FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 8, 2002

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2002-01

Harry Kresky
250 West 57th Street, Suite 2015
New York, NY 10107

Dear Mr. Kresky:

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

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

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

[1] 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.

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

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

ACT AND COMMISSION REGULATIONS

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

The Fund Act also provides that the eligible candidate of a minor party whose candidate for the office of President in the preceding election received at least 5% but less than 25% of the total vote is eligible to receive pre-general election payments, if other conditions for eligibility are met. 26 U.S.C. §9004(a)(2)(A), see also 11 CFR 9004.2(b). A new party or minor party candidate can qualify for post-election funding if that candidate has received at least 5% of the total vote. 26 U.S.C. §9004(a)(3), see also 11 CFR 9004.3(a).

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

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[2] 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 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.

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

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

APPLICATION TO PARTY PROPOSAL

Pre-General election funding

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

The Commission concludes that your proposal for pre-general election funding is not in accord with either the language or the legislative intent of the Fund Act. The relevant sections of the Fund Act and related Commission regulations speak in terms that contemplate one Presidential candidate per one political party, rather than several Presidential candidates of either the same political party or of multiple parties. For example, the term "minor party" at 26 U.S.C. §9002(2) refers to a minor party as a party "*whose candidate* for the office of President in the preceding Presidential election received, as the candidate of such party, 5 percent or more but less than 25 percent of the total number of popular votes received by all candidates for such office." [emphasis added]. The language of 26 U.S.C. §9004(a)(2)(A) is similar. The legislative debates for

the Fund Act suggest the view of Congress that the Fund Act would operate on the basis of one Presidential candidate per minor party. For example, in 1971 when debating the impact of the Fund Act on third party activity, the example of third party activity that was most often recalled by the Members of Congress was that of Governor Wallace in 1968. *See* 117 *Cong. Rec*. S 18934 (daily ed. Nov 18, 1971) (statement of Sen. Pastore), *reprinted in 2 Legal History of the Presidential Election Campaign Fund Act*, at 2221 (1984); *see also* 117 *Cong. Rec*. S 45826 (daily ed. Dec 9, 1971) (written statement of Sen. Kennedy), *reprinted in 2 Legal History* at 2582.[3]

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

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

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

In view of the foregoing, the Commission concludes that the entitlement for pre-general election funding under 26 U.S.C. §9004(a)(2)(A), of a minor party candidate may not be determined by combining or aggregating the vote totals of several minor party Presidential candidates. Each separate minor party must use the vote totals received by

[3] 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.

its own discrete minor party Presidential candidate to ascertain the entitlement, if any, of that minor party's candidate.[4]

Convention funding

Your request also asks whether, using the performance of multiple minor candidates in 2004, an entitlement to minor party convention funding could be determined with respect to 2008, according to your proposal. The Commission notes that a necessary prerequisite to obtaining convention funding in 2008 is the existence of a national committee of a political party. See 26 U.S.C. §9008 and Advisory Opinions 2001-13 and 2000-06. Your request does not specifically identify the national committee of a minor party that might claim these funds in 2008 under your proposal. Moreover, the outcome of the 2004 Presidential election is highly speculative in general terms with respect to the prospect of any minor party candidate obtaining 5% or more of the total popular vote. This aspect of your inquiry is, therefore, hypothetical and the Commission expresses no opinion regarding it at this time. 11 CFR 112.1(b). See Advisory Opinion 1996-22.

This response constitutes an advisory opinion concerning the 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)

David M. Mason
Chairman

Enclosures: (AOs 2001-13, 2000-06, 1996-22, 1982-62, 1980-96, and 1980-56)

[4] 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.