FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 20, 1996

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1996-12

Arthur Block
Attorney at Law
72 Spring Street, Suite 1201
New York, NY 10012

Dear Mr. Block:

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

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

You indicate that Dr. Fulani intends to hire a number of individuals and vendors 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.

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

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

However, you should be aware that the status of Dr. Fulani's disbursements as qualified campaign expenses is subject to verification in the post-primary audit process. After the conclusion of the matching payment period, the Commission will conduct an examination and audit of the qualified campaign expenses of every candidate who receives public financing. 26 U.S.C. 9038(a). The Commission may determine, based on the information it obtains in the audit process, that these disbursements are not qualified campaign expenses. 11 CFR 9038.1(a). Under section 9033.11(a) of the regulations, Dr. Fulani bears the burden of demonstrating that her disbursements are qualified campaign expenses under section 9032(9). The regulations require candidates who seek matching funds to explicitly agree to assume this burden in their candidate agreement. 11 CFR 9033.1(b)(1). Thus, although these transactions appear, *ab initio*, to be qualified campaign expenses, Dr. Fulani will be expected to demonstrate during the audit process that they are in connection with her campaign for nomination, and therefore are qualified campaign expenses.

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

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

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

In questions 2 through 5, you ask whether the membership of the individuals or the vendor personnel in the socialist collective, or the close political association between these persons and the candidate, would alter the standard that would be used to determine whether the payments are qualified campaign expenses. If so, you ask that the altered standard be stated. While the factual conditions that exist in a particular situation may be relevant to determining whether a disbursement is a qualified campaign expense, they do not alter the standard used to make this determination. As indicated above, disbursements will be considered qualified campaign expenses if the candidate provides the documentation necessary to demonstrate that the disbursements were made in connection with the candidate's campaign for nomination.

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

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

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

In question 14, you ask "if the work contracted for were done by the vendor and the price paid was commercially reasonable, could the expenditure still be found not qualified because it was later decided by the Commission that the payment was `solely for the benefit of' the socialist collective?" Question 15 asks about the criteria that would be used to make this determination. As indicated above, disbursements that are made in connection with the candidate's campaign for nomination will be considered qualified campaign expenses. If Dr. Fulani is able to demonstrate that she entered into these contracts in connection with her campaign for nomination, that the work contracted for was actually performed for the campaign, and the contractor was paid an amount that is commercially reasonable for the goods or services provided, the payment will be a qualified campaign expense.

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

Questions 16 through 19 inquire as to the concept of "arms length." You ask whether the transaction described in question 14 would be considered "not at arms length." You also ask about the criteria that the Commission would use to make this determination and whether these criteria are defined in any provision of law or contract that is binding upon a candidate.

No provision of the Matching Payment Act, the Federal Election Campaign Act, 2 U.S.C. 431 *et seq*.("FECA"), the Commission's regulations or Dr. Fulani's candidate agreement specifically defines "arms length."[3] When no specific definition exists, the Commission usually applies generally accepted legal principles. Under general legal principles, the phrase "arms length" refers to a transaction negotiated by unrelated parties, each acting in his or her own self interest. Black's Law Dictionary 109 (6th ed. 1990). Transactions are generally considered to be at arms

length if they are entered into in good faith in the ordinary course of business by parties with independent interests. *Id.* Under these standards, the transaction described in question 14 does not appear to be at arms length, because Dr. Fulani and her vendors do not appear to have independent interests.

However, the fact that this transaction is not at arms length does not, by itself, lead to the conclusion that it would not be a qualified campaign expense. As indicated above, a qualified campaign expense is an expense that is incurred in connection with the candidate's campaign for nomination for election and that does not violate any applicable State or Federal law. 26 U.S.C. 9032(9). In determining whether a transaction violates the FECA, the Commission generally focuses upon the question of whether the candidate or committee paid the usual and normal charge for the goods or services provided, rather than on whether the transaction was at arms length. The regulations define the usual and normal charge for goods as the price of those goods in the market from which they ordinarily would have been purchased at the time of transaction. The usual and normal charge for services is the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered. 11 CFR 100.8(a)(1)(iv)(B).

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

However, the Commission cautions that the Act and regulations do require Dr. Fulani to use any public funds she receives only to defray qualified campaign expenses. By submitting a candidate agreement and accepting public funds, Dr. Fulani specifically agreed to comply with this requirement. Under some circumstances, the fact that a vendor-candidate transaction was not at arms length may be an indication that the transaction was not in connection with the candidate's campaign for nomination. Therefore, the nature of the campaign's contractual relationships with its vendors would be relevant to determining whether the campaign's disbursements to its vendors are qualified campaign expenses.

Finally, question 20 asks what steps the candidate should take to ensure that these payments will be qualified campaign expenses, given the existence of the socialist collective and the close relationship between the vendors and the candidate. The only appropriate response to this question is that Dr. Fulani should take steps to satisfy the requirements outlined above and to otherwise comply with the Act and Commission regulations. The advisory opinion process may

only be used with respect to a specific transaction or activity as set forth by the requester. 2 U.S.C. 437f, 11 CFR 112.1(b).

The Commission expresses no opinion regarding the tax ramifications of your proposed activities, as these issues are not within its jurisdiction. This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Lee Ann Elliott
Chairman

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

1 Your request indicates that the core collective, of which Dr. Fulani is also a member, "functions according to the principle 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.' " The Commission is not addressing the question of whether members of the collective are "members" for purposes of Federal election law.
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.
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.
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).