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FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 8, 1996

AGENDA ITEM
For Meeting of: 5-16-96

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Paul S. Sanford
Staff Attorney

SUBJECT: Draft AO 1996-12

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 16, 1996.

Attachment

DRAFT

1 CERTIFIED MAIL
2 RETURN RECEIPT REQUESTED

3
4 ADVISORY OPINION 1996-12

5
6 Arthur Block
7 Attorney at Law
8 72 Spring Street, Suite 1201
9 New York, NY 10012
10

11 Dear Mr. Block:

12 This responds to your letter of March 25, 1996, requesting an advisory opinion on
13 behalf of Dr. Lenora B. Fulani regarding the application of the Presidential Primary
14 Matching Payment Account Act, 26 U.S.C. §9031, *et seq.* ("the Act"), and Commission
15 regulations, to a series of transactions that Dr. Fulani intends to enter into during the 1996
16 presidential primary campaign.

17 Dr. Fulani has filed a statement of candidacy for president in the 1996 election
18 cycle, and a statement of organization has been filed by her principal campaign
19 committee, Lenora B. Fulani for President 96. Your request states that Dr. Fulani will
20 compete for the presidential nomination of the parties formed and being formed under the
21 name "Reform Party," as well as pursuing other options for seeking minor party
22 presidential nominations and independent presidential candidate ballot access. You also
23 indicate that Dr. Fulani intends to apply for Federal primary matching funds, and has
24 executed and delivered to the Commission's Audit Division the candidate certification
25 and agreement letter required by section 9033(a) of the Act.

26 You indicate that Dr. Fulani intends to hire a number of individuals and vendors
27 to provide the critical core of expertise, advice and services for her campaign. Your

request describes a series of transactions that she intends to enter into in order to obtain these services. According to your descriptions, these transactions feature certain common elements. For each transaction, you identify an individual, a vendor, or a group of individuals, and describe the goods and/or services that these entities will provide to Dr. Fulani's campaign. The individuals and vendors she intends to hire and the services they will provide are as follows: (1) Fred Newman as campaign manager; (2) yourself as legal counsel; (3) Gary Sinawski as legal counsel; (4) a new firm to be created by Phyllis Goldberg, David Nackman and Jacqueline Salit to handle advertising, design of campaign materials and the task of giving expression to Dr. Fulani's message; (5) the firm of Ross & Green to do public relations work, press and media coordination and media and event booking; and (6) other persons to serve as fundraising director, telemarketing fundraisers, treasurer, operations manager, field organizing director, personal/security aides to the candidate, and driver for the campaign.

You then indicate that each of these individuals, and in the case of the vendors, the principals of each vendor, are members of a core collective that you describe in your request.¹ Further, you state the rate at which each individual or vendor will be paid, and assert that these amounts are commercially reasonable in light of the circumstances of each transaction. Your descriptions conclude by listing the qualifications of these individuals and vendors in support of your assertion that the amounts to be paid are commercially reasonable.

¹ Your request indicates that the core collective, of which Dr. Fulani is also a member, "functions according to the principal that, 'all money in the possession of or accruing to those at the core belongs to the collective and is used at the discretion of the members of the collective to pursue shared political goals.'"

1 Your request contains twenty questions regarding the application of the Act and
2 Commission regulations to these transactions. Your questions can be broken down into
3 six groups. Each group of questions will be discussed in turn.

4 Your first question is whether payments to these individuals and vendors for the
5 identified goods and services would be qualified campaign expenses. Section 9032(9)
6 defines the term "qualified campaign expense" as a purchase, payment, distribution, loan,
7 advance, deposit or gift of anything of value that is incurred by a candidate or his or her
8 authorized committee in connection with his or her campaign for nomination for election
9 and that does not violate any applicable State or Federal law. 26 U.S.C. §9032(9). See
10 11 CFR 9032.9. Based upon the limited factual descriptions contained in your request,
11 the transactions you propose appear to be in connection with Dr. Fulani's campaign for
12 nomination, and, standing alone, do not appear to violate any applicable State or Federal
13 law. Therefore, if Dr. Fulani enters into these transactions, and the individuals or vendors
14 actually provide the goods or services you describe, the committee's payments for these
15 goods or services would appear to fall within the definition of a qualified campaign
16 expense.

