FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 14, 1996

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1996-4

James F. Schoener
1712 Glenhouse Drive #315
Sarasota, Florida 34231

Dear Mr. Schoener:

This responds to your letter dated February 2, 1996, as supplemented by your letter dated February 28, 1996, requesting an advisory opinion on behalf of Lyndon H. LaRouche, Jr., concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), the Presidential Primary Matching Payment Account Act, ("the Matching Payment Act"), and Commission regulations to a bridge loan to his presidential campaign to compensate for the present shortfall in the disbursement of matching funds.

Mr. LaRouche is a candidate for the nomination of the Democratic Party for President of the United States and is running in a number of primaries. His principal campaign committee is the Committee to Reverse the Accelerating Global, Economic, and Strategic Crisis: LaRouche Exploratory Committee ("the 1996 committee"). Mr. LaRouche has completed his threshold submission for primary matching funds and has qualified for such funds.

You note that the Presidential Primary Matching Payment Account ("matching payment account"), maintained by the Secretary of the Treasury ("the Treasury"), is faced with a shortfall in the amount of funds available during the first few months of 1996 to make matching fund payments to qualified candidates. Regulations of the Department of the Treasury, which implement the funding priorities of 26 U.S.C. 9037(a), prescribe the procedures that govern the set aside of funds for the national party conventions and the general election before disbursements of matching funds are made to primary candidates. See 26 CFR 701.9006-1(b), (c), and (d), and 702-9037-1. Because of the shortfall, the initial payments to certified candidates, made in January 1996, were approximately sixty percent of the amounts to which they were entitled. *Federal Election Commission Record*, Vol. 22, No. 2 (February 1996), p. 3.

Further payments were made on February 1 and 15, 1996, covering approximately one percent and three percent respectively of the total accumulated unpaid amount to which the candidates were entitled at those points. Payments of matching funds in March are expected to be three to eight percent of the total accumulated unpaid entitlement. A recent *FEC Record* article notes, however, that the matching payment account "should recover by spring, at which time all certified candidates will receive all of their entitlements." *FEC Record,* Vol. 22, No. 1 (January 1996), p. 13.

You explain that, because of the inability to obtain the matching funds for which it had been or would be certified, the LaRouche campaign will not have the ability to pay for expenses required to conduct an effective campaign, such as the media time necessary for the "early densely clustered primaries." You also state that this applies to payments made either in advance of services, or after an extension of credit, to the campaign. You note that the cited article in the February 1995 *FEC Record* states that "candidates would presumably have to make up the difference with some form of bridge loans secured by the remaining entitlement for that period and repay those loans out of their March or April payments." *FEC Record,* Vol. 21, No. 2 (February 1995), p. 2.

The LaRouche campaign wishes to obtain a bridge loan from a financial institution or other source and seeks the Commission's response to four questions pertaining to these loans. The questions are restated as follows:

(1) May the candidate's withheld entitlement be assigned directly to the financial institution as assurance of repayment of the bridge loan?

(2) May the campaign instruct the Treasury to issue matching fund payments directly to the lending institution, with the proof of assignment that can be furnished to the institution?

(3) If the candidate becomes ineligible for further matching payments under the provisions of 26 U.S.C. 9033(c)(1)(B), is there any way to assure the financial institution of the repayment from the delayed Treasury payments? (You ask this question based on the assumption that the indebtedness is incurred for qualified campaign expenses prior to the date of ineligibility.)

(4) If the campaign is unsuccessful in obtaining a bridge loan from financial institutions, may the "Treasury receivable," i.e., the amount that is certified but unpaid from the Treasury, "be sold or transferred to the remaining surplus in Mr. LaRouche's 1992 presidential primary campaign"? You represent that any sale or transfer would be subject to the same guarantees as would be provided to a bank or other lending institution in a similar loan transaction.

Your first two questions pertain to the permissibility of obtaining loans based upon the anticipated payment of matching funds and the payment of such funds to the lending institution. Commission regulations specifically address the situation where a presidential primary candidate seeks a loan in reliance upon the receipt of such funds.[1]

A lending institution making such a loan must obtain a written agreement whereby the candidate or political committee receiving the loan pledges the future matching fund payments. 11 CFR

