May Representative Nethercutt and Nethercutt for Senate engage in joint fundraising with other Federal candidates, non-Federal candidates, non-Federal accounts of State party committees, or 501(c) and 527 tax-exempt organizations to raise Federal and non-Federal funds for election recount expenses?

Political committees, including the principal campaign committees of Federal candidates, may engage in joint fundraising with other political committees and unregistered committees or organizations subject to the requirements of 11 CFR 102.17. Nevertheless, Federal candidates and their agents and authorized committees remain subject to the section 441i(e) restrictions on soliciting non-Federal funds in connection with a Federal election. See 11 CFR 102.17(a). As discussed above, the Commission has concluded that candidates may participate in joint fundraising activity with organizations where both Federal and non-Federal funds are raised without soliciting non-Federal funds provided that the activity include certain disclaimers. See Advisory Opinion 2003-05. Therefore, Representative Nethercutt and Nethercutt for Senate may engage in joint fundraising for election recount expenses with all the organizations listed in your request subject to the disclaimers and restrictions described below.

1 For any joint fundraising efforts, Representative Nethercutt and Nethercutt for
2 Senate must follow the joint fundraising procedures in section 102.17. If the joint
3 fundraising activity is also raising non-Federal funds for the other participating
4 organization(s) or non-Federal candidate(s), Representative Nethercutt and Nethercutt for
5 Senate may accept only Federal funds in their portion of the proceeds and may solicit
6 only Federal funds for any participating organization(s) or candidate(s). Moreover, to
7 ensure that Representative Nethercutt does not solicit funds that are not subject to the
8 limitations, prohibitions or reporting requirements of the Act for these other organizations
9 in violation of section 441i(e)(1)(A), he must use the oral and written disclaimers
10 specified in prior advisory opinions to make clear that he is only soliciting Federal funds.
11 *See* Advisory Opinion 2003-36. Subject to this restriction, Representative Nethercutt
12 may engage in joint fundraising to raise Federal and non-Federal funds for election
13 recount expenses with any or all of the entities described in your request.⁷

14 The Commission expresses no opinion regarding the possible application of any
15 rules of the House of Representatives to the described activity, because the interpretation
16 of those rules is not within its jurisdiction.

17 This response constitutes an advisory opinion concerning the application of the
18 Act and Commission regulations to the specific transaction or activity set forth in your
19 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
20 of the facts or assumptions presented, and such facts or assumptions are material to a
21 conclusion presented in this advisory opinion, then the requestors may not rely on that
22 conclusion as support for their proposed activity.

⁷ These various organizations must still comply with any applicable sections of the Act and Commission regulations which may restrict their ability to raise and spend non-Federal funds including funds used for election recount expenses.

1

2

Sincerely,

3

Bradley A. Smith
Chairman

4

5 Enclosures (AOs 2003-36, 2003-05, 1998-26, and 1978-92)

1 **ADVISORY OPINION 2004-38**

2 **Stephen M. Hoersting, Esq.**
3 **General Counsel**
4 **National Republican Senatorial Committee**
5 **425 Second Street, N.E.**
6 **Washington, DC 20002**

DRAFT B

7 **Tim McKeever, Esq.**
8 **Counsel**
9 **Nethercutt for Senate Committee**
10 **330 112th Avenue, N.E.**
11 **Suite 101**
12 **Bellevue, Washington 98004**

13 **Dear Messrs. Hoersting and McKeever:**

14 **We are responding to your inquiry on behalf of Representative George R.**
15 **Nethercutt and Nethercutt for Senate (collectively, "the requestors"), regarding efforts to**
16 **raise and spend funds for any election recount expenses that might arise from**
17 **Representative Nethercutt's campaign for United States Senator under the Federal**
18 **Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations.**
19 **The requestors may raise and spend funds for themselves or for other organizations for**
20 **any election recount expenses provided that the funds are not from prohibited sources. In**
21 **addition, Nethercutt for Senate must report the receipts and disbursements for election**
22 **recount expenses if a recount fund is a separate bank account of Nethercutt for Senate.**

23 **Representative George R. Nethercutt currently represents the Fifth Congressional**
24 **district of Washington and is seeking election to the United States Senate. His principal**
25 **campaign committee is Nethercutt for Senate. In preparing for the possibility that the**
26 **2004 general election of the United States Senator from Washington may give rise to one**
27 **or more recounts, the requestors raise two questions concerning election recount**

1 expenses.¹ These questions involve the requestors' establishing and controlling a fund to
2 raise and spend funds to pay election recount expenses and Representative Nethercutt's
3 soliciting funds and participating in joint fundraising for a variety of different types of
4 organizations not directly or indirectly established, financed, maintained, or controlled by
5 the requestors to pay election recount expenses.

