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FEDERAL ELECTION COMMISSION
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November 12, 2002

MEMORANDUM

AGENDA ITEM
For Meeting of: 11-14-02

SUBMITTED LATE

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Acting Associate General Counsel

J. Duane Pugh Jr.
Acting Special Assistant General Counsel

SUBJECT: Draft AO 2002-13 – Alternative Drafts

The Office of the General Counsel has prepared two draft Advisory Opinions related to recounts of the November 5, 2002 Federal elections. Both drafts conclude that the national congressional campaign committees may spend "recount funds," which are funds that are not subject to Federal Election Campaign Act ("FECA") limitations or reporting requirements, but are not corporate, labor organization, or foreign national funds, for recount purposes until December 31, 2002. The drafts differ in that Draft A provides more description of the Commission's 1977 promulgation of regulations on this subject and reaches a different conclusion with respect to Federal candidates. Draft A concludes that Federal candidates will be subject to 2 U.S.C. 441i(e) as of November 6, 2002, and that this provision of the Bipartisan Campaign Reform Act ("BCRA") prohibits, *inter alia,* Federal candidates from receiving or disbursing any funds that are not subject to the limitations, prohibitions, and reporting requirements of FECA. Draft B concludes that Federal candidates may continue to operate with respect to recounts as they did prior to BCRA.

This Office would recommend Draft A, except for its conclusion that recount donations should not be aggregated with and subject to the same contribution limit as other contributions from the same contributors for the general election. FECA limits the amount that may be contributed to Federal candidates and their authorized committees "with respect

to any election." 2 U.S.C. 441a(a)(1)(A) and (2)(A). Recounts are not elections under FECA definition, 2 U.S.C. 431(1), so this Office concludes that the election that recount funds are provided "with respect to" is the election subject to the recount, which in the circumstances of the Advisory Opinion is the November 5, 2002 Federal elections.

We request that both drafts be placed on the agenda for November 14, 2002.

Attachments
Drafts A and B

DRAFT

ADVISORY OPINION 2002-13

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Dear Messrs. Bauer, Vogel, and McGahn:

This responds to your letters dated October 17, 2002, and October 30, 2002, which request an advisory opinion on behalf of the Democratic Senatorial Campaign Committee ("DSCC"), the Democratic Congressional Campaign Committee ("DCCC"), the National Republican Senatorial Committee ("NRSC") and the National Republican Congressional Committee ("NRCC") (collectively, the "National Congressional Campaign Committees"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), the Bipartisan Campaign Reform Act of 2002, Pub.

L. No. 107-155, 116 Stat. 81 (2002)("BCRA"), and Commission regulations to the raising and spending of funds for a recount of the results of any of the Federal elections on November 5, 2002.[1]

FACTUAL BACKGROUND

Your letters explain that that the "primary function" of the National Congressional Campaign Committees is "to aid the election of candidates affiliated with their respective parties." The membership of each of the four National Congressional Campaign Committees is limited to Members of the relevant house of Congress who are also members of the identified political party. Specifically, with respect to DSCC and the NRSC, you state that all incumbent Senators who were Federal candidates on October 17, 2002, are "members" of their respective political party's organization. With respect to the DCCC and the NRCC, you state that "many" incumbent Members of Congress who are seeking reelection are "members" of these two groups. Additionally, you explain that the National Congressional Campaign Committees provide "political and financial support and guidance" to challengers and to candidates for open congressional seats. Finally, you state that the National Congressional Campaign Committees seek this advisory opinion as agents of all these candidates.[2]

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[1] The Commission construes your request as not extending to runoff elections, as defined in 11 CFR 100.2(d).

[2] The Act requires the issuance of advisory opinions no later than twenty days after the Commission receives a complete written request, rather than the customary sixty days, provided *inter alia,* any candidate, including any authorized committee of a candidate, submits the request within sixty days of an election involving the requesting party. *See* 2 U.S.C. 437f(a)(2). Commission regulations also permit an agent of a candidate or an authorized committee to submit such a request. 11 CFR 112.4(b)(1). However, agents are specifically required to disclose the identity of the principal. 11 CFR 112.1(a). You state that the National Congressional Campaign Committees are unable to identify any candidates on whose behalf this advisory opinion is sought because no candidate will know whether a recount effort is necessary until after the

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You state that two of the National Congressional Campaign Committees (the DSCC and the DCCC) have each established a separate entity solely for the purpose of supporting Federal candidates in carrying out a recount effort. The other two National Congressional Campaign Committees (the NRSC and the NRCC) as of October 30, 2002, had not yet established a separate entity solely for the purpose of supporting Federal candidates in carrying out a recount effort, but your request indicates that each may establish such an entity.[3]

You state that Federal candidates and officeholders will also establish recount entities that are wholly separate from their principal campaign committees and exist solely for the purpose of supporting Federal candidates in carrying out a recount effort.

You state that each of these "recount entities," whether established by a National Congressional Campaign Committee or by a Federal candidate or officeholder, will raise only funds from sources other than national banks, corporations, labor organizations, or foreign nationals. *See* 2 U.S.C. 441b (national banks, corporations, labor organizations)

November 5, 2002 elections. Because this request relates to activity that will closely follow the effective date of BCRA, the Commission has endeavored to provide a prompt response and anticipates issuing this opinion prior to the expiration of twenty days from the completion of the request, or November 19, 2002. Consequently, the Commission does not need to resolve the issue of whether your advisory opinion request meets the standards for twenty-day consideration in 11 CFR 112.4(b)(1). The Commission considers this Advisory Opinion as a response to a request from the four National Congressional Campaign Committees, who may rely on it pursuant to 11 CFR 112.5(a)(1). Any candidates on whose behalf you seek this advisory opinion and who are involved in a recount of the November 5, 2002, election results may rely on this advisory opinion pursuant to 11 CFR 112.5(a)(1).

