FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 28, 1988

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1988-5

Bernard E. Schneider
660 Newport Center Drive
Suite 1400
Newport Beach, CA 92660

Dear Mr. Schneider:

This responds to your letter dated January 29, 1988, requesting an advisory opinion on behalf of Friends of Gary Hart-1988, Inc. concerning application of both the Federal Election Campaign Act of 1971, as amended ("the Act") and the Presidential Primary Matching Payment Account Act ("the Matching Payment Act").

You state that Friends of Gary Hart-1988, Inc. ("Hart 88"), is former Senator Hart's principal campaign committee in his campaign for the 1988 Democratic Party presidential nomination. You further indicate that Mr. Hart's 1984 presidential campaign committee ("Hart 84") has reported outstanding debts of $1.1 million and that Mr. Hart wants to retire this outstanding 1984 debt expeditiously.

Mr. Hart has qualified for 1988 matching funds and Hart 88 has received Federal matching payments in the amount of $1,122,281 as of March 16, 1988. The most recent report filed with the Commission by Hart 88 indicates that as of February 29, 1988, Hart 88 had net cash on hand of approximately $457,000. In addition, on March 11, 1988, Mr. Hart publicly announced his withdrawal from the 1988 presidential campaign.

On behalf of Hart 88, you request an advisory opinion as to whether Hart 88 may use its funds to make loans or contributions to retire (or reduce) the outstanding 1984 Hart campaign debt. You also ask several related questions that are premised upon either an affirmative or negative answer to the principal question. In addition, you ask what consequences would follow for Hart 88, and its officials, if Hart 88 funds are used for 1984 campaign debts notwithstanding an advisory opinion concluding that such use is contrary to law.

The threshold issue raised by your request is whether the use (loan or gift) of Hart 88 funds to retire outstanding debts of the 1984 campaign is a "qualified campaign expense" of Hart 88. The Commission's opinion on this question is central to your request because the Matching Payment Act requires that Federal matching payments be used only for qualified campaign expenses. 11 CFR 9034.4(a)(1). Use of Federal matching payments for other purposes triggers, at the very least, a repayment obligation and would also constitute a statutory violation which may result in criminal fines or civil penalties, or both. 26 U.S.C. 9038(b)(2), (b)(3) and 9042(b); see 2 U.S.C. 437g(a)(5)(A), (a)(5)(B), (a)(6)(A), (a)(6)(B), (a)(6)(C). In addition, use of 1988 campaign funds, attributable either to Federal matching payments or contributions by any person, for any purpose other than qualified campaign expenses may affect Federal matching fund claims by candidates who become ineligible and whose entitlement must therefore be based solely on their net outstanding campaign obligations as of their date of ineligibility. 11 CFR 9034.1(b); see also 11 CFR 9033.5, 9034.4(a)(1), 9034.5.

The term "qualified campaign expense" is defined by the Matching Payment Act to mean, in part, any purchase, payment, loan, advance or gift of money, or anything of value, incurred by a presidential candidate (or his authorized committee) in connection with his campaign for the nomination. 26 U.S.C. 9032(9)(A); 11 CFR 9032.9(a)(2). Commission regulations further explain that a qualified campaign expense must be incurred between the date when an individual becomes a presidential candidate through the last day of the candidate's eligibility.[1] 11 CFR 9032.9(a)(1). These provisions clearly indicate that a qualified campaign expense must be incurred in connection with the same campaign for which matching fund eligibility and entitlement has been asserted by the candidate and determined by the Commission.

You have indicated that Mr. Hart's 1988 campaign, "in the view of some," suffers an "impediment" as a result of the outstanding 1984 debt. Whether or not this is so, it does not alter the application of the restrictions set forth in the definition of qualified campaign expense to the facts presented here. The outstanding debts of Mr. Hart's 1984 campaign for his party's presidential nomination represent qualified campaign expenses of that campaign and were incurred in 1984 or earlier, regardless of when they may be paid.