6 ***Legal Analysis and Conclusions***

7 ***Question 1: May the requestors establish and control an election recount fund? If so,***
8 ***how can the requestors comply with the Act and Commission regulations as they raise***
9 ***and spend money for election recount expenses, which are expenses incurred solely with***
10 ***respect to participating in a recount of the votes cast in a Federal election?***

11 The requestors may establish an election recount fund as a separate bank account
12 of Nethercutt for Senate or they may establish this fund as a separate entity. In either
13 case, donations to an election recount fund are not subject to the Act's contributions
14 limitations, but are subject to the prohibitions of funds from a corporation, labor
15 organization, national bank, or foreign national. An election recount fund that is a
16 separate entity is not subject to the Act's reporting requirements, while such a fund that is
17 a bank account of Nethercutt for Senate must report its receipts and disbursements on the
18 Nethercutt for Senate reports.

19 ***The Act and Commission Regulations***

20 The Act and Commission regulations define the terms "contribution" and
21 "expenditure" to include any gift, loan, or payment of money or anything of value for the

¹ The Commission understands that "election recount expenses" would include legal fees and expenses, fees for payment of staff, expenses for administrative overhead and office equipment incurred solely with respect to participating in a recount related to the November 2004 election for United States Senator from Washington.

1 purpose of influencing a Federal election. 2 U.S.C. 431(8)(A)(i) and (9)(A)(i);
2 11 CFR 100.52(a) and 100.111(a). Commission regulations promulgated before the
3 enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116
4 Stat. 81 (2002) ("BCRA"), make exceptions from the cited definitions for gifts, loans, or
5 payments made with respect to a recount of the results of a Federal election.
6 11 CFR 100.91 and 100.151.² The Commission explained these exclusions of costs of
7 recounts "since, though [recounts and election contests] are related to elections, [they] are
8 not Federal elections as defined by the Act." H.R. Doc. No. 95-44, at 40 (1977). The
9 Act defines elections to include, *inter alia*, primary, general, special and runoff elections,
10 but it does not address recounts or election contests. See 2 U.S.C. 431(1); see also 11
11 CFR 100.2. The recount regulations nonetheless expressly bar the receipt or use of funds
12 prohibited by 11 CFR 110.20 (foreign nationals) and Part 114 (corporations, labor
13 organizations, and national banks). 11 CFR 100.91 and 100.151.

14 Previous Advisory Opinions

15 The Commission has applied the statutory and regulatory provisions existing prior
16 to BCRA to issues related to election recounts in two advisory opinions. First, in
17 Advisory Opinion 1978-92, the Commission concluded that any funds received by a
18 separate organizational entity established by the candidate's authorized committee solely
19 for the purposes of funding the election recount effort would not be subject to the
20 contribution limitations of 2 U.S.C. 441a, and would not trigger political committee
21 status or reporting obligations for the separate election recount entity. Advisory Opinion

² These regulations were recodified without substantive change from 11 CFR 100.7(b)(20) and 100.8(b)(20), effective November 6, 2002. See 67 Fed. Reg. 50582 (Aug. 5, 2002). Prior to 1980, similar provisions appeared at 11 CFR 100.4(b)(15) and 100.7(b)(17). See 45 Fed. Reg. 15080 (Mar. 7, 1980).

1 1978-92. The Commission also concluded that the source prohibitions applicable to
2 funds raised for the separate election recount entity were those applicable to corporations,
3 labor organizations, and national banks, which were included in 11 CFR 100.4(b)(15) and
4 100.7(b)(17).³ *Id.* The Commission noted that involvement of current officers and staff
5 of the authorized committee as organizers and principals in a separate election recount
6 entity would not change these conclusions. *Id.*

7 Alternatively, the Commission also concluded in Advisory Opinion 1978-92 that
8 if the authorized committee itself established a separate bank account and conducted the
9 recount activity, FECA's reporting requirements would apply to the separate bank
10 account because they apply to all receipts and disbursements of a candidate's principal
11 campaign committee and are not limited to contributions and expenditures. *Id.*

12 In Advisory Opinion 1998-26, the Commission considered a candidate's principal
13 campaign committee that established, as a wholly separate entity, a contested election
14 trust fund. The Commission reiterated that the trust fund was not subject to reporting
15 requirements, could accept amounts in excess of the contribution limitations in
16 2 U.S.C. 441a, but could not accept funds from prohibited sources, as specified in the
17 predecessors to the recount regulations, 11 CFR 100.7(b)(20) and 100.8(b)(20).

18 Advisory Opinion 1998-26.

19 **The Bipartisan Campaign Reform Act of 2002**

20 BCRA took effect after these advisory opinions were issued. Under BCRA,
21 candidates and Federal officeholders may not solicit, receive, direct, transfer, or spend

³ In the recodification of 11 CFR 100.4(b)(15) and 100.7(b)(17) as 11 CFR 100.7(b)(20) and 100.8(b)(20), respectively, the prohibition on funds from foreign nationals was added to the regulation. See 45 Fed. Reg. 15080, 15102 (Mar. 7, 1980).

