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**AGENDA ITEM**

For Meeting of: 2-21-02

February 13, 2002

**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director

FROM: Lawrence H. Norton  
General Counsel

N. Bradley Litchfield *NBL/RS*  
Associate General Counsel

Michael G. Marinelli *mm*  
Staff Attorney

SUBJECT: Draft AO 2002-01

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for February 21, 2002.

Attachment

# DRAFT

1 ADVISORY OPINION 2002-01

2  
3 Harry Kresky  
4 250 West 57<sup>th</sup> Street, Suite 2015  
5 New York, NY 10107  
6

7  
8 Dear Mr. Kresky:  
9

10 This refers to your letters dated January 2, 2002, and November 30, 2001, on  
11 behalf of Lenora B. Fulani and James Mangia, active members of various third party  
12 political organizations, concerning the application of the Presidential Election Campaign  
13 Fund Act (the "Fund Act") and Commission regulations to their eligibility for pre-general  
14 election funding.

15 You state that Ms. Fulani and Mr. Mangia are presently testing the waters to  
16 determine whether or not to run for President in 2004.<sup>1</sup> You explain that these activities  
17 include: meeting with and speaking by telephone with persons to determine the level of  
18 support within the independent political movement for such a candidacy and whether or  
19 not it is possible to raise sufficient funds for a viable campaign; and discussion with these  
20 people of the issues presented by the instant requests to determine how a campaign could  
21 be structured. You assert that the likelihood of either Ms. Fulani or Mr. Mangia seeking  
22 the U. S. Presidency depends, in part, on the Commission's response to this advisory  
23 opinion request.

24 Your specific question is whether general election Presidential funding under the  
25 Fund Act can be allocated in a way that permits distribution in 2008 to "a coalition

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<sup>1</sup> Your request identifies 20 other individuals with apparent organizational ties to the Reform Party, the Natural Law Party or the Independent/Independence party organizations who you also mention as requesters. They are not, however, linked to any specific course of action similar to that described with respect to Ms. Fulani and Mr. Mangia.

1 running one or more candidates in the year 2004" who, in the aggregate, obtain five  
2 percent of the vote in 2004. Such an amount would thereafter be redistributed to the 2008  
3 presidential candidates of the coalition parties on the basis on the performance of various  
4 candidates.<sup>2</sup> You propose this even though no one member of the coalition constitutes a  
5 political party whose presidential candidate received five percent of the vote. You further  
6 wish to know whether, in the above situation, such a coalition could receive "convention  
7 funding pursuant to 26 U.S.C. §9008."

8 You state your belief that there is a desire for a viable third party alternative as  
9 measured by the responses to various polls of the American electorate and you believe  
10 that this interpretation of the Fund Act would foster this development.

#### 11 **ACT AND COMMISSION REGULATIONS**

12 The Fund Act provides, at 26 U.S.C. §9004(a)(2)(B), that a candidate of one or  
13 more political parties for the office of President who was a candidate for such office in  
14 the preceding presidential election and received 5% or more, but less than 25%, of the  
15 popular vote in that election, and who meets the other conditions for eligibility, shall be  
16 entitled to pre-general election payments. See 11 CFR 9004.2(a).

17 The Fund Act also provides that the eligible candidate of a minor party whose  
18 candidate for the office of President in the preceding election received at least 5% but less  
19 than 25% of the total vote is eligible to receive pre-general election payments, if other  
20 conditions for eligibility are met. 26 U.S.C. §9004(a)(2)(A), see also 11 CFR 9004.2(b).

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<sup>2</sup> Your proposal may be illustrated by this example: In the 2004 Presidential election cycle, the Natural Law Party, the Green Party and the Libertarian Party each nominate a separate presidential candidate and the total popular votes of those three candidates as a group is 6% of the total national popular vote for President, but no single candidate received 5% of the total. The 6% share is split among the three candidates in a ratio of 60%/25%/15%. You would propose that the three-candidate group receive

1 A new party or minor party candidate can qualify for post-election funding if that  
2 candidate has received at least 5% of the total vote. 26 U.S.C. §9004(a)(3), see also 11  
3 CFR 9004.3(a).

4 The Fund Act, at 26 U.S.C. §9002(7), defines a "minor party," in the context of  
5 "any presidential election, [as] a political party whose candidate for the office of  
6 President in the preceding Presidential election received, as the candidate of such party, 5  
7 percent or more but less than 25 percent of the total number of popular votes received by  
8 all candidates for such office." Non-major party candidates who were not candidates for  
9 President in the preceding election, and who wish to qualify for pre-election funding in  
10 the next following presidential election, can become eligible only as candidates of a  
11 minor party. 26 U.S.C. §9004(a)(2)(A). In addition, only the national committee of a  
12 major or minor party is eligible for convention funding under 26 U.S.C. §9008.

13 The term "candidate" means with respect to any presidential election, an  
14 individual who: (A) has been nominated for election to the office of President of the  
15 United States or the office of Vice president of the United States by a major party, or  
16 (B) has qualified to have his name on the election ballot (or to have the names of electors  
17 pledged to him on the election ballot) as the candidate of a political party for election to  
18 either such office in 10 or more States. 26 U.S.C. §9002(2). For purposes of the  
19 definition of "minor party," and for purposes of section 9004(a)(2) the term "candidate"  
20 means, with respect to any preceding presidential election, an individual who received  
21 popular votes for the office of President in such election. *Id.*

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entitlement under the Fund Act at the same level as would be available if any one of them had alone  
received the 6%, and such amount would then be shared among them on 60/25/15% basis.

