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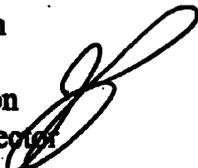
FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**AGENDA ITEM**  
For Meeting of: 10-29-98

October 22, 1998

**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon   
Acting Staff Director

FROM: Lawrence M. Noble   
General Counsel

N. Bradley Litchfield   
Associate General Counsel

Jonathan M. Levin   
Senior Attorney

Subject: Draft AO 1998-20

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 29, 1998.

Attachment

**DRAFT**

1 ADVISORY OPINION 1998-20

2  
3 Arthur R. Block  
4 14 Wall Street  
5 28<sup>th</sup> Floor  
6 New York, NY 10005-2101

7  
8 Dear Mr. Block:

9  
10 This responds to your letter dated September 9, 1998, on behalf of Dr. Lenora B.  
11 Fulani and Lenora B. Fulani for President ("the Committee"), requesting an advisory  
12 opinion concerning the application of the Federal Election Campaign Act of 1971, as  
13 amended ("the Act"), and Commission regulations to the permissibility of raising funds  
14 outside of the limits of the Act for the purposes of making a repayment to the United  
15 States Treasury.

16 Dr. Fulani was a candidate for the 1992 presidential nomination of the Democratic  
17 Party, the New Alliance Party, and several other parties, and the Committee was her  
18 authorized campaign committee. As a primary election candidate in 1992, Dr. Fulani  
19 qualified for public matching funds from the United States Treasury, which were certified  
20 by the Commission. On March 6, 1997, the Commission issued a final repayment  
21 determination requiring that the Committee repay the sum of \$117,269.54 in matching  
22 fund payments to the U.S. Treasury. The Commission made this determination based on  
23 findings that: (i) certain expenditures of the Committee were not qualified campaign  
24 expenses, and a proportion of the funds used in this manner were matching payments; and  
25 (ii) the Committee had received matching funds in excess of its entitlement. The  
26 Committee petitioned the U.S. Court of Appeals for the D.C. Circuit for review of the  
27 repayment order. On June 23, 1998, the court issued a decision denying the petition. See  
28 *Fulani v. Federal Election Commission*, 147 F.3d 924 (D.C. Cir. 1998).

29 You state that Dr. Fulani wants to satisfy this repayment obligation "and put  
30 closure on the 1992 election cycle."<sup>1</sup> You assert that, despite this desire, she is no longer  
31 able to engage in the type of "grass roots" fundraising that she used in her 1992

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<sup>1</sup> The reports of the Committee disclose that there are no debts owed to or by the Committee other than the matching fund repayments.

1 presidential campaign, enabling her to raise a large total amount in small contributions.

2 You note further that she does not have a large number of supporters who can make  
3 contributions in the \$500-\$1,000 range. She believes that "the only potentially viable  
4 means" for raising the funds necessary to repay the Treasury would entail the acceptance  
5 of contributions by a few close supporters in excess of \$1,000 per contributor. Toward  
6 this end, you ask the following questions:

7 (1) May an individual make contributions aggregating in excess of \$1,000 to the  
8 Committee when the purpose of the contributions and intended use of the funds is  
9 solely to make a repayment to the U.S. Treasury?

10  
11 (2) May an individual make loan(s) aggregating in excess of \$1,000 to the Committee  
12 when the purpose of the loan and intended use of the funds is solely to make the  
13 repayment to the Treasury?

14  
15 (3) May Dr. Fulani, as an individual, receive personal gifts of money or personal loans in  
16 excess of \$1,000 and subsequently use some or all of the proceeds to satisfy her joint  
17 and several liability to the Treasury?

18  
19 In support of your request, you argue that your proposal presents exceptional  
20 circumstances and that the Commission had approved "direct and indirect waivers" of the  
21 limitations in special circumstances with respect to debt retirement or matching fund  
22 repayment obligations of the presidential campaign committees of Senator John Glenn  
23 and Congressman Richard Gephardt. See Advisory Opinions 1993-19 and 1987-4. You  
24 also argue that funds raised to defray the costs of a matching fund repayment should not  
25 be treated as contributions because the ordered repayment is based, you assert, on the use  
26 of matching payments for non-qualified expenses and thus is akin to the payment of civil  
27 or criminal penalties under 11 CFR 9034.4(b)(4), which are not qualified campaign  
28 expenses and cannot be defrayed from contributions or matching payments.