1 funds "in connection with an *election* for Federal office" unless the funds are subject to
2 the limitations, prohibitions, and reporting requirements of the Act. 2 U.S.C.
3 441i(e)(1)(A) (emphasis added). BCRA also imposes limitations on the funds Federal
4 candidates may solicit, receive, direct, transfer, or spend "in connection with any *election*
5 other than an election for Federal office." 2 U.S.C. 441i(e)(1)(B) (emphasis added).
6 However, recounts are not elections under the Act, so funds received and spent in
7 connection with a recount are not funds received or spent in connection with an election,
8 and are therefore not subject to 2 U.S.C. 441i(e)(1). Moreover, the Commission discerns
9 no evidence that Congress intended through BCRA to implicitly overturn either the
10 Commission's longstanding rules or advisory opinions on the treatment of recount funds.
11 See 2 U.S.C. 431(1).⁴ Consequently, BCRA's new restrictions in 2 U.S.C. 441i(e)(1) on
12 Federal candidates soliciting, receiving, directing, transferring, or spending funds in
13 connection with either Federal or non-Federal elections do not alter the prior treatment of
14 funds raised and spent by Federal candidates on recounts.

15 **Application to Requestors' Proposals**

16 The requestors may establish an election recount fund as either a separate bank
17 account within Nethercutt for Senate or a separate entity. These recount entities may
18 accept funds exceeding the Act's contribution limitations,⁵ but they are barred from
19 accepting funds from corporations, labor organizations, national banks, and foreign
20 nationals under 11 CFR 100.91.

⁴ The absence of 2 U.S.C. 441i(e) in BCRA's section 402(a)(4), which is entitled "Provisions not to apply to runoff elections," may reflect Congress's understanding that 2 U.S.C. 441i(e) does not apply to recounts because they are not elections under 2 U.S.C. 431(1).

⁵ The requestors may also advise donors that donations to election recount funds will not be aggregated with contributions from individuals for purposes of the aggregate bi-annual contribution limits of 2 U.S.C. 441a(a)(3).

1 The reporting requirements applicable to candidate-established election recount
2 funds are as follows. If the candidate-established election recount fund is a separate
3 account of Nethercutt for Senate, then its receipts and disbursements must be reported on
4 the Nethercutt for Senate's reports as "other receipts" and "other disbursements,"
5 respectively, and must be itemized if they exceed \$200 in the aggregate. *See*
6 11 CFR 104.3(a)(3)(x) and (b)(2)(vi). If the candidate-established election recount fund
7 is a separate entity established by Representative Nethercutt, then the separate entity is
8 not subject to the Act's reporting requirements based on its recount activities. *See*
9 Advisory Opinions 1998-26 and 1978-92.

10 *Question 2: May Representative Nethercutt and Nethercutt for Senate raise funds for*
11 *recount expenses for the non-Federal account of a State party committee, 501(c) and 527*
12 *tax-exempt organizations that are not established, financed, maintained, controlled by or*
13 *acting on behalf of the requestors in compliance with the requirements of the Act and*
14 *Commission regulations?*

15 As discussed above, section 441i(e) does not restrict a Federal candidate's raising
16 and spending of funds for election recount expenses, provided those funds are not from
17 prohibited sources. 11 CFR 100.91 and 100.152. Therefore, Representative Nethercutt
18 may solicit funds for election recount expenses for State party committees and 501(c) and
19 527 tax-exempt organizations so long as the funds solicited comply with the source
20 prohibitions in Commission regulations regarding recounts. In addition, political
21 committees, including the principal campaign committees of Federal candidates, may
22 engage in joint fundraising with other political committees and unregistered committees
23 or organizations subject to the requirements of 11 CFR 102.17. Therefore,

1 Representative Nethercutt may engage in joint fundraising to raise monies for election
2 recount expenses with any or all of the entities described in your request, so long as the
3 funds raised comply with the prohibitions in the Act, and the procedures in section
4 102.17 are followed.

5 The Commission expresses no opinion regarding the possible application of any
6 rules of the House of Representatives to the described activity, because the interpretation
7 of those rules is not within its jurisdiction.

8 This response constitutes an advisory opinion concerning the application of the
9 Act and Commission regulations to the specific transaction or activity set forth in your
10 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
11 of the facts or assumptions presented, and such facts or assumptions are material to a
12 conclusion presented in this advisory opinion, then the requestors may not rely on that
13 conclusion as support for their proposed activity.

14 Sincerely,

15 Bradley A. Smith
16 Chairman

17 Enclosures (AOs 2003-36, 2003-05, 1998-26, and 1978-92)