1           The term "political party" for purposes of the Fund Act is defined in Commission  
2 regulations as "an association, committee or organization which nominates or selects an  
3 individual for election to any Federal office, including the office of President or Vice  
4 President of the United States, whose name appears on the general election ballot as the  
5 candidate of such association, committee or organization." 11 CFR 9002.15. See also 2  
6 U.S.C. §431(16).

### 7 ***APPLICATION TO PARTY PROPOSAL***

#### 8 ***Pre-General election funding***

9           In several past opinions, the Commission has examined the qualifications under  
10 26 U.S.C. §9004(a)(3) of a new party or minor candidate in a current general election for  
11 post-general election funding. See Advisory Opinion 1980-56 (eligibility of 1980  
12 Presidential candidate Barry Commoner for post-1980 general election funding) and  
13 Advisory Opinion 1980-96 (eligibility of 1980 Presidential candidate John Anderson for  
14 post-1980 general election funding). The Commission has also examined the eligibility  
15 under 26 U.S.C. §9004(a)(2)(B), of a prior minor party or prior new party Presidential  
16 candidate for pre-general election funding in the current general election. See Advisory  
17 Opinion 1982-62 (eligibility of 1980 Presidential candidate John Anderson for pre-  
18 election funding in 1984) and Advisory Opinion 1996-22 (eligibility of 1992 candidate  
19 Ross Perot for pre-election funding in 1996). Your proposal represents the first time that  
20 the Commission has considered the eligibility of a group of candidates of minor parties  
21 under 26 U.S.C. §9004(a)(2)(A) for pre-general election funding.

22           The Commission concludes that your proposal for pre-general election funding is  
23 not in accord with either the language or the legislative intent of the Fund Act. The

1 relevant sections of the Fund Act and related Commission regulations speak in terms that  
2 contemplate one Presidential candidate per one political party, rather than several  
3 Presidential candidates of either the same political party or of multiple parties. For  
4 example, the term "minor party" at 26 U.S.C. §9002(2) refers to a minor party as a party  
5 "whose candidate for the office of President in the preceding Presidential election  
6 received, as the candidate of such party, 5 percent or more but less than 25 percent of the  
7 total number of popular votes received by all candidates for such office." [emphasis  
8 added]. The language of 26 U.S.C. §9004(a)(2)(A) is similar. The legislative debates for  
9 the Fund Act suggest the view of Congress that the Fund Act would operate on the basis  
10 of one Presidential candidate per minor party. For example, in 1971 when debating  
11 impact of the Fund Act on third party activity, the example of third party activity that was  
12 most often recalled by the Members of Congress was that of Governor Wallace in 1968.  
13 See 117 Cong. Rec. S 18934 (daily ed. Nov 18, 1971) (statement of Sen. Pastore),  
14 reprinted in 2 *Legal History of the Presidential Election Campaign Fund Act*, at 2221  
15 (1984); see also 117 Cong. Rec. S 45826 (daily ed. Dec 9, 1971) (written statement of  
16 Sen. Kennedy), reprinted in 2 *Legal History* at 2582.<sup>3</sup>

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<sup>3</sup> Your request cites to a prior memo prepared by the Office of General Counsel dated September 11, 2000 offering the Commission advice on dealing with conflicting claims to the pre-general election funding to be awarded to the Reform Party candidate in 2000. This memo suggested to the Commission the possibility of dividing the pool of pre-election funding entitled to more than one candidate of the same party. Nonetheless, the Commission notes that on September 14, 2000, having considered the September 11 memo, the Commission awarded the funds to only one Reform Party Presidential candidate and his Vice-Presidential running mate. See, Statement of Reasons, *Entitlement of Patrick Buchanan and Ezola Foster to \$12,613,452 in Pre-Election Public Funding*, LRA (October 17, 2000). The Commission also notes that the situation presented in your request differs from the circumstances discussed in the September 11 memo and the Statement of Reasons. In that situation, the pre-general election funding entitlement of the Reform Party in 2000 was based on the 1996 general election performance of one Reform Party Presidential candidate. The dispute in 2000 concerned how that entitlement should be awarded, since two rival individuals each claimed to be the only legitimate nominee of the Reform Party. You present the situation where the pre-general election entitlement itself is based on the performance of multiple presidential candidates, none of whom present competing claims to the same entitlement.

1           The Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) examined the  
2 legislative history of the Fund Act and observed that while designed to treat third parties  
3 fairly, it was also to “serve the important public interest against providing artificial  
4 incentives to splintered parties and unrestrained factionalism.” *Id.* at 96. The Court  
5 further noted:

6           Congress’ interest in not funding hopeless candidacies with large sums of  
7 public money, necessarily justifies the withholding of public assistance  
8 from candidates without a significant modicum of support. *Id.* [citations  
9 omitted]  
10

11 To provide pre-general election funding to a minor party based on the prior performance  
12 of several minor party Presidential candidates within the same political party, or of a  
13 group of several Presidential candidates who join together in one coalition although  
14 having differing political party affiliations, would clearly run counter to these concerns.

15           In view of the foregoing, the Commission concludes that the entitlement for pre-  
16 general election funding under 26 U.S.C. §9004(a)(2)(A), of a minor party candidate may  
17 not be determined by combining or aggregating the vote totals of several minor party  
18 Presidential candidates. Each separate minor party must use the vote totals received by  
19 its own discrete minor party Presidential candidate to ascertain the entitlement, if any, of  
20 that minor party’s candidate.<sup>4</sup>

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<sup>4</sup> While your request concerns the grant of pre-general election funding in 2008 under 26 U.S.C. §9004(a)(2)(A), the above conclusions and rationale also apply to the entitlement for post-general election funding in 2004 under 26 U.S.C. §9004(a)(3). In neither circumstance may several minor party candidates combine their vote totals to establish a single or unitary funding entitlement that would then be distributed among them.

