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FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 21, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 1996-7

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 28, 1996.

Attachment

AGENDA ITEM
For Meeting of: 3-28-96

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2 **ADVISORY OPINION 1996- 7**

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4 **Sharon Ayres, Treasurer**
5 **Harry Browne for President**
6 **1500 Adams Avenue, Suite 105**
7 **Costa Mesa CA 92626**

DRAFT

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9 **Dear Ms. Ayres:**

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11 **This responds to your letters dated February 20, and January 18, 1996, concerning**
12 **the application of the Presidential Primary Matching Payment Account Act ("the Fund**
13 **Act"), and Commission regulations to a proposal by the Harry Browne for President**
14 **Committee ("the Committee") regarding its application for matching funds.**

15 **According to records on file at the Commission, Harry Browne is seeking the**
16 **nomination of the Libertarian Party for President of the United States. You indicate that**
17 **the Committee has received sufficient contributions in enough states to qualify to receive**
18 **matching funds, under the Fund Act, but is ideologically opposed to taking them. You**
19 **note, however, that State governments and organizations are increasingly using Federal**
20 **matching funds qualification as a measure of a Presidential candidate's viability, e.g., for**
21 **ballot access in Delaware, for inclusion in presidential debates, and as a criterion in**
22 **deciding whom to invite as a speaker. Hence, you wish to explore the possibility that Mr.**
23 **Browne would seek to qualify for matching funds, without accepting them, and without**
24 **being subject to other requirements that apply to presidential candidates who qualify for**
25 **matching funds.**

26 **Specifically, you ask whether the candidate may make a submission for matching**
27 **payments, pursuant to 11 CFR Part 9033, and have the Commission make a**
28 **determination as to whether the Committee has satisfied the minimum threshold**

1 requirements without accepting any matching funds; whether the Committee, assuming it
2 initially qualifies for matching funds, may make non-threshold submissions under 11
3 CFR 9036.2 to determine how much more money the Committee would have been
4 entitled to; whether the Committee would be guaranteed no liability for repayment under
5 11 CFR 9038.2 since it would have received no funds; and whether the Committee would
6 be subject to other requirements including submission to a Commission audit pursuant to
7 11 CFR 9038.1.

8 Under the Fund Act and Commission regulations, to be eligible to receive
9 Presidential primary matching funds a candidate shall, in writing--

10 (1) agree to obtain and furnish to the Commission any evidence it may request of
11 qualified campaign expenses,

12 (2) agree to keep and furnish to the Commission any records, books and other
13 information it may request, and

14 (3) agree to an audit and examination by the Commission under section 9038 and
15 to pay any amounts required to be paid under such section. See 26 U.S.C. §9033(a).

16 Commission regulations further delineate the documentation requirements a
17 candidate must agree to as part of establishing eligibility for matching funds. 11 CFR
18 9033.1. The Commission will not consider a candidate's threshold submission until that
19 candidate has submitted a candidate agreement that accepts these requirements. See 26
20 U.S.C. §9033(a) and 11 CFR 9033.1(a)(2). The importance of a candidate's personal
21 assent to these preconditions has been emphasized. See *LaRouche v. Federal Election*
22 *Commission*, 996 F.2d. 1263, 1266 (D.C. Cir. 1993).

1 In your request, you state that the candidate is “ideologically opposed” to
2 accepting matching funds. You further state that the campaign’s purpose would be to
3 make a threshold submission, as outlined by the regulations, but not to accept the
4 matching payments or become subject to the various conditions described in 26 U.S.C.
5 §9033(a) or 11 CFR 9033.1, 9038.1 and 9038.2, including repayment requirements,
6 agreement to an audit of the campaign, and the obligation to maintain certain documents.
7 The request of the candidate and his committee for matching funds would be only for the
8 limited purpose of satisfying criteria established by other entities for his participation in
9 various campaign events. The Commission concludes that in these circumstances the
10 candidate could not be viewed as having given the necessary assent to the candidate
11 agreement, under 26 U.S.C. §9033(a) and 11 CFR 9033.1(a)(2), and to all the conditions
12 stated therein. Consequently, the Commission may not consider his eligibility for
13 matching funds.

14 Given that the circumstances you propose could not objectively be considered an
15 assent by the candidate, the Commission could not, therefore, make a determination as to
16 whether the Committee satisfied the minimum threshold for matching funds. Having
17 answered your first question in the negative, a response to your further questions
18 (regarding the Committee’s ability to make further submissions, its obligations for
19 repayment of funds, its other obligations such as a Commission audit) is unnecessary.

20 This response constitutes an advisory opinion concerning the application of the

1 Fund Act, or regulations prescribed by the Commission, to the specific transaction or
2 activity set forth in your request. See 2 U.S.C. §437f.

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Sincerely,

(signed)

Lee Ann Elliott
Chairman