Your request also includes questions relating to State and local political party committees' activities related to recounts of the November 5, 2002, Federal elections. An advisory opinion request must concern a specific transaction or activity that the requester is planning to undertake. *See* 11 CFR 112.1(b) and (c). The activities of third parties cannot be included in a request. Therefore, your questions concerning the activities of State and local political party committees are not addressed in this opinion.

[3] For purposes of this Advisory Opinion, the Commission's response is framed as if issued October 30, 2002, the date your request was finalized.

and 2 U.S.C. 441e (foreign nationals). You further explain that the funds received from a particular source may exceed FECA's limits for contributions from that source. *See* 2 U.S.C. 441a(a)(1), (2), and (3). These "recount funds" will be maintained in separate accounts and will not be commingled with any funds of any other entity.

The recount entities do not intend to register with or report financial activity to the Commission. The recount entities anticipate incurring expenses traditionally associated with the undertaking of a recount effort, which you identify as including, but not limited to, legal fees and expenses, fees for the payment of staff, expenses for administrative overhead and office equipment, and any other expenses that may arise in connection with a particular recount effort. Specifically excluded are any expenses "for the purpose of influencing" any election for Federal office. For purposes of this Advisory Opinion, we assume that none of the recount entities will be organizations described in section 501(c) or 527 of the Internal Revenue Code of 1986. *See* 2 U.S.C. 441i(d); 11 CFR 300.50 through 300.52, 67 Fed. Reg. 49,129-31 (July 29, 2002).

QUESTIONS PRESENTED

With respect to the recount entities established by the National Congressional Campaign Committees prior to November 6, 2002, you ask whether these recount entities may raise recount funds prior to November 6, 2002, the general effective date of BCRA. You also ask whether the National Congressional Campaign Committees' recount entities may spend these recount funds from November 6 through December 31, 2002, to pay expenses, retire debts, or pay for obligations incurred in connection with a recount resulting from the November 5 elections. You also ask for an explanation of the effect

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BCRA's contribution limits will have on recount entities established by the National Congressional Campaign Committees.

Notably, your request does not seek guidance regarding the National Congressional Campaign Committee recount entities raising recount funds from various sources on or after November 6, or raising or spending recount funds on or after January 1, 2003.

You also inquire about separate recount entities established by the Federal candidates you represent. You ask whether Federal candidates may establish, finance, maintain, and control the recount entities, including soliciting and spending recount funds before, on and after November 6, 2002, without interruption. Alternatively, you ask whether a Federal candidate could establish a separate recount entity before November 6, and finance, maintain, and control the entity, including soliciting and spending recount funds on or after November 6, without interruption. You also ask for an explanation of the effect of BCRA's contribution limits on separate recount entities established by Federal candidates.

Finally, with respect to state and local party committees, you ask if separate recount entities established by state or local party committees before, on or after November 6, 2002, may raise and spend recount funds before, on and after November 6, without interruption. For the reasons stated above, this latter question is not properly before the Commission.

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THE ACT AND COMMISSION REGULATIONS

The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift, loan, or payment of money or anything of value for the purpose of influencing a Federal election. 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.52(a) and 100.111(a). Commission regulations make exceptions from the cited definitions for gifts, loans, or payments made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election. 11 CFR 100.91 and 100.151.[4] The Commission explained these exclusions of costs of recounts and election contests "since, though they are related to elections, [they] are not Federal elections as defined by the Act." H.R. Doc. No. 95-44, at 40 (1977); *reprinted in* FEC, *Explanations and Justifications for FEC Regulations,* 37, 42 (2001). The Act defines elections to include, *inter alia,* primary, general, special and runoff elections, but it does not address recounts or election contests. 2 U.S.C. 431(1). The recount regulations nonetheless expressly bar the receipt or use of funds prohibited by 11 CFR 110.4(a) (foreign nationals)[5] and Part 114 (corporations, labor organizations, and national banks). 11 CFR 100.91 and 100.151. 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,

[4] 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. 50,582, 50,591, 50,596 (Aug. 5, 2002).

[5] These regulations will be recodified as 11 CFR 110.20, effective January 1, 2003.

corporations, and labor organizations in 2 U.S.C. 441b and foreign nationals in 2 U.S.C. 441e. H.R. Doc. No. 95-44, at 40; *see also* 2 U.S.C. 441b(b)(2) (defining contribution or expenditure as any payment in connection with any election for purposes of 2 U.S.C. 441b) and 2 U.S.C. 441e(a) (prohibiting contributions of money or other thing of value in connection with an election to any political office).

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 contribution limits or reporting requirements.[6]

THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002 AND IMPLEMENTING REGULATIONS

BCRA states, "A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of

[6] BCRA's amendments to 2 U.S.C. 441b are consistent with the distinction because the amendments state that 2 U.S.C. 441b contributions include 2 U.S.C. 431 contributions, which illustrates that all contributions that are "for the purpose of influencing" are also "in connection with" a Federal election. 2 U.S.C. 441b(b)(2).

value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of [FECA, as amended by BCRA]." 2 U.S.C. 441i(a)(1). This broad prohibition applies to any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee. 2 U.S.C. 441i(a)(2). The Commission's regulations include similar prohibitions. 11 CFR 300.10.

This broad prohibition becomes effective on November 6, 2002, which is the day following the November 5, 2002, Federal elections. 2 U.S.C. 431 note, *codifying* BCRA, sec. 402(b)(1), 116 Stat. 81, 113. However, BCRA also provides a brief transitional period during which the national political parties may spend non-Federal funds received before BCRA's effective date for certain limited purposes. Under section 402(b)(2) of BCRA, 116 Stat. at 113, any funds not subject to the limitations, prohibitions, and reporting requirements of the Act that are received by the national committee of a political party prior to November 6, 2002, may be used prior to January 1, 2003 for the purpose of "paying expenses or retiring outstanding debts or paying for obligations that were incurred solely in connection with any runoff election, recount, or election contest resulting from an election held prior to November 6, 2002," subject to other conditions not relevant here. BCRA, sec. 402(b)(2)(A) and (B)(i)(II), 116 Stat. at 113. The Commission's regulations implement these transition rules at 11 CFR 300.12. *See also* 11 CFR 300.1(b)(1).