100.7(b)(11)(i)(B). The amount of the loan or loans obtained on the basis of such payments must not exceed the amount of pledged payments. 11 CFR 100.7(b)(11)(i)(B)(*1*). The loan amounts must be based on a reasonable expectation of the receipt of pledged payments. To this end, the candidate or committee must furnish the lending institution documents (that is, cash flow charts or other financial plans) that reasonably establish that such future funds will be available. 11 CFR 100.7(b)(11)(i)(B)(*2*). A separate depository account must be established at the lending institution, or the lender must obtain an assignment from the candidate or political committee to access funds in a committee account established at another qualified depository institution,[2] and the committee must notify the other institution of the assignment. 11 CFR 100.7(b)(11)(i)(B)(*3*). See 11 CFR 9037.3. The loan agreement must require the deposit of the matching payments into the separate depository account for the purpose of retiring the debt according to the loan agreement's repayment requirements. 11 CFR 100.7(b)(11)(i)(B)(*4*). Finally, the candidate or committee must authorize the Secretary of the Treasury to directly deposit the matching payments into that depository account. 11 CFR 100.7(b)(11)(i)(B)(*5*).

The foregoing regulations respond to your first two questions by providing direction as to the depositing of funds from the Treasury and as to assurances that the lender will receive such funds. In accordance with those regulations, the 1996 LaRouche committee must establish a separate depository account at the lending institution or provide an assignment to that institution granting it access to the committee's account at another institution. The committee's loan agreement must provide for the deposit of matching funds into that account and the committee must authorize the Treasury to do so.

Your third question anticipates the possibility that the LaRouche campaign will become ineligible for further certifications of matching payments because of a lack of success in the Democratic presidential primaries. The Matching Payment Act and Commission regulations provide that a candidate previously declared eligible for matching payments will be declared ineligible for further matching payments on the 30th day following the date of the second consecutive primary election in which such individual receives less than 10 percent of the number of popular votes cast for all candidates of the same party for the same office in that primary election, if the candidate permitted or authorized his or her name to appear on the ballot. 26 U.S.C. 9033(c)(1)(B); 11 CFR 9033.5(b).[3] Your question reflects a concern that after Mr. LaRouche is declared ineligible, he may not receive matching payments for which he had been previously certified but did not receive at the customary time because of the shortfall.

Your concern is reflected in Commission regulations. The Commission will continue to certify funds even if there are insufficient funds in the primary matching payment account to make the full payment to the candidate. See 11 CFR 9036.2(d) and 26 CFR 702.9037-2(c). Nevertheless, Commission regulations provide that a matching fund certification issued to a candidate does not mandate full payment by the Treasury if there is a shortfall in the account. 11 CFR 9037.1. See 26 CFR 702.9037-1 and 702.9037- 2.[4]

Generally speaking, candidates who have satisfied eligibility and certification requirements are entitled to receive payments in an amount equal to their matchable contributions, subject to the possibility that these amounts would be affected by a shortfall. 11 CFR 9034.1(a). See Explanation and Justification, Commission Regulations on Public Financing of Presidential

Primary and General Election Candidates, 56 Fed. Reg. 35898, 35904-5 (July 29, 1991). A candidate who has become ineligible may not receive further matching payments, regardless of the date of deposit of underlying contributions, if he has no net outstanding campaign obligations. 11 CFR 9034.1(a). If he has such obligations after the date of ineligibility, he is entitled to continue to receive matching payments but the amount would be the lesser of the amount of contributions submitted for matching and the net outstanding campaign obligations ("NOCO"). 11 CFR 9034.1(b).[5] The regulations further state that, in the event of non-payment because of a shortfall, the Commission may revise a previously certified amount after the candidate's date of ineligibility. 11 CFR 9036.4(c)(2). Specifically, after the candidate's date of ineligibility, and if the candidate had not received the entire amount of matching funds on a regularly scheduled date because of a shortfall, the candidate must submit a revised statement of net outstanding campaign obligations ("NOCO Statement") to be filed on a date (determined by the Commission) before the next scheduled payment date. 11 CFR 9034.5(f)(3) [60 Fed. Reg. 31883 (June 16, 1995)]. If the candidate has lower net outstanding campaign obligations than the previously certified but unpaid amount, the certified amount will be revised accordingly, and the Treasury Secretary and the candidate will be notified. 11 CFR 9036.4(c)(2).

The application of the above-cited regulations is illustrated by this hypothetical example. Assume that Mr. LaRouche becomes ineligible for further matching funds on March 30 and that his campaign has assets of $25,000 and liabilities (for pre-March 30 qualified campaign expenses) of $300,000.[6] His net outstanding campaign obligations as of that date would be $275,000, and his entitlement would be limited to that amount. It would not matter if prior certifications approved by the Commission were $500,000 and actual Treasury payments (before March 30) were only $150,000. The entitlement after March 30 would be determined only on the basis of the NOCO Statement.