17 However, you should be aware that the status of Dr. Fulani's disbursements as
18 qualified campaign expenses is subject to verification in the post-primary audit process.
19 After the conclusion of the matching payment period, the Commission will conduct an
20 examination and audit of the qualified campaign expenses of every candidate who
21 receives public financing. 26 U.S.C. §9038(a). The Commission may determine, based
22 on the information it obtains in the audit process, that these disbursements are not
23 qualified campaign expenses. 11 CFR 9038.1(a). Under section 9033.11(a) of the

1 regulations, Dr. Fulani bears the burden of demonstrating that her disbursements are
2 qualified campaign expenses under section 9032(9). The regulations require candidates
3 who seek matching funds to explicitly agree to assume this burden in their candidate
4 agreement. 11 CFR 9033.1(b)(1). Thus, although these transactions appear, *ab initio*, to
5 be qualified campaign expenses, Dr. Fulani will be expected to demonstrate during the
6 audit process that they are in connection with her campaign for nomination, and therefore
7 are qualified campaign expenses.

8 In order to facilitate the audit process, the regulations and the candidate agreement
9 require candidates to document their qualified campaign expenses and to "provide an
0 explanation, in addition to complying with the documentation requirements, of the
1 connection between any disbursements made by the candidate or authorized committee(s)
2 of the candidate and the campaign if requested by the Commission." 11 CFR 9033.1(b).²
3 Section 9033.11(b) of the regulations sets out the specific requirements for documenting
4 disbursements. These requirements enable the Commission to verify that public funds
5 are being spent in connection with the candidate's campaign for nomination and therefore
6 are qualified campaign expenses. In most cases, complying with these requirements will
7 adequately demonstrate that the candidate's disbursements are qualified campaign
8 expenses.

9 However, as indicated above, the Commission has the authority to consider any
0 information it obtains in the audit process in determining whether disbursements are

² Candidates must agree to comply with these requirements in order to obtain matching funds. 11 CFR 9033.1(a). Dr. Fulani's candidate agreement letter indicates that she has agreed to abide by these conditions.

1 qualified campaign expenses. 11 CFR 9038.1(a). The Commission also has the authority
2 to routinely consider information obtained from other sources, such as other materials
3 submitted by the candidate as part of the matching payment process, disclosure reports on
4 file with the Commission, and other publicly available documents. 11 CFR 9039.2(a).
5 Finally, section 9039(b) of the Act authorizes the Commission to conduct investigations
6 to ensure that public funds are used only to defray qualified campaign expenses, and to
7 use any information obtained during such an investigation as the basis for a repayment
8 determination. 11 CFR 9039.3(a)(3).

9 Consequently, if facts come to light in any of these processes that raise questions
10 as to whether the candidate's disbursements are qualified campaign expenses, Dr. Fulani
11 may be asked to provide an additional explanation of the connection between the
12 payment and her campaign for nomination, in accordance with 11 CFR 9033.1(b)(3). If
13 she is unable to document the transactions sufficiently enough to demonstrate to the
14 Commission that they were in connection with her campaign for nomination, they will
15 not be qualified campaign expenses.

16 In questions 2 through 5, you ask whether the membership of the individuals or
17 the vendor personnel in the socialist collective, or the close political association between
18 these persons and the candidate, would alter the standard that would be used to determine
19 whether the payments are qualified campaign expenses. If so, you ask that the altered
20 standard be stated. While the factual conditions that exist in a particular situation may be
21 relevant to determining whether a disbursement is a qualified campaign expense, they do
22 not alter the standard used to make this determination. As indicated above,
23 disbursements will be considered qualified campaign expenses if the candidate provides

1 the documentation necessary to demonstrate that the disbursements were made in
2 connection with the candidate's campaign for nomination.