BCRA also places limits on the amount and types of funds that can be solicited, received, directed, transferred or spent by Federal candidates and officeholders. These restrictions apply to Federal candidates and officeholders, their agents, and entities directly and indirectly established, financed, maintained, or controlled by, or acting on behalf of, any such candidates or officeholders. 2 U.S.C. 441i(e)(1)(A). In connection with an election for Federal office, including any Federal election activity, those subject to these rules may not solicit, receive, direct, transfer, or spend funds unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act. *Id.* Similarly, in connection with any election *other than* an election for Federal office, those subject to these rules may not solicit, receive, direct, transfer, or spend funds unless the funds are not in excess of the amounts permitted under 2 U.S.C. 441a and are not from sources prohibited by the Act from making contributions in connection with Federal elections. 2 U.S.C. 441i(e)(1)(B). These amendments are effective November 6, 2002. BCRA, sec. 402(b)(1), 116 Stat. at 113. Note that unlike national party committees, Federal candidates are not covered by the transition rules applicable to runoff elections, recounts or election contests arising from elections held prior to November 6, 2002. *See* BCRA, sect. 402(a)(4), 116 Stat. at 112 (BCRA's Federal candidate provisions, FECA sec. 323(e), codified at 2 U.S.C. 441i(e), are not included in the exemption).

The Commission has promulgated final rules implementing these provisions of BCRA. 11 CFR 300.60 to 300.65, 67 Fed. Reg. 49,064, 49,131-32 (July 29, 2002). Section 300.60 establishes the scope of the "Federal Candidates and Officeholders" regulations. Section 300.61 implements the provisions of BCRA related to Federal

elections, and section 300.62 implements the BCRA provisions related to non-Federal elections. The Commission has defined "agent" as used in 11 CFR 300.60 as any person who has actual authority, either express or implied, to engage in any of the following activities on behalf of the Federal candidate or officeholder: soliciting, receiving, directing, transferring, or spending funds in connection with any election. 11 CFR 300.2(b)(3), 67 Fed. Reg. at 49,121. The Commission specified a test for determining whether an entity is directly or indirectly established, maintained, financed, or controlled by a sponsor, which involves the consideration of a number of identified factors. 11 CFR 300.2(c)(2); 67 Fed. Reg. at 49,121. The Commission also promulgated a safe harbor in connection with this test, which states that only actions and activities occurring after November 6, 2002 will be considered in evaluating whether an entity is directly or indirectly established, maintained, or controlled by another. 11 CFR 300.2(c)(3). Additionally, if an entity receives funds from another entity prior to November 6, 2002, the receipt of such funds prior to that date has no bearing on determining whether the recipient entity is financed by the sponsoring entity under that regulation provided that the entity disposes of such funds prior to November 6, 2002. *Id.*

BCRA also raises the dollar limits on contributions made to Federal candidates effective January 1, 2003. 2 U.S.C. 441a(a)(1)(A); 2 U.S.C. 431 note. Under amended Commission regulations to take effect on January 1, 2003, these new contribution limitations will not apply to contributions made for elections prior to the effective date. See 11 CFR 110.1(b)(3)(iii)(C), 67 Fed. Reg. --- (Nov. -, 2002).

PRIOR ADVISORY OPINIONS

The Commission has applied the statutory and regulatory provisions existing prior to BCRA to issues related to recounts in two advisory opinions. Advisory Opinion 1978-92 was provided to an authorized committee of a Senatorial candidate that anticipated a possible general election recount. In that opinion, the Commission applied 11 CFR 100.4(b)(15) and 100.7(b)(17), which were predecessor regulations to 11 CFR 100.91 and 100.151, and concluded that any funds received for the recount effort would not be subject to the limitations of 2 U.S.C. 441a and would not trigger political committee status or reporting obligations for any separate organizational entity established by the candidate's committee solely for the purposes of funding the recount effort. *Id.* The only fund source restrictions applicable to funds raised for this entity were those expressly included in 11 CFR 100.4(b)(15) and 100.7(b)(17).[7] *Id.* The Commission noted that involvement of current officers and staff of the authorized committee as organizers and principals in a separate recount committee would not change these conclusions. *Id.* If the authorized committee itself established a separate bank account and conducted the recount activity, the Commission noted that it would be subject to FECA's reporting requirements, which apply to all receipts and disbursements of a candidate's principal campaign committee and are not limited to contributions and expenditures. *Id.*

[7] In the recodification from 11 CFR 100.4(b)(15) and 100.7(b)(17) to 11 CFR 100.7(b)(20) and 100.8(b)(20), the prohibition on funds from foreign nationals was added to the regulation. *See* 45 Fed. Reg. 15,080, 15,099, 15,102 (Mar. 7, 1980).