29 ***Responses to Questions One and Two***

30  
31 Under the Act and regulations, no person, other than a multicandidate committee,  
32 is permitted to make contributions to a candidate and that candidate's authorized  
33 committee with respect to any election for Federal office which, in the aggregate exceed

1 \$1,000. 2 U.S.C. §441a(a)(1)(A); 11 CFR 110.1(b)(1); see also 2 U.S.C. §441a(f).<sup>2</sup> The  
2 Act and regulations define the term “contribution” to include a loan made for the purpose  
3 of influencing a Federal election, other than a loan of money by a qualified depository  
4 institution made in accordance with applicable banking laws and regulations and in the  
5 ordinary course of business. 2 U.S.C. §431(8)(A)(i) and (B)(vii); 11 CFR 100.7(a)(1) and  
6 (b)(11); see Advisory Opinion 1994-26.

7 The Commission has consistently applied the limits of 2 U.S.C. §441a to  
8 contributions made following a Federal election for the purpose of retiring debts arising  
9 from that election campaign. Contributions made by a person for such purposes must be  
10 aggregated with contributions already made by that person for that election. Advisory  
11 Opinions 1993-19 and 1989-10; *Federal Election Commission v. Ted Haley*  
12 *Congressional Committee*, 852 F.2d 1111 (9<sup>th</sup> Cir. 1988).<sup>3</sup> More specifically, the  
13 Commission regulations address the source of funds that may be used for the repayment  
14 of matching funds to the U.S. Treasury. They are: personal funds of the candidate  
15 (without regard to the \$50,000 limit on the aggregate contributions by the candidate);  
16 contributions and Federal funds in the authorized committee’s account(s); and most  
17 relevant here, any additional funds raised subject to the limitations and prohibitions of the  
18 Act. 11 CFR 9038.2(a)(4) [formerly, 11 CFR 9034.4(c)]. In contrast to the treatment of  
19 matching fund repayments, Commission regulations specifically provide that any funds  
20 received or expended for the purpose of paying a civil or criminal penalty shall not be  
21 considered contributions or expenditures under the Act (although they will be subject to  
22 the prohibitions of the Act). 11 CFR 9034.4(b)(4).

23 Based on the precedential and regulatory treatment of the payment of the post-  
24 election debts of a committee and, in particular, matching fund repayments owed by an  
25 authorized presidential campaign committee, the Commission concludes that the  
26 Committee may not accept contributions from individuals, in the form of either a gift or a

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<sup>2</sup> A multicandidate committee may not make contributions aggregating in excess of \$5,000, to any candidate and her authorized committee with respect to any Federal election. 2 U.S.C. §441a(a)(2)(A).

<sup>3</sup> This principle has been applied in a number of advisory opinions where a significant time period had passed between the election at issue and the proposed fundraising. See Advisory Opinions 1993-19 (over nine years), 1985-2 (seven years), 1983-39 (five years), and 1982-64 (four years).

1 loan, that, when aggregated with other contributions made to the Committee, exceed  
2 \$1,000.

3       You cite Advisory Opinion 1993-19 as relevant to Dr. Fulani's situation because  
4 of a waiver granted by the Commission to the 1984 presidential campaign committee of  
5 Senator Glenn, which sought to raise funds to retire campaign debt. In that opinion, the  
6 Commission concluded that, although 26 U.S.C. §9035 and 11 CFR 9035.2 prohibit a  
7 candidate who accepts matching funds from making contributions or expenditures from  
8 his personal funds in excess of \$50,000, the request for a waiver would be granted  
9 because of the "the truly singular situation" presented. However, the Commission did not  
10 treat the Glenn campaign in a manner that was different in effect from the approach taken  
11 in this opinion. Significantly, the Commission explicitly rejected a request for a post-  
12 election waiver of the \$1,000 limit for the campaign, which had accepted matching  
13 payments and still owed over three million dollars to banks and other creditors as of late  
14 1993. Moreover, the waiver that was granted to the Glenn campaign for the retirement of  
15 debts is already available, in effect, to the Fulani campaign for the retirement of the  
16 repayment obligation by virtue of the above-cited regulation at 11 CFR 9038.2(a)(4)  
17 which permits use of personal funds without a limit.

