



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 18, 1990

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1990-7

Maxwell A. Snead, Jr.
Snead and Promis
2000 Gaylord Street
Suite 100
Denver, CO 80205-5622

Dear Mr. Snead:

This responds to your letters dated March 28, 1990, and April 26, 1990, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to proposed transfers of funds by Schroeder Fund for the Future, Inc. ("the Fund") to the Schroeder for Congress Committee, Inc. ("Schroeder for Congress").

Your firm represents Representative Patricia Schroeder and the Fund. You state that the Fund was originally established as an exploratory committee for Representative Schroeder's possible presidential candidacy in 1988. The Fund was initially organized with the name Schroeder 1988?, Inc., a nonprofit corporation, and this remains as the corporate name. In November 1987, a certificate of assumed name was filed with the Colorado Secretary of State indicating that the name, Schroeder Fund For The Future, Inc., would thereafter be used. The Fund filed a 1989 Federal income tax return as a "political organization," as defined in 26 U.S.C. 527(e)(1).

The testing-the-waters effort took place during the summer and fall of 1987. On September 28, 1987, Ms. Schroeder announced that she was terminating her testing-the-waters effort and would not seek the presidential nomination in 1988. You state that, although Ms. Schroeder's advisers maintained that the Fund was not subject to the reporting requirements of the Act, reports of the Fund's receipts and disbursements have been filed with the Commission in accordance with the requirements for political committees of candidates.

In a letter dated "November, 1987," mailed to contributors and other participants in her exploratory effort, she stated that the committee's name was being changed to Schroeder Fund for the Future and would fund further efforts by her to speak out on issues on a national basis. The letter explained that 35 to 45 percent of the amount received by the Fund would remain "after all the bills for the summer's activities [were] paid." Ms. Schroeder offered to refund the corresponding percentage of the contributor's donation or, if no request was made, to use such funds for her future activities.^{1/}

You further state that "winding down" the 1987 exploratory activities extended for several months into 1988, and that the Fund thereafter "limited itself primarily to maintaining the mailing list it accumulated during the testing-the-waters effort through follow-up mailings." You state that several mailings were conducted. Three mailings, one each in December of 1987, 1988, and 1989, involved mass mailings of seasons' greetings cards. You also enclose a copy of a mailing sent to 30,000 addresses dated February 7, 1989, which solicited contributions to the Fund and offered an autographed copy of Ms. Schroeder's book, Champion of the Great American Family: A Personal and Political Book, and a Schroeder '88 button to persons contributing \$100 or more. A review of the reports of the Fund reveal no contributions to Federal candidates.^{2/}

You explain that Ms. Schroeder was a candidate in 1988 for the U.S. House of Representatives from the First District of Colorado, and that she is a candidate for the same office in the 1990 elections. Her principal campaign committee for both elections has been the Schroeder for Congress Committee which you assert is not affiliated with the Fund. You maintain that the Fund "does not concern itself with, nor support her candidacy for the office of Representative; it has not done so in the past, nor has it made any distributions for the purpose of influencing any election for Federal office." You further assert that Ms. Schroeder is a 1990 candidate for the House seat only and that she has not "established or authorized the establishment of any testing-the-waters committee."

Citing Commission regulations at 11 CFR 110.3(c)(4), you state that the Fund wishes to transfer part or all of its surplus to Schroeder for Congress. You explain that most of the surplus is from donations received in 1987 prior to Ms. Schroeder's determination not to be a presidential candidate in 1988, and that the remainder of the surplus is from interest income and from donations received when the Fund's mailing list was being updated.

You present a number of questions pertaining to the proposed transfer. They are rephrased and summarized as follows:

- (1) Does the Fund qualify as a previous Federal campaign committee for the purposes of transferring funds to her current House campaign committee?
- (2) If the Fund does qualify as a previous Federal campaign committee, may the Fund transfer all or part of its surplus?
- (3) Will such a transfer "jeopardize the unaffiliated status between" the Schroeder Committee and the Fund?

(4) Given the requirement of 11 CFR 110.3(c)(4) that the cash-on-hand from which the transfer to the current campaign committee is made shall be considered as consisting of funds most recently received by the transferor, is interest income which is part of the cash-on-hand treated in the same manner as contributions so that more recently received interest is deemed transferred before contributions received earlier?

(5) Are the transferred contributions considered contributions during the election cycle in which the transfer takes place or during the election cycle in which they were first received?

(6) What rules govern the excess of aggregate contributions which, as a result of the transfer, exceed the permissible amount?

According to 11 CFR 110.3(c)(4), transfers of funds may be made without limit

between a candidate's previous Federal campaign committee and his or her current Federal campaign committee, or between previous Federal campaign committees, 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. The cash on hand from which the transfer is made shall be considered to consist of funds most recently received by the transferor committee. The transferor committee must be able to demonstrate that such cash on hand contains sufficient funds at the time of the transfer that comply with the limitations and prohibitions of the Act to cover the amount transferred.

11 CFR 110.3(c)(4). Under the regulations, "previous Federal campaign committee" is defined as a principal campaign committee, or other authorized committee, organized to further the candidate's campaign in an election already held. 11 CFR 110.3(c)(4)(i). A "current Federal campaign committee" is defined as a principal campaign committee, or other authorized committee, organized to further the candidate's campaign in a future Federal election. 11 CFR 110.3(c)(4)(ii).