More recently, in Advisory Opinion 1998-26, the Commission concluded that a candidate's principal campaign committee that established a wholly separate entity, a contested election trust fund that, according to the requester, was established pursuant to Senate rules, could accept a repayment of a loan made from the principal campaign committee to the contested election trust fund. The Commission reiterated that the separate entity was not subject to reporting requirements, could accept donations in excess of the contribution limitations in 2 U.S.C. 441a, but could not accept funds from prohibited sources, as specified in 11 CFR 100.7(b)(20) and 100.8(b)(20). *Id.*

APPLICATION TO PROPOSALS

National Congressional Campaign Committees

Your request asserts that national congressional campaign committees have historically established separate *accounts* for election recount purposes, but, as clarified in your October 30, 2002 letter, it confines its inquiry to separate *entities* established by national congressional campaign committees. The Commission notes that the two Advisory Opinions did not consider accounts or entities established by national party committees, such as the national congressional campaign committees. The Commission concludes, however, that because funds raised for recounts would not be contributions to or from, or expenditures by, a national congressional campaign committee, such committees may establish separate entities for recount purposes under the FECA and Commission regulations prior to the effective date of the BCRA amendments. Therefore, prior to November 6, 2002, the National Congressional Campaign Committees may establish wholly separate entities that raise and spend recount funds in support of recount

efforts for particular Federal candidates, as permitted by 11 CFR 100.7(b)(20) and 100.8(b)(20). Prior to BCRA's effective date, these recount entities may raise funds that are not deemed "contributions," so the funds may be in excess of the contribution limits in 2 U.S.C. 441a(a)(1)(B) and (2)(B), and their receipt will not trigger political committee status or reporting obligations for the recount entities. However, consistent with pre-BCRA 11 CFR 100.7(b)(20) and 100.8(b)(20), the recount entities may not receive any funds from corporations (including national banks), labor organizations, or foreign nationals. The recount entities may spend recount funds for the specific expenses identified by the requesters and specified above related to recounts resulting from the November 5, 2002 elections. The Commission emphasizes that this opinion does not address the raising or spending of recount funds for any other purpose. The Commission notes that your request did not ask about a national congressional campaign committee merely using a separate bank account, rather than establishing a separate organizational entity, to conduct recount efforts; consequently, this Advisory Opinion does not address any reporting obligations that would arise if a national congressional campaign committee used a separate bank account without establishing a separate entity for recount purposes.

During the period from November 6, 2002, through December 31, 2002, the National Congressional Campaign Committees will be subject to the transition rules in section 402(b)(2) of BCRA. 116 Stat. at 113; *codified at* 2 U.S.C. 431 note; 11 CFR 300.12. During this period, recount funds, which are not subject to the contribution limitations and reporting requirements of the Act, that were received prior to November 6, 2002, may be used in connection with a recount of any election held prior to

November 6, 2002. Thus, the National Congressional Campaign Committees may spend any recount funds that were properly received under the Commission's pre-BCRA rules prior to November 6, 2002, for recount purposes, until December 31, 2002, without regard to when the recount entities were established. The Commission notes that under new 11 CFR 300.12(c), any non-Federal funds remaining in an account of a separate recount entity must be either disgorged to the United States Treasury or returned by check to the donors no later than December 31, 2002.

None of the National Congressional Campaign Committee's recount funds related to the November 5, 2002, Federal election, whether used to pay recount expenses before, on, or after November 6, 2002, but no later than December 31, 2002, are subject to the 2 U.S.C. 441a(a)(1)(B) and (2)(B) contribution amount limits. Your request does not ask about the amounts raised or spent after December 31, 2002, by recount entities established by the National Congressional Campaign Committees, so this Advisory Opinion does not address any such activities. Nor does your request ask about the use of any funds other than recount funds or any recount funds received on or after November 6, 2002, by any of the National Congressional Campaign Committees or recount entities established by them, so this Advisory Opinion does not address any such funds.

Federal Candidates

Prior to November 6, 2002, Commission regulations at 11 CFR 100.7(b)(20) and 100.8(b)(20), as interpreted in Advisory Opinions 1998-26 and 1978-92, provided that Federal candidates may establish completely separate entities to conduct recount activities. These recount entities were permitted to raise funds that were not subject to

the contribution limitations of 2 U.S.C. 441a(a)(1)(A) and (2)(A) and did not trigger political committee status or reporting obligations for the separate recount entities. The separate recount entities were not, however, permitted to receive funds from corporations, labor organizations, national banks, or foreign nationals. 11 CFR 100.7(b)(20) and 100.8(b)(20); Advisory Opinion 1998-26 and 1978-92. These recount funds could have been spent for expenses traditionally associated with the undertaking of a recount effort, as described above.

As of November 6, 2002, certain provisions of BCRA will apply to Federal candidates, their agents, and entities directly or indirectly established, maintained, financed, or controlled by Federal candidates. BCRA imposes limitations on the funds Federal candidates may solicit, receive, direct, transfer, or spend *"in connection with* Federal elections" and "in connection with non-Federal elections." 2 U.S.C. 441i(e)(1) (emphasis added).[8] BCRA limits the funds available to Federal candidates for use in connection with a Federal election to those subject to the limitations, prohibitions, and reporting requirements of FECA. Thus, for the first time, if a Federal candidate solicits, receives, directs, transfers, or spends any funds "in connection with" a Federal election, those funds must be subject to the limitations, prohibitions, and reporting requirements of FECA.

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

[8] The reason why BCRA's exemption for runoff elections, recounts, or election contests resulting from the November 5, 2002 elections does not apply to Federal candidates is not apparent.

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 logic and the plain language of BCRA, particularly in light of the Commission's regulation dating 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 of 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. To the extent that Advisory Opinions 1978-92 and 1998-26 are inconsistent with this result, they are superseded with respect to candidates. To the extent that 11 CFR 100.91 and 100.151 may be inconsistent with 2 U.S.C. 44i(e) with respect to candidates or more generally with respect to elections that are held after BCRA's effective date, the Commission intends to reevaluate the continuing viability of these rules in a subsequent rulemaking.

As described above, the Commission has promulgated regulations defining "agent" for these purposes, 11 CFR 300.2(b)(3), and specifying a fact-specific test for determining whether an entity is directly or indirectly established, maintained, financed, or controlled by a sponsor, 11 CFR 300.2(c)(2). In your request, you state that Federal

candidates will be among those who establish, finance, maintain or control the separate entities that are related to a Federal candidate. While your request does not provide sufficient information to independently apply the factors set forth in 11 CFR 300.2(b)(3) or (c)(2), the Commission accepts your representation that the Federal candidates will establish, finance, maintain or control the separate recount entities established by Federal candidates. Consequently, the Commission concludes that these recount entities, and any candidates' agents involved in the recounts, are subject to 2 U.S.C. 441i(e)(1), and must not solicit, receive, direct, transfer, or spend funds for recount activities that are not subject to the limitations, prohibitions, and reporting requirements of the Act.

