



FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

May 17, 1991

SUBMITTED LATE

AGENDA ITEM

For Meeting of: 1 May 23, 1991

MEMORANDUM

TO: The Commission
THROUGH: John C. Surina
Staff Director
FROM: Lawrence M. Noble
N. Bradley Litchfield
SUBJECT: Draft AO 1991-12

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for May 23, 1991.

Attachment

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3 **ADVISORY OPINION 1991-12**

4 **Robert F. Bauer**
5 **B. Holly Schadler**
6 **Perkins Coie**
7 **607 Fourteenth Street, N.W.**
8 **Suite 800**
9 **Washington, D.C. 20005-2011**

DRAFT

10 **Dear Mr. Bauer and Ms. Schadler:**

11 **This responds to your letter dated April 3, 1991,**
12 **requesting an advisory opinion on behalf of the Schroeder**
13 **Fund for the Future, Inc. ("the Fund") concerning application**
14 **of the Federal Election Campaign Act of 1971, as amended**
15 **("the Act"), and Commission regulations to a proposed**
16 **transfer of moneys from the Fund to Schroeder for Congress**
17 **Committee, Inc. ("Schroeder for Congress"), the principal**
18 **campaign committee of Representative Patricia Schroeder.**

19 **The Fund was established in 1987 for the purpose of**
20 **testing the waters to determine whether Ms. Schroeder would**
21 **run for president in 1988. The corporate name of the Fund**
22 **was originally Schroeder 19887, Inc. and the Fund adopted its**
23 **current assumed name pursuant to the Colorado Nonprofit**
24 **Corporation Act in April 1988. You state that the Fund is**
25 **incorporated under state law solely for liability purposes,**
26 **as provided under 11 CFR 114.12(a). In addition, the**
27 **Commission noted in Advisory Opinion 1990-7 that the Fund**
28 **filed a 1989 Federal income tax return as a "political**
29 **organization," as defined in 26 U.S.C. §527(e)(1).**

30 **After Ms. Schroeder decided not to become a presidential**
candidate, the Fund "was left with a substantial reserve of

3 contributions." Ms. Schroeder sent a letter, dated "November
4 1987," to her contributors in which she offered to refund a
5 percentage of each of their contributions or, in the
6 alternative, to use the excess funds for the purpose of
7 speaking out and building a constituency for issues that "we
8 focused on in the campaign." Only a relatively small number
9 of contributors asked for refunds. You state that "[t]he
10 overwhelming majority of responses reflected a contributor
11 intent to have the Fund operate in support of positions on
12 issues emphasized by Ms. Schroeder in the course of her
13 exploratory effort."^{1/} You assert that, "[i]n this sense, the
14 character of the Fund did not change" and "it remained an
15 organization associated with a public official and certain
16 views on public policy, but no longer with a candidate for
17 any federal office."

18 You state that, throughout 1988, the Fund paid expenses
19 for winding down from the exploratory effort, and the Fund
20 "turned more to its new status, unrelated to any federal
21 campaign." You maintain that few funds were received, other
22 than receipts in the form of bank interest, and that the Fund
23 expended only a fraction of its remaining moneys.^{2/} According

24
25 ^{1/} The Fund's 1987 year end report disclosed cash on hand
26 of \$404,020. The Committee reports also disclose that the
27 subsequent refund effort resulted in the return of
approximately \$22,000 on or about April 15, 1988.

28 ^{2/} Reports filed by the Fund indicate that it has received
29 contributions totaling approximately \$100,000 in 1988 and
30 1989 as compared with \$878,000 in 1987. The reports also
disclose that the Fund made expenditures of \$100,000 in 1988
and 1989, as compared to \$477,000 in 1987.

3 to the most recent report filed by the Fund, the 1990 July
4 Quarterly, the Fund's balance is approximately \$467,000.

5 In April 1990, the Fund requested an advisory opinion
6 from the Commission asking for approval to transfer its
7 surplus funds, which totaled \$459,000 at the time, to
8 Schroeder for Congress for the 1990 re-election campaign.
9 The Fund proposed that it could be treated as a previous
10 Federal campaign committee of Ms. Schroeder and thereby make
11 such a transfer. The Fund asserted that it was not
12 affiliated with Schroeder for Congress. In Advisory Opinion
13 1990-7, the Commission barred a transfer beyond the \$1,000
14 limit of 2 U.S.C. §441a(a)(1)(A), and concluded that the
15 Fund, as a testing the waters committee, did not qualify as a
16 previous campaign committee. The Commission also accepted
17 the Fund's assertion of non-affiliation with Schroeder for
18 Congress, but did so only for purposes of the opinion. The
19 Commission emphasized that making this assumption did not
20 imply the Commission's agreement with the assertion, nor with
21 related assertions that the Fund is not a political committee
22 and has not accepted any contribution or made any expenditure
23 under the Act.