Based on the foregoing, the Commission suggests that one way of providing the lending institution with some assurance that the matching payments will be made is for the LaRouche campaign to obtain the loan prior to the date of ineligibility. Thus, the obligation to repay the loan will be reflected in the NOCO Statement that the LaRouche campaign is obligated to file after the date of ineligibility. See 11 CFR 9034.5(a), and (f)(2) and (3) [60 Fed. Reg. 31883 (June 16, 1995)]. The Commission cautions, however, that the loan proceeds may be used only for qualified campaign expenses. Specifically, the proceeds may be used for qualified campaign expenses incurred prior to the date of ineligibility and for "winding down" costs after the date of ineligibility. See 11 CFR 9034.4(a)(3)(i) and (ii).[7] If any loan proceeds are used for continuing to campaign after the date of ineligibility, such amounts will not be included in the net outstanding campaign obligation total, and matching funds may not be used to repay that part of the loan. 11 CFR 9034.4(a)(3)(ii).[8] In its audit of the campaign, conducted pursuant to 11 CFR 9038.1, the Commission will examine the circumstances of the use of the loan proceeds and will require a ratio repayment of any matching payments received by the campaign that were used for non-qualified campaign expenses. 11 CFR 9038.2(a) and (b)(2)(i)(B) and (ii)(D). See 11 CFR 9038.2(b)(2)(iii). In view of the impact that a revised NOCO figure would have on the matching payments ultimately made and in view of the regulations as to the permissible use of the loan proceeds, the LaRouche campaign should be as accurate as possible in the information it provides to the lender as to the campaign's present and prospective financial activity, in compliance with 11 CFR 100.7(b)(11)(i)(B)(2).[9]

Your fourth question inquires whether the 1996 LaRouche committee could sell or transfer the "Treasury receivable" to the 1992 presidential primary committee, Democrats for Economic Recovery - LaRouche in `92 ("the 1992 LaRouche committee"), in the event efforts with lending institutions are unsuccessful. According to its 1995 year end report, the 1992 LaRouche committee has cash on hand totalling approximately $125,000 and has only $108 in debts or obligations owed by it; your request indicates that this amount has been paid. In essence, you propose to have the 1996 LaRouche committee borrow the 1992 LaRouche committee's surplus funds and secure this loan through the prospective receipt of matching funds from the Treasury. You note that the Commission's audit of the 1992 campaign is complete, all required repayments of matching funds have been made, and there are no outstanding enforcement matters pertaining to the campaign.

As indicated in footnote 1, one of the criteria necessary for a loan to a political committee to be excepted from the term "contribution" is that the source be a qualified depository institution as defined in 11 CFR 100.7(b)(11). The proposed loan, however, is the same, in effect, as a transfer of funds from the 1992 committee to the 1996 committee. Commission regulations state that the contribution limits of the Act do not apply to the transfer of funds between a candidate's previous Federal campaign and his current Federal campaign, provided that the candidate is not a candidate for more than one Federal office at the same time and provided that the funds transferred are not composed of contributions that would be in violation of the Act. 11 CFR 110.3(c)(4).[10] Transfers of funds by an authorized committee of a presidential candidate receiving matching funds are subject to further restrictions. In Advisory Opinion 1988-5, the Commission informed a candidate's 1988 presidential primary campaign committee that it could not use its funds to retire the debt of the 1984 presidential primary committee. The Commission reasoned that such disbursements by the 1988 committee would not be qualified campaign expenses under 26 U.S.C. 9032(9)(A) and 11 CFR 9032.9(a). However, the Commission stated that once the 1988 committee had satisfied its obligations to repay matching funds to the Treasury and had satisfied all other repayment obligations or possible penalty payments, the Committee could retain the remaining funds in its accounts and use them to retire the 1984 committee's debts. After repayments and penalty payments were made, and only then, could the 1988 committee treat its remaining cash balance as excess funds under 2 U.S.C. 439a and apply it to the 1984 debt. Advisory Opinion 1988-5. See Advisory Opinion 1990-11.

As indicated above, the 1992 LaRouche committee has a net surplus and has satisfied the relevant obligations. It may thus loan its cash on hand to the 1996 committee.[11] Funds disbursed by the Treasury must first be deposited in a designated account of the 1996 committee before they are disbursed to the 1992 committee to repay its loan to the 1996 committee. See 11 CFR 9037.3.

This response constitutes an advisory opinion concerning the application of the Act, the Matching Payment 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)

Lee Ann Elliott
Chairman

Enclosures (AOs 1994-26, 1990-11, and 1988-5)

1 The Commission notes your reference to the lending "financial institution." In excepting certain loans from the definition of "contribution," Commission regulations provide that a loan of money by a State bank, a Federally chartered depository institution (including a national bank), or a depository institution whose deposits and accounts are insured by the Federal Deposit Insurance Corporation is not a contribution by the lending institution if the loan is made in accordance with applicable banking laws and regulations and is made in the ordinary course of business. 11 CFR 100.7(b)(11). See 2 U.S.C. 431(8)(B)(vii). The Commission assumes that your reference to financial institutions is limited to the entities referred to in the regulation. See Advisory Opinion 1994- 26.