The limitations, prohibitions, and reporting requirements of FECA that will apply pursuant to 2 U.S.C. 441i(e)(1)(A) to recount entities directly or indirectly established, financed, maintained or controlled or acting on behalf of a Federal candidate are as follows. For the period from November 6 to December 31, 2002, the contribution amount limitations of $1,000 from any person other than a multicandidate political committee and $5,000 from any multicandidate political committee are established in 2 U.S.C. 441a(a)(1)(A) or (2)(A).[9] Donations to recount entities are subject to contribution amount limitations by operation of 2 U.S.C. 441i(e)(1)(A); however, they are not contributions *per se*. *See* 11 CFR 100.91. Consequently, donations to recount entities established by Federal candidates will not be aggregated with contributions from

[9] As explained above, unlike other provisions of BCRA, the increase in contribution limits takes effect on January 1, 2003.

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the same contributors for the general election that is subject to recounting.[10] Thus, individual contributors who have contributed $1,000 to the candidate for the 2002 general election may also donate an additional $1,000 to the candidate's 2002 recount entity. For these purposes, a recount is similar to a runoff election, which is also subject to a contribution limit separate from the general election contribution limit.

After January 1, 2003, the contribution amount limitation applicable to contributions to candidates from persons other multicandidate political committees will increase to $2,000. However, pursuant to recently revised 11 CFR 110.1(b)(3)(iii)(C), which takes effect on January 1, 2003, contributions may not exceed the limitations in effect on the date of the related election. Donations to recount funds that are subject to the amount limitations likewise may not exceed the limitations in effect on the date of the election to which the recount relates. Again, recounts are similar to runoff elections in this respect. Therefore, for recounts related to the November 5, 2002, general elections, the maximum donation to a candidate recount entity from any person other than a multicandidate political committee is $1,000.

The prohibitions applicable to donations to Federal candidate recount entities are in 2 U.S.C. 441b (national banks, corporations, and labor organizations), 441c (government contractors), 441e (foreign nationals), 441f (in the name of another), 441g (currency in excess of $100), and 441k (minors). The reporting requirements applicable to Federal candidate recount entities are in 2 U.S.C. 434. After November 5, 2002,

[10] Donations to recount entities are not aggregated with contributions from individuals for purposes of the aggregate annual or bi-annual contribution limits of 2 U.S.C. 441a(a)(3).

donations to recount entities should be reported as "itemized other receipts" and disbursements as "itemized other disbursements." *See* 11 CFR 104.3(a)(3)(x)(A) and (b)(2)(vi)(A).

These conclusions with respect to candidates do not change the foregoing determinations regarding recount entities established by the National Congressional Campaign Committees. To the extent any Federal candidate, or any agent of any Federal candidate, directly or indirectly establishes, finances, maintains, or controls the recount entity, the more specific provisions of section 402(b)(2) of BCRA, 116 Stat. at 113, expressly permit the recount entities established by the National Congressional Campaign Committees to use recount funds in accordance with the transition rules of that section provided those funds were raised before November 5, 2002, in accordance with the Commission's previous rules.

The Commission expresses no opinion regarding any tax ramifications of the proposed activity, or the application of any rules of the U.S. Senate or House of Representatives to the activities presented in your request because those issues are not within its jurisdiction. The Commission specifically notes that it has not completed all of the implementing regulations related to BCRA. This opinion cannot be considered to reflect the application of any regulations not yet issued by the Commission.

This response constitutes an advisory opinion concerning application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a

conclusion presented in this opinion, then the requestors may not rely on that conclusion as support for their proposed activities.

Sincerely,

David M. Mason
Chairman

Enclosures (AOs 1998-26 and 1978-92)

DRAFT

ADVISORY OPINION 2002-13

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Donald F. McGahn II
General Counsel
National Republican Congressional Committee
320 First Street, SE
Washington, DC 20003

Dear Messrs. Bauer, Vogel, and McGahn:

This responds to your letters dated October 17, 2002, and October 30, 2002, which request an advisory opinion on behalf of the Democratic Senatorial Campaign Committee ("DSCC"), the Democratic Congressional Campaign Committee ("DCCC"), the National Republican Senatorial Committee ("NRSC") and the National Republican Congressional Committee ("NRCC") (collectively, the "National Congressional Campaign Committees"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), the Bipartisan Campaign Reform Act of 2002, Pub.

L. No. 107-155, 116 Stat. 81 (2002)("BCRA"), and Commission regulations to the raising and spending of funds for a recount of the results of any of the Federal elections on November 5, 2002.[1]

FACTUAL BACKGROUND

Your letters explain that that the "primary function" of the National Congressional Campaign Committees is "to aid the election of candidates affiliated with their respective parties." The membership of each of the four National Congressional Campaign Committees is limited to Members of the relevant house of Congress who are also members of the identified political party. Specifically, with respect to DSCC and the NRSC, you state that all incumbent Senators who were Federal candidates on October 17, 2002, are "members" of their respective political party's organization. With respect to the DCCC and the NRCC, you state that "many" incumbent Members of Congress who are seeking reelection are "members" of these two groups. Additionally, you explain that the National Congressional Campaign Committees provide "political and financial support and guidance" to challengers and to candidates for open congressional seats. Finally, you state that the National Congressional Campaign Committees seek this advisory opinion as agents of all these candidates.[2]

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[1] The Commission construes your request as not extending to runoff elections, as defined in 11 CFR 100.2(d).