24 You now maintain that the Fund's assertion of
25 non-affiliation was based upon the premise that it did not
26 concern itself with, nor spend funds toward, any Federal
27 election-related activities of Ms. Schroeder in the course of
28 her 1990 House re-election campaign. You state that the
29 Fund's Board, in consultation with Ms. Schroeder, has now
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3 concluded that it should "alter its originally planned course
4 of action centered on issues" and that, consistent with its
5 - goals when originally established, it should transfer its
6 balance to Schroeder for Congress for 1992. You ask whether
7 this may be done.

8 You state that since the Fund has voluntarily filed
9 reports with the Commission from its inception, it proposes
10 to modify its registration and "bring its reports up to date
11 - to the extent necessary to reflect its affiliated political
12 committee status." The Fund also proposes that all
13 contributions received by the Fund after September 28, 1987
14 (when Ms. Schroeder announced the termination of her
15 presidential testing the waters effort), and before November
16 6, 1990, be aggregated with contributions received by
17 Schroeder for Congress for 1992, and that excessive funds
18 would be refunded to the original contributors. The Fund
19 would thereafter terminate as a political committee and as a
20 corporation.

21 In Advisory Opinion 1990-7, the Commission concluded
22 that, by merely testing the waters for the presidency, Mrs.
23 Schroeder did not become a candidate for the 1988
24 presidential election and the Fund could not be considered a
25 previous Federal campaign committee. See 11 CFR 110.3(c)(4).
26 The Commission based this conclusion on the testing the
27 waters provisions of the regulations which provide that funds
28 received, and payments made, solely for determining whether
29 an individual should become a candidate are not contributions
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3 and expenditures under the Act unless and until such time as
4 the individual becomes a candidate. 11 CFR 100.7(b)(1) and
5 100.8(b)(1). The Commission concluded, therefore, that the
6 Fund could not rely on 11 CFR 110.3(c)(4) to make unlimited
7 transfers to Schroeder for Congress.

8 Commission regulations provide, however, that transfers
9 of funds may be made without limit on amount between
10 affiliated committees whether or not they are political
11 committees under the Act. 11 CFR 102.6(a)(1), 110.3(c)(1).
12 Included within the definition of affiliated committees are
13 committees that are established, financed, maintained or
14 controlled by the same person or group of persons. 2 U.S.C.
15 §441(a)(5); 11 CFR 100.5(g)(2), 100.5(g)(3)(v),
16 110.3(a)(1)(ii), and 110.3(a)(2)(v). Both the Fund and
17 Schroeder for Congress are controlled by Ms. Schroeder for
18 campaign-related purposes. See Advisory Opinions 1990-16,
19 1987-12, and 1984-3. In addition, the treasurer of the Fund,
20 Maxwell Snead, and the treasurer of Schroeder for Congress,
21 Victoria Promis are law partners, and both committees appear
22 to share an address which is also the address of Snead &
23 Promis. The Commission concludes, therefore, that the Fund
24 is affiliated with Schroeder for Congress and may make
25 transfers to Schroeder for Congress that are not subject to
26 the limits of 2 U.S.C. §441a.

27 Such a transfer, if in excess of \$1,000 as you
28 anticipate, will cause the Fund to become a political
29 committee subject to the registration and reporting
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3 requirements of the Act. 2 U.S.C. §431(4)(A); 11 CFR
4 100.5(a). The Fund has filed a statement of organization and
5 amended statements indicating that it was initially an
6 exploratory committee and later that it was not an
7 exploratory committee, but also did not fit into any of the
8 political committee categories listed on the registration
9 form. The Fund will now have to file a statement of
10 organization indicating that it is an authorized committee of
11 Ms. Schroeder for her 1992 re-election campaign.

