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FEDERAL ELECTION COMMISSION

Washington, DC 20463

AGENDA ITEM

For Meeting of: 2-14-96

February 8, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Stryna
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 1996-3

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for February 14, 1996.

Attachment

DRAFT

1
2 **ADVISORY OPINION 1996-3**

3
4 **Irwin Gostin**
5 **The Breeden-Schmidt Foundation**
6 **PO Box 711718**
7 **San Diego, California 92171-1718**

8
9 **Dear Mr. Gostin:**

10
11 **This refers to your letters dated January 9, 1996 and December 9, 1995, which request**
12 **advice concerning application of the Federal Election Campaign Act of 1971, as amended ("the**
13 **Act"), to the possible status of The Breeden-Schmidt Foundation ("the Foundation") as a**
14 **political committee.**

15 **You state that the Foundation was established in order to receive a testamentary**
16 **distribution from Wilmer Breeden. Mr. Breeden left the funds to a friend, in trust, to be used for**
17 **the purpose of advancing the principles of socialism. You state that since its formation, the**
18 **Foundation has not solicited nor received funds from any other source. Its only receipts have**
19 **been income on the investment of the "original charitable contribution" from the estate of**
20 **Mr. Breeden.¹**

21 **You explain that periodic distributions are made from Foundation assets for various**
22 **purposes that its Board of Trustees deem to be in accordance with the principles of the**
23 **Foundation's creation. The Foundation has made political contributions to Federal candidates in**
24 **the past and proposes to continue making them, but wishes to know whether this action would**

¹ Your request states that the Foundation is unincorporated and is not a labor union. Furthermore, the trust documents included with your request state that the Foundation "is not intended to be a charitable trust for tax purposes, although the trustees may, if they unanimously determine, apply for such designation and tax status."

1 cause the Foundation to become a political committee. If it does become a political committee,
2 the Foundation inquires as to the requirements that govern its contributions in Federal elections.

3 The term "political committee" means any committee, club, association, or other group of
4 persons which receives contributions aggregating in excess of \$1,000 during a calendar year, or
5 which makes expenditures aggregating in excess of \$1,000 during a calendar year. 2 U.S.C.
6 §431(4)(A).² The Commission notes, however, that when determining if an entity should be
7 treated as a political committee, the standard used is whether a major purpose of the organization
8 is campaign activity; that is, making payments or donations to influence any election to public
9 office. See 26 U.S.C. §527(e)(1), (2); Advisory Opinions 1995-11 and 1994-25; and *Akins v.*
10 *Federal Election Commission*, No. 92-1864 (D.D.C. March 30, 1994). Appellate court judgment
11 vacated-rehearing *en banc* granted, No. 94-5088 (D.C. Cir. Jan 26 1995). See also *Federal*
12 *Election Commission v. Massachusetts Citizens for Life, Inc.* ("MCFL"), 479 U.S. 238, 262
13 (1986) (The Court stated that if MCFL's independent expenditures "become so extensive that the
14 organization's major purpose may be regarded as campaign activity, the corporation would be
15 classified as a political committee.")

16 The declaration of trust under which the Foundation was created states that the funds of
17 the Foundation are to be used to:

18 pay out such sums as contributions and subsidies and for
19 conducting operations themselves to persons, entities and causes
20 advancing the principles of Socialism and those causes related to
21 Socialism. This shall include, but not be limited to, subsidizing
22 publications, establishing and conducting reading rooms,

² Other definitions, not applicable here, apply to separate segregated funds and local committees of political parties.
See 2 U.S.C. §431(4)(B), (4)(C).

1 supporting radio, television and the newspaper media and
2 candidates for public office.