[2] The Act requires the issuance of advisory opinions no later than twenty days after the Commission receives a complete written request, rather than the customary sixty days, provided *inter alia,* any candidate, including any authorized committee of a candidate, submits the request within sixty days of an election involving the requesting party. *See* 2 U.S.C. 437f(a)(2). Commission regulations also permit an agent of a candidate or an authorized committee to submit such a request. 11 CFR 112.4(b)(1). However, agents are specifically required to disclose the identity of the principal. 11 CFR 112.1(a). You state that the National Congressional Campaign Committees are unable to identify any candidates on whose behalf this advisory opinion is sought because no candidate will know whether a recount effort is necessary until after the

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You state that two of the National Congressional Campaign Committees (the DSCC and the DCCC) have each established a separate entity solely for the purpose of supporting Federal candidates in carrying out a recount effort. The other two National Congressional Campaign Committees (the NRSC and the NRCC) as of October 30, 2002, had not yet established a separate entity solely for the purpose of supporting Federal candidates in carrying out a recount effort, but your request indicates that each may establish such an entity.[3]

You state that Federal candidates and officeholders will also establish recount entities that are wholly separate from their principal campaign committees and exist solely for the purpose of supporting Federal candidates in carrying out a recount effort.

You state that each of these "recount entities," whether established by a National Congressional Campaign Committee or by a Federal candidate or officeholder, will raise only funds from sources other than national banks, corporations, labor organizations, or foreign nationals. *See* 2 U.S.C. 441b (national banks, corporations, labor organizations)

November 5, 2002 elections. Because this request relates to activity that will closely follow the effective date of BCRA, the Commission has endeavored to provide a prompt response and anticipates issuing this opinion prior to the expiration of twenty days from the completion of the request, or November 19, 2002. Consequently, the Commission does not need to resolve the issue of whether your advisory opinion request meets the standards for twenty-day consideration in 11 CFR 112.4(b)(1). The Commission considers this Advisory Opinion as a response to a request from the four National Congressional Campaign Committees, who may rely on it pursuant to 11 CFR 112.5(a)(1). Any candidates on whose behalf you seek this advisory opinion and who are involved in a recount of the November 5, 2002, election results may rely on this advisory opinion pursuant to 11 CFR 112.5(a)(1).

Your request also includes questions relating to State and local political party committees' activities related to recounts of the November 5, 2002, Federal elections. An advisory opinion request must concern a specific transaction or activity that the requester is planning to undertake. *See* 11 CFR 112.1(b) and (c). The activities of third parties cannot be included in a request. Therefore, your questions concerning the activities of State and local political party committees are not addressed in this opinion.

[3] For purposes of this Advisory Opinion, the Commission's response is framed as if issued October 30, 2002, the date your request was finalized.

and 2 U.S.C. 441e (foreign nationals). You further explain that the funds received from a particular source may exceed FECA's limits for contributions from that source. *See* 2 U.S.C. 441a(a)(1), (2), and (3). These "recount funds" will be maintained in separate accounts and will not be commingled with any funds of any other entity.

The recount entities do not intend to register with or report financial activity to the Commission. The recount entities anticipate incurring expenses traditionally associated with the undertaking of a recount effort, which you identify as including, but not limited to, legal fees and expenses, fees for the payment of staff, expenses for administrative overhead and office equipment, and any other expenses that may arise in connection with a particular recount effort. Specifically excluded are any expenses "for the purpose of influencing" any election for Federal office. For purposes of this Advisory Opinion, we assume that none of the recount entities will be organizations described in section 501(c) or 527 of the Internal Revenue Code of 1986. *See* 2 U.S.C. 441i(d); 11 CFR 300.50 through 300.52, 67 Fed. Reg. 49,129-31 (July 29, 2002).

QUESTIONS PRESENTED

With respect to the recount entities established by the National Congressional Campaign Committees prior to November 6, 2002, you ask whether these recount entities may raise recount funds prior to November 6, 2002, the general effective date of BCRA. You also ask whether the National Congressional Campaign Committees' recount entities may spend these recount funds from November 6 through December 31, 2002, to pay expenses, retire debts, or pay for obligations incurred in connection with a recount resulting from the November 5 elections. You also ask for an explanation of the effect

BCRA's contribution limits will have on recount entities established by the National Congressional Campaign Committees.

Notably, your request does not seek guidance regarding the National Congressional Campaign Committee recount entities raising recount funds from various sources on or after November 6, or raising or spending recount funds on or after January 1, 2003.

You also inquire about separate recount entities established by the Federal candidates you represent. You ask whether Federal candidates may establish, finance, maintain, and control the recount entities, including soliciting and spending recount funds before, on and after November 6, 2002, without interruption. Alternatively, you ask whether a Federal candidate could establish a separate recount entity before November 6, and finance, maintain, and control the entity, including soliciting and spending recount funds on or after November 6, without interruption. You also ask for an explanation of the effect of BCRA's contribution limits on separate recount entities established by Federal candidates.

Finally, with respect to state and local party committees, you ask if separate recount entities established by state or local party committees before, on or after November 6, 2002, may raise and spend recount funds before, on and after November 6, without interruption. For the reasons stated above, this latter question is not properly before the Commission.

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THE ACT AND COMMISSION REGULATIONS

The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift, loan, or payment of money or anything of value for the purpose of influencing a Federal election. 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.52(a) and 100.111(a). Commission regulations make exceptions from the cited definitions for gifts, loans, or payments made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election. 11 CFR 100.91 and 100.151.[4] The Commission explained these exclusions of costs of recounts and election contests "since, though they are related to elections, [they] are not Federal elections as defined by the Act." H.R. Doc. No. 95-44, at 40 (1977); *reprinted in* FEC, *Explanations and Justifications for FEC Regulations*, 37, 42 (2001). The Act defines elections to include, *inter alia*, primary, general, special and runoff elections, but it does not address recounts or election contests. 2 U.S.C. 431(1). The recount regulations nonetheless expressly bar the receipt or use of funds prohibited by 11 CFR 110.4(a) (foreign nationals)[5] and Part 114 (corporations, labor organizations, and national banks). 11 CFR 100.91 and 100.151.

THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002 AND IMPLEMENTING REGULATIONS

BCRA states, "A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct

[4] 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. 50,582, 50,591, 50,596 (Aug. 5, 2002).

[5] These regulations will be recodified as 11 CFR 110.20, effective January 1, 2003.

to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of [FECA, as amended by BCRA]." 2 U.S.C. 441i(a)(1). This broad prohibition applies to any such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee. 2 U.S.C. 441i(a)(2). The Commission's regulations include similar prohibitions. 11 CFR 300.10.

This broad prohibition becomes effective on November 6, 2002, which is the day following the November 5, 2002, Federal elections. 2 U.S.C. 431 note, *codifying* BCRA, sec. 402(b)(1), 116 Stat. 81, 113. However, BCRA also provides a brief transitional period during which the national political parties may spend non-federal funds received before BCRA's effective date for certain limited purposes. Under section 402(b)(2) of BCRA, 116 Stat. at 113, any funds not subject to the limitations, prohibitions, and reporting requirements of the Act that are received by the national committee of a political party prior to November 6, 2002, may be used prior to January 1, 2003 for the purpose of "paying expenses or retiring outstanding debts or paying for obligations that were incurred solely in connection with any runoff election, recount, or election contest resulting from an election held prior to November 6, 2002," subject to other conditions not relevant here. BCRA, sec. 402(b)(2)(A) and (B)(i)(II), 116 Stat. at 113. The Commission's regulations implement these transition rules at 11 CFR 300.12. *See also* 11 CFR 300.1(b)(1).

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BCRA also places limits on the amount and types of funds that can be solicited, received, directed, transferred or spent by Federal candidates and officeholders. These restrictions apply to Federal candidates and officeholders, their agents, and entities directly and indirectly established, financed, maintained, or controlled by, or acting on behalf of, any such candidates or officeholders. 2 U.S.C. 441i(e)(1)(A). In connection with an election for Federal office, including any Federal election activity, those subject to these rules may not solicit, receive, direct, transfer, or spend funds unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act. *Id.* Similarly, in connection with any election *other than* an election for Federal office, those subject to these rules may not solicit, receive, direct, transfer, or spend funds unless the funds are not in excess of the amounts permitted under 2 U.S.C. 441a and are not from sources prohibited by the Act from making contributions in connection with Federal elections. 2 U.S.C. 441i(e)(1)(B). These amendments are effective November 6, 2002. BCRA, sec. 402(b)(1), 116 Stat. at 113. Note that unlike national party committees, Federal candidates are not covered by the transition rules applicable to runoff elections, recounts or election contests arising from elections held prior to November 6, 2002. *See* BCRA, sect. 402(a)(4), 116 Stat. at 112 (BCRA's Federal candidate provisions, FECA sec. 323(e), codified at 2 U.S.C. 441i(e), are not included in the exemption).

The Commission has promulgated final rules implementing these provisions of BCRA. 11 CFR 300.60 to 300.65, 67 Fed. Reg. 49,064, 49,131-32 (July 29, 2002). BCRA also raises the dollar limits on contributions made to Federal candidates effective January 1, 2003. 2 U.S.C. 441a(a)(1)(A); 2 U.S.C. 431 note. Under amended

Commission regulations to take effect on January 1, 2003, these new contribution limitations will not apply to contributions made for elections prior to the effective date. See 11 CFR 110.1(b)(3)(iii)(C), 67 Fed. Reg. --- (Nov. -, 2002).

PRIOR ADVISORY OPINIONS

The Commission has applied the statutory and regulatory provisions existing prior to BCRA to issues related to recounts in two advisory opinions. Advisory Opinion 1978-92 was provided to an authorized committee of a Senatorial candidate that anticipated a possible general election recount. In that opinion, the Commission applied 11 CFR 100.4(b)(15) and 100.7(b)(17), which were predecessor regulations to 11 CFR 100.91 and 100.151, and concluded that any funds received for the recount effort would not be subject to the limitations of 2 U.S.C. 441a and would not trigger political committee status or reporting obligations for any separate organizational entity established by the candidate's committee solely for the purposes of funding the recount effort. *Id.* The only fund source restrictions applicable to funds raised for this entity were those expressly included in 11 CFR 100.4(b)(15) and 100.7(b)(17).[6] *Id.* The Commission noted that involvement of current officers and staff of the authorized committee as organizers and principals in a separate recount committee would not change these conclusions. *Id.* If the authorized committee itself established a separate bank account and conducted the recount activity, the Commission noted that it would be subject to FECA's reporting requirements, which apply to all receipts and disbursements

[6] In the recodification from 11 CFR 100.4(b)(15) and 100.7(b)(17) to 11 CFR 100.7(b)(20) and 100.8(b)(20), the prohibition on funds from foreign nationals was added to the regulation. *See* 45 Fed. Reg. 15,080, 15,099, 15,102 (Mar. 7, 1980).

of a candidate's principal campaign committee and are not limited to contributions and expenditures. *Id.*

More recently, in Advisory Opinion 1998-26, the Commission concluded that a candidate's principal campaign committee that established a wholly separate entity, a contested election trust fund that, according to the requester, was established pursuant to Senate rules, could accept a repayment of a loan made from the principal campaign committee to the contested election trust fund. The Commission reiterated that the separate entity was not subject to reporting requirements, could accept donations in excess of the contribution limitations in 2 U.S.C. 441a, but could not accept funds from prohibited sources, as specified in 11 CFR 100.7(b)(20) and 100.8(b)(20). *Id.*