12 The Fund as a new political committee will have to
13 disclose on its first report as a political committee the
14 sources of funds then in its account, which are assumed to be
15 composed of those ^{funds} ~~contributions~~ most recently received prior
16 to the transfer, and it will have to itemize such
17 ^{funds} ~~contributions~~ to the extent required by the Act. 11 CFR
18 104.12; 2 U.S.C. §434(b); 11 CFR 104.3(a). The Fund will
19 also be required to exclude from its beginning cash on hand,
20 and from those funds proposed to be transferred to the
21 already existing political committee, any ^{funds} ~~contributions~~ not
22 permissible under the Act. 11 CFR 104.12. See 2 U.S.C.
23 §§441b, 441c, and 441e. This means that ^{donations} ~~contributions~~ from
24 corporations, labor organizations, national banks, Federal
25 contractors, and foreign nationals must be excluded from
26 funds to be transferred. Advisory Opinions 1990-16 and
27 1987-12. You have indicated that the Fund has complied with
28 the prohibitions of the Act; hence, it appears that no such
29 exclusions need be made.
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3 Moreover, since the contribution limits apply to
4 Schroeder for Congress and since the Fund is affiliated with
5 it, the contribution limits of 2 U.S.C. §441a(a) apply to the
6 contributors to the Fund. Accordingly, the ~~contributions~~^{donations} of
7 any person that are included in the Fund's cash on hand must
8 be aggregated with any contribution made by that person to
9 Schroeder for Congress for the next election, i.e., the 1992
10 primary election. The aggregate amount in excess of the
11 limits must also be excluded from the beginning cash on hand
12 and the amount transferred. 11 CFR 104.12. Advisory Opinion
13 1990-16. The applicable limits are \$1,000 in the aggregate
14 for contributions from individuals and \$5,000 in the
15 aggregate for contributions from multicandidate committees.
16 2 U.S.C. §441a(a)(1)(a) and (a)(2)(A). Therefore, if the
17 Fund's cash on hand, i.e., the ~~contributions~~^{funds} most recently
18 received, includes an \$800 ~~contribution~~^{donation} to the Fund and the
19 same donor has also contributed \$500 to Schroeder for
20 Congress for the 1992 primary election, then \$300 must be
21 excluded from the beginning cash on hand of the Fund as a
22 political committee and from the amount transferred to
23 Schroeder for Congress.

24 This rule applies unless the excessive amount can be
25 redesignated. If Schroeder for Congress intends to seek the
26 donor's written redesignation to the 1992 general election of
27 all or part of the \$500 contribution in order to remedy an
28 excessive aggregate contribution, such redesignation must be
29 obtained within sixty days of the receipt of the \$500
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3 contribution. 11 CFR 103.3(b)(3). No redesignation may be
4 done for the earlier \$800 ^{donation} ~~contribution~~ since it appears that
5 nearly all the ^{donations} ~~contributions~~ to the Fund were received before
6 1990. Moreover, the redesignation procedures allowed under
7 the Commission regulations only apply to "contributions" as
8 defined in the Act. See 11 CFR 110.1(b).

9 You propose that aggregation should be made for
10 ^{donations} ~~contributions~~ received after September 28, 1987, and before
11 the general election day in 1990. ^{The Commission concludes that all} ~~By choosing the date of~~
12 ^{donations made after September 28, 1987, must be aggregated with contributions} ~~September 28, 1987, it appears that you view contributions~~
13 ^{by the same persons to the 1992 election. See, by analogy, 11 CFR 110.3(c)(6)(u).} ~~comprising the cash on hand and received by that date as not~~
14 ~~aggregable because they were originally made in connection~~
15 ~~with the 1988 election. As stated above, the Commission~~
16 ~~concluded in Advisory Opinion 1990-7 that the Fund could not~~
17 ~~be considered a previous Federal campaign committee for the~~
18 ~~1988 presidential election because funds received, and~~
19 ~~payments made, solely for determining whether an individual~~
20 ~~should become a candidate are not contributions and~~
21 ~~expenditures if the individual does not become a candidate.~~
22 ~~11 CFR 100.7(b)(1) and 100.8(b)(1). Since the funds raised~~
23 ~~prior to September 28, 1987, were not contributions with~~
24 ~~respect to the 1988 elections, they are not excludable from~~
25 ~~the pool of funds to be aggregated. See Advisory Opinion~~
26 ~~1990-16, note 3.~~

27 Based on the foregoing, the Fund's report filed for the
28 period when the transfer is made should itemize the
29 ^{funds} ~~contributions~~ that are the sources of its beginning cash on
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3 hand as a political committee. 11 CFR 104.12. The beginning
4 cash on hand will be the Fund's present cash on hand minus
5 the amounts for each contributor (in the Fund's present cash
6 on hand) that, when aggregated with such person's
7 contribution(s) to Schroeder for Congress for the 1992
8 primary election, exceed the applicable section 441a(a)
9 limit.

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

14 Sincerely,

15
16 John Warren McGarry
17 Chairman for the
18 Federal Election Commission

19 Enclosures (AOs 1990-16, 1990-7, 1987-12, and 1984-3)
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