FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 4, 1998

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1998-20

Arthur R. Block
14 Wall Street
28th Floor
New York, NY 10005-2101

Dear Mr. Block:

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

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

You state that Dr. Fulani wants to satisfy this repayment obligation "and put closure on the 1992 election cycle."[1] You assert that, despite this desire, she is no longer able to engage in the type of "grass roots" fundraising that she used in her 1992 presidential campaign, enabling her to raise a large total amount in small contributions. You note further that she does not have a large number of supporters who can make contributions in the $500-$1,000 range. She believes that "the only potentially viable means" for raising the funds necessary to repay the Treasury would entail the acceptance of contributions by a few close supporters in excess of $1,000 per contributor. Toward this end, you ask the following questions:

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

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

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

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

Responses to Questions One and Two

Under the Act and regulations, no person, other than a multicandidate committee, is permitted to make contributions to a candidate and that candidate's authorized committee with respect to any election for Federal office which, in the aggregate, exceed $1,000. 2 U.S.C. §441a(a)(1)(A); 11 CFR 110.1(b)(1); see also 2 U.S.C. §441a(f).[2] The Act and regulations define the term "contribution" to include a loan made for the purpose of influencing a Federal election, other than a loan of money by a qualified depository

[1] The reports of the Committee disclose that there are no debts owed to or by the Committee other than the matching fund repayments.

[2] 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).

institution made in accordance with applicable banking laws and regulations and in the ordinary course of business. 2 U.S.C. §431(8)(A)(i) and (B)(vii); 11 CFR 100.7(a)(1) and (b)(11); see Advisory Opinion 1994-26.

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

Based on the precedential and regulatory treatment of the payment of the post-election debts of a committee and, in particular, matching fund repayments owed by an authorized presidential campaign committee, the Commission concludes that the Committee may not accept contributions from individuals, in the form of either a gift or a loan, that**,** when aggregated with other contributions made to the Committee, exceed $1,000.

You cite Advisory Opinion 1993-19 as relevant to Dr. Fulani's situation because of a waiver granted by the Commission to the 1984 presidential campaign committee of Senator Glenn, which sought to raise funds to retire campaign debt. In that opinion, the Commission concluded that, although 26 U.S.C.§9035 and 11 CFR 9035.2 prohibit a candidate who accepts matching funds from making contributions or expenditures from his personal funds in excess of $50,000, the request for a waiver would be granted because of the "the truly singular situation" presented. However, the Commission did not treat the Glenn campaign in a manner that was different in effect from the approach taken in this opinion. Significantly, the Commission explicitly rejected a request for a post-election waiver of the $1,000 limit for the campaign, which had accepted matching payments and still owed over three million dollars to banks and other creditors as of late 1993. Moreover, the waiver that was granted to the Glenn campaign for the retirement of debts is already available, in effect, to the Fulani campaign for the retirement of the

[3] 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).

repayment obligation by virtue of the above-cited regulation at 11 CFR 9038.2(a)(4) which permits use of personal funds without a limit.

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

You have also referred to Advisory Opinion 1987-4, another portion of Advisory Opinion 1993-19, and a 1992 audit repayment decision (cited in the 1993 opinion) with respect to the 1988 presidential campaign of Mr. Gephardt as examples of waivers of the limits by the Commission. In the advisory opinions, the Commission concluded that Senator Glenn's 1984 presidential committee could receive transfers from excess funds in his 1986 and 1992 Senate campaign committees, and possible 1998 Senate campaign committee, to assist in retiring the 1984 debt. In the 1992 audit decision, the Commission permitted a transfer from Congressman's Gephardt's 1992 authorized House campaign committee to his 1988 presidential campaign committee. These permitted transfers, however, did not constitute waivers of the limits of the Act. Such transfers, which were between campaign committees in separate election cycles, were permissible under Commission regulations. See 11 CFR 110.3(c)(4) [11 CFR 110.3(a)(2)(iv) in the 1987 opinion]. Compare 11 CFR 110.3(c)(5) [11 CFR 110.3(a)(2)(v) in the 1987 opinion].[4]

Response to Question Three

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

In defining personal funds of a candidate, the Commission includes some specified sources other than those that were the candidate's assets at the time she became

[4] 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.

a candidate. 11 CFR 110.10(b)(2); see also 11 CFR 110.10(b)(1). These sources are as follows:

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

You have not presented any facts that would establish a basis for concluding that these gifts will be of a personal nature which had been customarily received prior to candidacy. Your situation is, instead, similar to that of the candidate described in Advisory Opinion 1985-33. There, the Commission examined a situation in which there were "entities" willing to make personal loans to the candidate "as a candidate," but were not willing to make loans to the principal campaign committee. The candidate would then loan the funds to her committee. The Commission noted that the candidate was an agent of the committee and was receiving these funds for the purpose of using them in her campaign. Therefore, the loans did not qualify as personal funds. See 2 U.S.C. §432(e)(2); 11 CFR 101.2(a) and 102.7(d). Even though you state that the gifts or loans might not be earmarked for the campaign, you have acknowledged that the purpose of the acceptance of such gifts would be to repay the Treasury; i.e., for the purpose of satisfying the debt of the Committee. See Advisory Opinions 1982-64 and 1978-40. Moreover, even if the proceeds of such gifts or loans were to go immediately into other entities or projects associated with Dr. Fulani, you have already established the purpose of this subsidization activity, and such gifts may free up other funds of the candidate to repay the matching fund obligation. See Advisory Opinion 1982-64.

Based on the foregoing, the Commission concludes that your proposal for the receipt of gifts and loans in excess of the Act's limitations would evade the limit at 2 U.S.C. §441a(a)(1)(A) and is impermissible under the Act.

You raise the argument that Dr. Fulani is entitled to relief under the First and Fifth Amendments to the Constitution related to the questions you present. You have provided no substantial analysis or support for such claims. Generally, Federal administrative agencies are without power or expertise to pass upon the constitutionality of legislative action. Advisory Opinion 1992-35. However, the Commission notes that the exceptions to the law which you request are neither "the same (or analogous)" to the instances you cited permitting transfers of funds from other authorized committees or the personal funds of the candidate. Furthermore, there is a "compelling and nondiscriminatory governmental purpose" to maintain a distinction between large contributions, which present opportunities for corruption, and expenditures of the candidate's own funds or transfers from a related committee. In fact, treating a

candidate's own funds differently from contributions from others is precisely a constitutional distinction mandated in *Buckley v. Valeo*. 424 U.S. 1, 51-54 (1976).

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. 2 U.S.C. §437f.

Sincerely,

(signed)

Scott E. Thomas
Acting Chairman

Enclosures (AOs 1994-26, 1993-19, 1992-35, 1989-22, 1989-10, 1987-4, 1985-33, 1983-39, 1982-64, and 1978-40)