Based on the facts submitted in your request, it appears that the Fund operated as an exploratory committee for Ms. Schroeder's possible presidential candidacy in 1987 and then, until some point during the first six months of 1988, was engaged in winding down the exploratory effort. Assuming the validity of your assertions as to the purpose and status of the Fund after Ms. Schroeder announced that she would not be a presidential candidate for 1988, it appears that its activities in 1988 were not to influence her nomination or election to the office of either President or Representative in the Congress.

Funds received, and payments made, solely for determining whether an individual should become a candidate are not contributions and expenditures under the Act unless and until such time as the individual becomes a candidate. 11 CFR 100.7(b)(1) and 100.8(b)(1); Advisory Opinion 1985-40. Assuming the amounts received and disbursed by the Fund were not contributions or expenditures to influence any 1988 Federal election, Ms. Schroeder did not

become a 1988 presidential candidate and the Fund's activities by themselves would not have caused her to become a 1988 Congressional candidate. 2 U.S.C. 431(2); 11 CFR 100.3(a). If Ms. Schroeder was not a candidate for any 1988 presidential election, and given that she did not authorize the Fund to receive contributions or make expenditures for her 1988 House candidacy, the Fund does not meet the definition of a previous Federal campaign committee. See 2 U.S.C. 431(6) and 432(e)(1); 11 CFR 100.5(f)(1) and 101.1(b).

Based on the foregoing analysis and in response to questions (1) and (2), the Fund may not rely on 11 CFR 110.3(c)(4) and may not make unlimited transfers to Schroeder for Congress.

Your question (3) is predicated on your assertion that the Fund and Schroeder for Congress are unaffiliated. Thus, the Commission will assume, for purposes of this opinion, that the two entities are not affiliated. In making this assumption, the Commission emphasizes that it does not imply its agreement with that assertion, nor with your related assertions that the Fund is not a "political committee" and that it has not accepted any "contribution" or made any "expenditure," as defined in the Act and Commission regulations. Instead, the Commission considers your factual statements and your legal conclusions as presenting your complete description of all the circumstances relevant to the Fund's proposed transactions set forth in this advisory opinion request. 2 U.S.C. 437f(a)(1), 11 CFR 112.1(b) and (c). The Commission reiterates in this regard that it is not herein making a determination of the facts relevant to your inquiry, or concurring in the legal characterizations you proffer. Compare 2 U.S.C. 437g and 11 CFR 111.9, 111.10, and 111.16, with 2 U.S.C. 437f and 11 CFR Part 112.

Assuming the unaffiliated status of the committees, any transfers by the Fund to the Schroeder Committee will be treated as contributions subject to the limits of the Act. In the case of the Fund, which is neither a multicandidate committee nor a political committee of a national party, the limit is \$1,000 for the primary election and \$1,000 for the general election. 2 U.S.C. 441a(a)(1)(A); 11 CFR 110.1(b)(1). A further consequence of exceeding \$1,000 in contributions in a calendar year will be the triggering of political committee status for the Fund, assuming it does not presently qualify as a political committee based on its activities in 1988, 1989, or 1990. 2 U.S.C. 431(4); 11 CFR 100.5(a).^{3/}

According to Commission regulations, one of the indicia of affiliation is whether a committee provides funds in a significant amount or on an ongoing basis to another committee. 11 CFR 100.5(g)(4)(ii)(G) and 110.3(a)(3)(ii)(G). In view of the substantial amounts of cash-on-hand for both the Fund (\$459,392 as of the 1990 April Quarterly) and Schroeder for Congress (\$274,959 as of the 1990 April Quarterly), it appears that contributions in the amounts permissible under the Act would not, in and of themselves, jeopardize the unaffiliated status of the two organizations. See Advisory Opinions 1982-21 and 1976-104.

Based on the above conclusion that the Fund does not come within 11 CFR 110.3(c)(4) and may not make unlimited transfers, the Commission need not address questions four, five, and six of your request.

The Commission expresses no opinion about the possible application of House rules to your proposed activity, nor as to any tax ramification. Those matters are outside the Commission's jurisdiction.

This response constitutes an advisory opinion concerning application of the Act and Commission regulations to the specific transaction or activity set forth in your request.

Sincerely,

(signed)

Lee Ann Elliott
Chairman for the Federal Election Commission

Enclosures (AOs 1985-40, 1985-38, 1982-21, 1981-35, 1980-126, 1979-41, and 1976-104)

1/ You explain that the Fund has surplus funds from the 1987 exploratory effort. The 1987 Year End report of the Fund disclosed cash-on-hand of \$404,020. The subsequent refund effort resulted in the return of approximately \$22,000 on or about April 15, 1988. As of the most recent report filed (the 1990 April Quarterly), the Fund has cash on hand totaling \$459,392.

2/ The only contribution in support of a candidate was a \$100 contribution to a local candidate in New York City.

3/ For a review of circumstances where the Commission has considered whether a committee or organization is a political committee, see Advisory Opinions 1985-38, 1981-35, 1980-126, and 1979-41.