APPLICATION TO PROPOSALS

National Congressional Campaign Committees

Your request asserts that national congressional campaign committees have historically established separate *accounts* for election recount purposes, but, as clarified in your October 30, 2002 letter, it confines its inquiry to separate *entities* established by national congressional campaign committees. The Commission notes that the two Advisory Opinions did not consider accounts or entities established by national party committees such as the national congressional campaign committees. The Commission concludes, however, that because funds raised for recounts would not be contributions to or from, or expenditures by, a national congressional campaign committee, such committees may establish separate entities for recount purposes under the FECA and Commission regulations prior to the effective date of the BCRA amendments. Therefore,

prior to November 6, 2002, the National Congressional Campaign Committees may establish wholly separate entities that raise and spend recount funds in support of recount efforts for particular Federal candidates, as permitted by 11 CFR 100.7(b)(20) and 100.8(b)(20). Prior to BCRA's effective date, these recount entities may raise funds that are not deemed "contributions," so the funds may be in excess of the contribution limits in 2 U.S.C. 441a(a)(1)(B) and (2)(B), and their receipt will not trigger political committee status or reporting obligations for the recount entities. However, consistent with pre-BCRA 11 CFR 100.7(b)(20) and 100.8(b)(20), the recount entities may not receive any funds from corporations (including national banks), labor organizations, or foreign nationals. The recount entities may spend recount funds for the specific expenses identified by the requesters and specified above related to recounts resulting from the November 5, 2002 elections. The Commission emphasizes that this opinion does not address the raising or spending of recount funds for any other purpose. The Commission notes that your request did not ask about a national congressional campaign committee merely using a separate bank account, rather than establishing a separate organizational entity, to conduct recount efforts; consequently, this Advisory Opinion does not address any reporting obligations that would arise if a national congressional campaign committee used a separate bank account without establishing a separate entity for recount purposes.

During the period from November 6, 2002, through December 31, 2002, the National Congressional Campaign Committees will be subject to the transition rules in section 402(b)(2) of BCRA. 116 Stat. at 113; *codified at* 2 U.S.C. 431 note; 11 CFR 300.12. During this period, recount funds, which are not subject to the

contribution limitations and reporting requirements of the Act, that were received prior to November 6, 2002, may be used in connection with a recount of any election held prior to November 6, 2002. Thus, the National Congressional Campaign Committees may spend any recount funds that were properly received under the Commission's pre-BCRA rules prior to November 6, 2002, for recount purposes, until December 31, 2002, without regard to when the recount entities were established. The Commission notes that under new 11 CFR 300.12(c), any non-Federal funds remaining in an account of a separate recount entity must be either disgorged to the United States Treasury or returned by check to the donors no later than December 31, 2002.

None of the National Congressional Campaign Committee's recount funds related to the November 5, 2002 Federal elections, whether used to pay recount expenses before, on, or after November 6, 2002, but no later than December 31, 2002, are subject to the 2 U.S.C. 441a(a)(1)(B) and (2)(B) contribution amount limits. Your request does not ask about the amounts raised or spent after December 31, 2002, by recount entities established by the National Congressional Campaign Committees, so this Advisory Opinion does not address any such activities. Nor does your request ask about the use of any funds other than recount funds or any recount funds received on or after November 6, 2002, by any of the National Congressional Campaign Committees or recount entities established by them, so this Advisory Opinion does not address any such funds.

Federal Candidates

Prior to November 6, 2002, Commission regulations at 11 CFR 100.7(b)(20) and 100.8(b)(20), as interpreted in Advisory Opinions 1998-26 and 1978-92, provided that

Federal candidates may establish completely separate entities to conduct recount activities. These recount entities were permitted to raise funds that were not subject to the contribution limitations of 2 U.S.C. 441a(a)(1)(A) and (2)(A) and did not trigger political committee status or reporting obligations for the separate recount entities. The separate recount entities were not, however, permitted to receive funds from corporations, labor organizations, national banks, or foreign nationals. 11 CFR 100.7(b)(20) and 100.8(b)(20); Advisory Opinion 1998-26 and 1978-92. These recount funds could have been spent for expenses traditionally associated with the undertaking of a recount effort, as described above.

As of November 6, 2002, certain provisions of BCRA will apply to Federal candidates, their agents, and entities directly or indirectly established, maintained, financed, or controlled by Federal candidates. BCRA imposes limitations on the funds Federal candidates may solicit, receive, direct, transfer, or spend "in connection with Federal *elections*" and "in connection with non-Federal *elections*." 2 U.S.C. 441i(e)(1) (emphasis added). However, recounts are not elections under the Act, and the Commission discerns no evidence that Congress intended through BCRA to implicitly overturn either the Commission's longstanding rules or advisory opinions on the treatment of recount funds. *See* 2 U.S.C. 431(1).[7] Consequently, BCRA's new restrictions in 2 U.S.C. 441i(e)(1) on Federal candidates soliciting, receiving, directing, transferring, or spending funds in connection either Federal or non-Federal elections do

[7] 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).

not alter the prior treatment of funds raised and spent by Federal candidates on recounts. Accordingly, under 11 CFR 100.91 and 100.151, on or after November 6, 2002, Federal candidates may continue to establish recount entities to conduct recount activities provided those entities are operated in accordance with 11 CFR 100.91 and 100.151. These recount entities, if wholly separate from the candidate's principal campaign committee, may accept recount funds, which are amounts not subject to the contribution limitations or the reporting requirements of FECA, but are barred from accepting funds from corporations, labor organizations, national banks, and foreign nationals under 11 CFR 100.91 and 100.151.

The Commission expresses no opinion regarding any tax ramifications of the proposed activity, or the application of any rules of the U.S. Senate or House of Representatives to the activities presented in your request because those issues are not within its jurisdiction. The Commission specifically notes that it has not completed all of the implementing regulations related to BCRA. This opinion cannot be considered to reflect the application of any regulations not yet issued by the Commission.

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

Sincerely,

David M. Mason
Chairman

Enclosures (AOs 1998-26 and 1978-92)