18       The Commission also emphasizes that the waiver requested by Dr. Fulani (and  
19 denied to Senator Glenn) pertains to a provision of the Act that is binding on all  
20 candidates, regardless of whether they are publicly funded. This provision pertains  
21 directly to the issue of the undue influence that the Act is designed to prevent. The  
22 waiver granted to Senator Glenn is for a provision governing personal expenditure  
23 limitations by a small group of candidates, only those who are publicly financed.

24       You have also referred to Advisory Opinion 1987-4, another portion of Advisory  
25 Opinion 1993-19, and a 1992 audit repayment decision (cited in the 1993 opinion) with  
26 respect to the 1988 presidential campaign of Mr. Gephardt as examples of waivers of the  
27 limits by the Commission. In the advisory opinions, the Commission concluded that  
28 Senator Glenn's 1984 presidential committee could receive transfers from excess funds in  
29 his 1986 and 1992 Senate campaign committees, and possible 1998 Senate campaign  
30 committee, to assist in retiring the 1984 debt. In the 1992 audit decision, the Commission

1 permitted a transfer from Congressman's Gephardt's 1992 authorized House campaign  
2 committee to his 1988 presidential campaign committee. These permitted transfers,  
3 however, did not constitute waivers of the limits of the Act. Such transfers, which were  
4 between campaign committees in separate election cycles, were permissible under  
5 Commission regulations. See 11 CFR 110.3(c)(4) [11 CFR 110.3(a)(2)(iv) in the 1987  
6 opinion]. Compare 11 CFR 110.3(c)(5) [11 CFR 110.3(a)(2)(v) in the 1987 opinion].<sup>4</sup>

7 ***Response to Question Three***

8 As you know, both Dr. Fulani and the Committee are responsible for the  
9 repayment of the matching funds to the U.S. Treasury, under the agreement that candidate  
10 must sign to be eligible for public funding. See 11 CFR 9033.1 and 9038.2. As indicated  
11 above, the candidate may make such repayments from her personal funds without regard  
12 to the \$50,000 limit at 26 U.S.C. §9035. You propose that gifts or loans received by Dr.  
13 Fulani personally, with the objective of using the proceeds to repay the Treasury, would  
14 be personal funds, instead of contributions to retire an obligation incurred by the Dr.  
15 Fulani and the Committee.

16 In defining personal funds of a candidate, the Commission includes some  
17 specified sources other than those that were the candidate's assets at the time she became  
18 a candidate. 11 CFR 110.10(b)(2); see also 11 CFR 110.10(b)(1). These sources are as  
19 follows:

20 Salary and other earned income from bona fide employment;  
21 dividends and proceeds from the sale of the candidate's stocks or other  
22 investments; bequests to the candidate; income from trusts established  
23 before candidacy; income from trusts by bequest after candidacy of which  
24 the candidate is the beneficiary; gifts of a personal nature which had been  
25 customarily received prior to candidacy; proceeds from lotteries and  
26 similar games of chance.  
27

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<sup>4</sup> Moreover, the opinions were careful to assure that the conclusion would not permit the circumvention of the limits by the raising of funds by the transferor committee for purposes other than the Senatorial or House election. In Advisory Opinion 1987-4, the Commission limited the use of funds for transfer to funds raised prior to the 1986 general election. In Advisory Opinion 1993-19, the Commission cautioned that funds transferred from a 1998 Senate committee must contain funds solicited for the 1998 campaign and not solicited from contributors for retiring the 1984 presidential debt. See Advisory Opinion 1989-22.