Mr. Hart's eligibility and entitlement to Federal matching payments for 1984 were determined with reference only to the 1984 campaign period. The Matching Payment Act negates any notion of a combined campaign, spanning two presidential election cycles, in that the definitions of qualified campaign expense and matching payment period are limited to particular time periods and a presidential candidacy within those periods. 26 U.S.C. 9032(6), (9). Moreover, Commission determinations of eligibility, entitlement, and repayment obligations are based upon a singular presidential candidacy within only one presidential election cycle. 26 U.S.C. 9033(b) and (c), 9034(a), 9016(a), 9037(b), 9038(b). In the closely related context of Federal funding in general election campaigns, the Commission has recognized that the timing of when an expense was incurred, including the dates of the underlying activities which resulted in the expense, is determinative. See Advisory Opinion 1984-58.

The Commission therefore concludes that payments by Hart 88 to retire the 1984 campaign debts, either as transfers, contributions or loans (including any loan guarantee or security), would

not be qualified campaign expenses of Hart 88. Because of the Commission's opinion in response to the principal issue, your questions concerning application of 1988 expenditure and 1984 contribution limits to the use of Hart 88 funds for 1984 campaign debts are moot and hypothetical.

Accordingly, this conclusion means that Hart 88 will have repayment obligations to the extent it uses any of its funds, whether attributable to Federal matching payments under the Matching Payment Act or contributions received pursuant to the Act, for retiring the 1984 Hart campaign debts. 26 U.S.C. 9038(b). In addition, Hart 88 and its officials would be in violation of 26 U.S.C. 9042(b) and subject to criminal or civil penalties thereunder. See 2 U.S.C. 437g(a)(5), (a)(6). Moreover, because such a use is not a qualified campaign expense, and because Mr. Hart has withdrawn from the 1988 presidential campaign, his future entitlement to matching funds, if any, may not be based upon including 1984 debt payments in his statement of net outstanding campaign obligations. 11 CFR 9033.5 9034.1(b), 9034.4(a), 9034.5. Furthermore, use of its funds for nonqualified purposes in contravention of this opinion puts Hart 88 and its officials at risk for knowing and willful violations of both the Act and the Matching Payment Act, as well as subject to criminal prosecution. 2 U.S.C. 437g(a)(5)(C).

One of your questions asks whether Hart 88 may deem some of its funds as "excess" and then use such "excess" to retire 1984 debts. This possibility would only arise if, at the conclusion of the Hart 1988 campaign after its debts and obligations are paid, and subject to the Commission's audit and review of Hart 88, there are remaining funds in any account of Hart 88. In that event Hart 88 would be in the position of having an unexpended balance in its accounts. 26 U.S.C. 9038(b)(3); see 11 CFR 9038.2, 9038.3. Once Hart 88 makes its required repayment to the United States Treasury of the appropriate portion of that unexpended balance, and has satisfied all other repayment obligations or possible penalty payments, it may retain remaining funds in its accounts and use them to retire 1984 campaign debts. After repayments and penalty payments are made, and only then, Hart 88 would be permitted to treat its remaining cash balance as excess campaign funds under 2 U.S.C. 439a and apply it to the 1984 debt. At such point, after purging his campaign funds of their Federal portion, Mr. Hart would be in the same situation for purposes of 2 U.S.C. 439a as a candidate who never became eligible for Federal matching payments. See Advisory Opinions 1987-4 and 1986-8. Before the Commission's audit process is concluded and repayment or possible penalty obligations are satisfied, however, Hart 88 may not rely on 2 U.S.C. 439a and related regulations because those provisions do not supplant or supersede the requirements and conditions placed on presidential campaign funds pursuant to Chapter 96 of Title 26.

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 yours,

(signed)

Thomas J. Josefiak

Chairman for the Federal Election Commission

Enclosures (AOs 1987-4, 1986-8, and 1984-58)

1/ A candidate's eligibility ends on the date he publicly announces that he will not be actively conducting a presidential campaign in more than one state. 11 CFR 9033.5(a)(1). The date of ineligibility may also occur earlier than the date of such an announcement on the basis of other facts. 11 CFR 9033.5, 9033.6.