3 In questions 6 through 9, you ask whether, as a result of the membership of the
4 individuals or the vendor personnel in the socialist collective, or the close political
5 association between these persons and the candidate, the candidate would be held to a
6 higher standard of proof for showing that the payments are qualified campaign expenses.
7 If so, you ask that these higher standards be stated. In questions 10 through 13, you ask
8 whether, as a result of these conditions, Dr. Fulani would be subject to more stringent
9 documentation requirements. If so, you ask that these requirements be stated.

10 As in any other situation, Dr. Fulani will be expected to comply with the
11 documentation requirements in section 9033.1(b) that are outlined above. In addition, she
12 will be expected to provide an explanation of the connection between her disbursements
13 and her campaign for nomination, if requested to do so by the Commission. 11 CFR
14 9033.1(b)(3). Thus, Dr. Fulani will be subject to the same standard of proof and the same
15 documentation requirements that she would be subjected to if these persons were not
16 members of the socialist collective and were not Dr. Fulani's close political associates.

17 In the absence of any additional facts that raise questions as to whether Dr.
18 Fulani's disbursements are qualified campaign expenses, neither the membership of these
19 persons in the socialist collective, nor their close political association with Dr. Fulani,
20 would cause the Commission to request an additional explanation of the connection
21 between her disbursements and her campaign for nomination under 11 CFR 9033.1(b)(3).
22 However, if the membership or close political association, when considered in
23 conjunction with other facts that come to light in the audit or investigation processes, cast

1 doubt on whether Dr. Fulani's disbursements are qualified campaign expenses, the
2 Commission may require an additional explanation of the connection between the
3 disbursements and her campaign for nomination.

4 In question 14, you ask "if the work contracted for were done by the vendor and
5 the price paid was commercially reasonable, could the expenditure still be found not
6 qualified because it was later decided by the Commission that the payment was 'solely
7 for the benefit of the socialist collective?'" Question 15 asks about the criteria that would
8 be used to make this determination.

9 As indicated above, disbursements that are made in connection with the
10 candidate's campaign for nomination will be considered qualified campaign expenses. If
11 Dr. Fulani is able to demonstrate that she entered into these contracts in connection with
12 her campaign for nomination, that the work contracted for was actually performed for the
13 campaign, and the contractor was paid an amount that is commercially reasonable for the
14 goods or services provided, the payment will be a qualified campaign expense.

15 However, if the Commission's post-primary audit reveals that Dr. Fulani's
16 campaign made payments to a vendor that provided no goods or services to her
17 campaign, or paid an amount exceeding the commercially reasonable rate for whatever
18 goods or services were provided, these payments, or a portion thereof, will not be in
19 connection with her campaign for nomination, and therefore will not be a qualified
20 campaign expense.

21 Questions 16 through 19 inquire as to the concept of "arms length." You ask
22 whether the transaction described in question 14 would be considered "not at arms
23 length." You also ask about the criteria that the Commission would use to make this

1 determination and whether these criteria are defined in any provision of law or contract
2 that is binding upon a candidate.

3 No provision of the Matching Payment Act, the Federal Election Campaign Act, 2
4 U.S.C. §431 *et seq.* ("FECA"), the Commission's regulations or Dr. Fulani's candidate
5 agreement specifically defines "arms length."³ When no specific definition exists, the
6 Commission usually applies generally accepted legal principles. Under general legal
7 principles, the phrase "arms length" refers to a transaction negotiated by unrelated parties,
8 each acting in his or her own self interest. Black's Law Dictionary 109 (6th ed. 1990).
9 Transactions are generally considered to be at arms length if they are entered into in good
10 faith in the ordinary course of business by parties with independent interests. *Id.* Under
11 these standards, the transaction described in question 14 does not appear to be at arms
12 length, because Dr. Fulani and her vendors do not appear to have independent interests.