2 The institution must meet the requirement for a campaign depository set out in 11 CFR 103.2. It must be a State bank, a Federally chartered depository institution, or an institution where the depositor accounts are insured by the FDIC. See 2 U.S.C. 432(h)(1).

3 The candidate may negate this authorization if he certifies to the Commission, at least 25 days prior to the primary that he will not be an active candidate in that primary, and if the Commission accepts such certification. 11 CFR 9033.5(b) and (b)(1). See 26 U.S.C. 9033(c)(1)(B). In addition, separate primaries held in more than one State on the same date are not considered to be consecutive primaries and, if the candidate is running in primaries in different States on the same day, the highest percentage in any one State will govern. 11 CFR 9033.5(b)(2). Furthermore, the candidate may re-establish eligibility and again receive matching payments if he receives at least 20 percent in a primary election held subsequent to the date of the election which rendered the candidate ineligible. 26 U.S.C. 9033(c)(4)(B); 11 CFR 9033.8(b). See 11 CFR 9033.8(c).

4 In the event of a shortfall, the Treasury Secretary will seek to achieve an equitable distribution of the funds available in the account. 11 CFR 9037.2. See 26 CFR 702.9037-2(c). Any amount certified, but not paid to a candidate due to a shortfall, is treated as a certified amount for that candidate in the succeeding calendar month. 26 CFR 702.9037-2(c). The Secretary will continue to satisfy amounts certified for candidates until September 30, 1997, and any certified amounts that remain outstanding after that will not be paid. See 26 CFR 701.9006-1(a).

5 Within 15 days of a candidate's date of ineligibility, he must submit a NOCO Statement which contains, among other items, the total for all outstanding obligations for qualified campaign expenses and an estimate of necessary winding down costs, less the total of cash on hand, the fair market value of capital assets and other assets on hand, and the amounts owed to the committee. 11 CFR 9034.5(a). The NOCO Statement is used by the Commission to determine a candidate's continued entitlement to receive Federal matching funds to retire a candidate's outstanding campaign obligations. See 11 CFR 9034.1(b). Commission regulations require the candidate to submit a revised NOCO Statement with each submission for matching fund payments filed after the date of ineligibility. 11 CFR 9034.5(f)(2) [60 Fed. Reg. 31883 (June 16, 1995)].

6 The NOCO Statement should not include, as an asset, any amount representing matching fund certifications that have not been paid by the Treasury as of March 30. This is because the amount

of future Treasury payments after March 30 depends only on the remaining NOCO balance and not on the unpaid amounts related to Commission certifications approved before March 30.

7 "Winding down" costs are expenses associated with the termination of the campaign such as the costs of complying with the post-election requirements of the Matching Payment Act and other necessary administrative costs associated with winding down the campaign such as office rental, office supplies, and salaries. 11 CFR 9034.4(a)(3)(i).

8 In your letter dated February 28, 1996, you express concern about language in 11 CFR 9034.4(a)(3)(ii) which states that the candidate will receive the same proportion of matching funds to defray NOCO as he received before his date of ineligibility. This language, however, does not apply to the situation discussed here, i.e., to matching payments certified prior to the date of ineligibility; a ratio will not be applied to the NOCO figure. The Commission states no conclusion as to the application of any ratio with respect to contributions certified for matching payments after the date of ineligibility.

9 The Commission cautions that the actions it suggests as to the obtaining of the loan may not necessarily be sufficient assurance in the opinion of the lending institution. In addition, the Commission makes no conclusion as to whether the loan would be in the institution's ordinary course of business. See 11 CFR 100.7(b)(11).

10 This permission is restricted by the prohibition on transfers from a candidate's authorized committee to another authorized committee of the same candidate if the transferor committee has net debts outstanding. 11 CFR 116.2(c)(2). See 11 CFR 110.1(b)(3)(ii).

11 In view of the ability of the 1992 LaRouche committee to transfer its surplus to the 1996 committee, an alternative option for the 1996 committee would be to attempt to obtain a loan from a lending institution secured by the 1992 surplus. As indicated previously, the Commission cannot conclude whether this would be adequate security for the lending institution. In addition, the Commission makes no conclusion as to whether such a loan would be in the institution's ordinary course of business under 11 CFR 100.7(b)(11).