3
4 You also included information in your request regarding the number of political contributions
5 that the Foundation has made since its formation.³ For the period from 1990 to 1995, the annual
6 amount of the Foundation's political contributions varied from 2% to 18% of total distributions
7 for each year. In Congressional election years (1990, 1992 and 1994), the yearly contribution
8 range was 13% to 18% of the total disbursements for the year. In other years, the variation was
9 2% to 6%. The highest contribution total in any one year was under \$4,000 and for the entire six
10 year period contributions totaled \$10,000. It is also relevant that the supporting documents, you
11 provided, do not indicate that the Foundation's disbursements, other than its political
12 contributions, are used in any way related to election campaigns. For example, the documents do
13 not state that the Foundation publishes a newsletter or distributes other materials that feature
14 candidates or Members of Congress. Furthermore, there is no indication that the Foundation
15 attempts to recruit candidates for public office or solicit other personnel to assist as volunteers, or
16 otherwise, in the campaigns of candidates for public office.⁴

³ The approximate total amounts of disbursements and political contributions for Federal elections for the years 1990 to 1995 are shown below. The percentages of contributions compared to all disbursements is also stated for each year. In addition, the grand totals for the six year period are stated along with a percentage covering that span:

<u>Year</u>	<u>Outlays</u>	<u>Contributions</u>	<u>Percent</u>
1990	\$ 3,137	\$ 500	16%
1991	\$14,000	\$ 500	4%
1992	\$21,000	\$3,800	18%
1993	\$40,000	\$ 600	2%
1994	\$24,000	\$3,100	13%
1995	<u>\$27,000</u>	<u>\$1,500</u>	<u>6%</u>
Totals	\$129,137	\$10,000	8%

⁴The documents also do not indicate that it sponsors events where candidates appear to speak about campaign issues.

1 The pattern of the Foundation's contributions indicates that, while the declaration of trust
2 empowers the Foundation to make political contributions, these have not been of a magnitude,
3 either in absolute terms or in relation to total distributions, to be a major purpose of the
4 Foundation. Taking all these factors together, therefore, the Commission concludes that, in the
5 specific circumstances presented in your request, the Foundation's activities would not cause it to
6 be considered a political committee under the Act. The Commission cautions you that this
7 conclusion is valid only insofar as the Foundation does not alter the recent pattern of its activities
8 (including its disbursements) which is to make only occasional contributions in a total amount
9 that does not constitute a major part of the Foundation's yearly disbursements.⁵

10 Although not explicitly asked in your request, your inquiry raises the issues of attribution
11 of the contributions made by the Foundation. The Commission notes again that the Foundation
12 is the successor in interest to the estate of Mr. Breeden and was created by a testamentary trust.
13 Furthermore, the ability of the Foundation, through its trustees, to make contributions is
14 explicitly limited by the purposes and conditions set forth by Mr. Breeden. In this respect, the
15 situation of the Foundation is somewhat similar, though not identical, to contributions made by
16 the testamentary estate of a decedent. See Advisory Opinions 1983-13, 1986-24, and 1988-8. In
17 these opinions, because the Commission viewed the testamentary estate of a decedent as the
18 successor legal entity to the testator, it applied the Act and its limits to the estate as the alter ego
19 of the living testator. Applying that principle to the specific circumstances here, the Commission

⁵ Insofar as the activity of the Foundation is to make disbursements, the analysis of its activities has focused on the political contributions the Foundation has made and their relationship to other disbursements. A more extensive and different analysis would be required for other types of organizations, especially for those that promote volunteer activities on public policy issues.

1 concludes that the contributions made by the Foundation should be attributed to the successor in
2 interest to Mr. Breeden and his estate, the Foundation, rather than to the Foundation's trustees.

3 The Commission expresses no opinion regarding any tax ramifications of the
4 Foundation's proposed activities because these issues are not within its jurisdiction.

5 This response constitutes an advisory opinion concerning the application of the Act, or
6 regulations prescribed by the Commission, to the specific transaction or activity set forth in your
7 request. See 2 U.S.C. §437f.

8 Sincerely,

9

10

11 Lee Ann Elliott
12 Chairman

13

14 Enclosures (AOs 1995-11, 1994-25, 1988-8, 1986-24 and 1983-13)

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