13 However, the fact that this transaction is not at arms length does not, by itself,
14 lead to the conclusion that it would not be a qualified campaign expense. As indicated
15 above, a qualified campaign expense is an expense that is incurred in connection with the
16 candidate's campaign for nomination for election and that does not violate any applicable
17 State or Federal law. 26 U.S.C. §9032(9). In determining whether a transaction violates
18 the FECA, the Commission generally focuses upon the question of whether the candidate
19 or committee paid the usual and normal charge for the goods or services provided, rather
20 than on whether the transaction was at arms length. The regulations define the usual and
21 normal charge for goods as the price of those goods in the market from which they

³ The Commission offers no opinion as to whether any other statute, regulation or legal instrument that is binding on Dr. Fulani defines this phrase, as these matters are beyond its jurisdiction.

1 ordinarily would have been purchased at the time of transaction. The usual and normal
2 charge for services is the hourly or piecework charge for the services at a commercially
3 reasonable rate prevailing at the time the services were rendered. 11 CFR
4 100.8(a)(1)(iv)(B).

5 Thus, in Advisory Opinion 1995-38, the Commission concluded that a
6 nonconnected political committee could receive services from a vendor whose chief
7 executive officer also served as treasurer of the committee, so long as the committee paid
8 the usual and normal charges for those services. Similarly, in Advisory Opinion 1995-8,
9 the Commission concluded that the principal campaign committee of a congressional
10 candidate could rent a building owned by the candidate and his wife, so long as the
11 committee paid the usual and normal charge for the rental property, and the property
12 contained no part of the personal residence of the candidate or his family.⁴ Advisory
13 Opinion 1994-8 involved a principal campaign committee that wanted to lease office
14 space from the spouse of the candidate. The Commission concluded that the arrangement
15 would be permissible provided that the terms of the lease were consistent with the usual
16 and normal business charges and practices for the area in which the lease occurred. These
17 opinions illustrate that the transaction in question 14 would not be considered a
18 nonqualified campaign expense solely because it is not an arms length transaction.

19 However, the Commission cautions that the Act and regulations do require Dr.
20 Fulani to use any public funds she receives only to defray qualified campaign expenses.

⁴ The Commission's personal use rules prohibit the use of campaign funds for mortgage, rent or utility payments on any part of the personal residence of a candidate or a member of the candidate's family. See 11 CFR 113.1(g)(1)(i)(E).

1 By submitting a candidate agreement and accepting public funds, Dr. Fulani specifically
2 agreed to comply with this requirement. Under some circumstances, the fact that a
3 vendor-candidate transaction was not at arms length may be an indication that the
4 transaction was not in connection with the candidate's campaign for nomination.
5 Therefore, the nature of campaign's contractual relationships with its vendors would be
6 relevant to determining whether the campaign's disbursements to its vendors are qualified
7 campaign expenses.

8 Finally, question 20 asks what steps the candidate should take to ensure that these
9 payments will be qualified campaign expenses, given the existence of the socialist
10 collective and the close relationship between the vendors and the candidate. The only
11 appropriate response to this question is that Dr. Fulani should takes steps to satisfy the
12 requirements outlined above and to otherwise comply with the Act and Commission
13 regulations. The advisory opinion process may only be used with respect to a specific
14 transaction or activity as set forth by the requester. 2 U.S.C. §437f, 11 CFR 112.1(b).

15 The Commission expresses no opinion regarding the tax ramifications of the
16 proposed activities, as these issues are not within its jurisdiction.

17 This response constitutes an advisory opinion concerning application of the Act,
18 or regulations prescribed by the Commission, to the specific transaction or activity set
19 forth in your request. See 2 U.S.C. §437f.

20 Sincerely,

21
22 Lee Ann Elliott
23 Chairman

24 Enclosures (AOs 1995-38, 1995-8, and 1994-8)