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Part V

Federal Election Commission

11 CFR Part 102

Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees: Final Rule

FEDERAL ELECTION COMMISSION

11 CFR Part 102

[Notice 1992-10]

Special Fundraising Projects and Other Use of Candidate Names by Unauthorized Committees

AGENCY: Federal Election Commission.

ACTION: Final rule; transmittal of regulations to Congress.

SUMMARY: The Federal Election Commission is amending its regulations at 11 CFR part 102, to prohibit an unauthorized committee's use of a candidate's name in the title or other designation of any committee communication. Further information is provided in the supplementary information which follows:

DATES: Further action, including the announcement of an effective date, will be taken after these regulations have been before Congress for 30 legislative days pursuant to 2 U.S.C. 438(d). A document announcing the effective date will be published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, (202) 219-3690 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission is publishing today the final text of revised regulations at 11 CFR 102.14. The new rules prohibit an unauthorized committee from using a candidate's name in the title or other designation of any committee communication.

The Federal Election Campaign Act ["FECA" or "the Act"] prohibits the use of a candidate's name in the name of an unauthorized political committee. 2 U.S.C. 432(e)(4); 11 CFR 102.14. In *Common Cause* v. *FEC*, 842 F.2d 436 (D.C. Cir. 1988), the United States Court of Appeals for the District of Columbia Circuit upheld the Commission's authority to interpret this prohibition as applying only to the name under which the committee registers with the Commission [the "registered name"], rejecting the argument that it had to be interpreted so as to also include the names of any fundraising projects sponsored by that committee.

Since that time, however, the Commission has become increasingly concerned over the possibility for confusion or abuse inherent in this interpretation. Accordingly, on April 15, 1992, the Commission published a Notice of Proposed Rulemaking requesting comments on amendments to the rules designed to minimize or eliminate this possibility. 57 FR 13056.

Section 438(d) of title 2, United States Code, requires that any rules or regulations prescribed by the Commission to carry out the provisions of title 2 of the United States Code be transmitted to the Speaker of the House of Representatives and the President of the Senate 30 legislative days before they are finally promulgated. These regulations were transmitted to Congress on July 10, 1992.

Explanation and Justification

Questions surrounding the use of candidate names by unauthorized committees have been a focus of Commission concern for many years. The Common Cause decision grew out of the 1980 presidential election.

In that case, the Court of Appeals upheld the Commission's right to interpret 2 U.S.C. 432(e)(4) so as to permit use of candidates' names in the titles of unauthorized committee communications, since "[an] agency's construction, if reasonable, must ordinarily be honored." 842 F.2d at 439-40. However, the Court recognized that an interpretation imposing a more extensive ban on the use of candidate names by unauthorized committees was also reasonable.

In reaching its conclusion, the court examined the comprehensive text of the FECA, as well as the "sparse" legislative history of 2 U.S.C. 432(e)(4). 842 F.2d at 443. In addition, the court noted that the Commission has a responsibility to "allow the maximum of first amendment freedom of expression in political campaigns commensurate with Congress' regulatory authority." *Id.* at 448. In sum, it deferred to the Commission's judgment that, in trying to strike this balance, literal adherence to the language of 432(e)(4), coupled with the disclaimer requirement of 441d(a), struck the proper balance at that time. *Id.*

However, the situation today differs significantly from that of the early 1980's. In recent years the use of candidate names in the titles of projects or other unauthorized communications has increasingly become a device for unauthorized committees to raise funds or disseminate information. Under the former interpretation, a candidate who objected to the use of his or her name in this manner, who shared in none of the funds received in response to the solicitation, or who disagreed with the views expressed in the communication, was largely powerless to stop it. For example, in 1984 a United States Senator requested, and received, permission to obtain from Commission records the names and addresses of those who had responded to unauthorized solicitations made in his name, to inform these contributors that he had not authorized the solicitation. However, he could not suggest that contributors send donations instead to his campaign committee. See Advisory Opinion 1984-2.

For this reason, the Commission has become more concerned about the potential for confusion or abuse when an unauthorized committee uses a candidate's name in the title of a special fundraising project. A person who receives such a communication may not understand that it is made on behalf of the committee rather than the candidate whose name appears in the project's title. It is possible in these instances that potential donors think they are giving money to the candidate named in the project's title, when this is not the case.

The FECA requires, at 2 U.S.C. 441d(a)(3), that such communications include a disclaimer that clearly identifies who paid for the communication, and states whether it was authorized by any candidate or candidate's committee. However, this requirement is not, in and of itself, sufficient to deal with this situation.

For example, assume that the "XYZ Committee," a committee registered under that name with the Commission, establishes a special fundraising project called "Americans for Q." Although Q is a federal candidate, he has not authorized the XYZ Committee to use his name in this manner; and the committee plans to use contributions received from the special project for purposes other than the support of Q. Even if the solicitation contains the proper disclaimer, a potential donor might believe he or she was contributing to Q's campaign, when this was not so.

The NPRM proposed two amendments to Commission rules, to minimize this potential for confusion. Under the first, the political committee sponsoring the project would have been required to include in the required disclaimer the name of the committee paying for the project, as well as a statement whether the project has been authorized by the candidate whose name appeared in the title, or by any other candidate. As part of this proposal, the Commission also sought comments on whether disclaimer size and/or location requirements should be imposed. Second, a committee would not have been allowed to accept checks received in response to a special project solicitation, unless the checks were made payable to the registered name of the committee. Alternatively, the Commission sought comments on a

proposed ban on the use of a candidate's name in the project title of an unauthorized committee's special fundraising project, unless specifically permitted by the candidate.

The Commission received 14 comments in response to this Notice. Most came from party committees and political action committees ["PAC's"] that utilize this fundraising technique.

After reviewing these comments and the entire rulemaking record, the Commission has decided to adopt in its final rule a ban on the use of candidate names in the titles of all communications by unauthorized committees. The Commission believes the potential for confusion is equally great in all types of committee communications. While the focus of the Common Cause decision was on special fundraising projects, the decision equated solicitations with other committee communications for purposes of 2 U.S.C. 432(e)(4). A total ban is also more directly responsive to the problem at issue, and easier to monitor and enforce than the restrictions on check payees proposed in the NPRM. Accordingly, the Commission is today amending 11 CFR 102.14 to define "name" for the purpose of the 2 U.S.C. 432(e)(4) prohibition to include "any name under which a committee conducts activities, such as solicitations or other communications, including a special project name or other designation."

Comments that opposed any modifications to this standard argued that current disclaimer requirements are sufficient to minimize the potential for confusion in this area. However, an examination of the record in the current rulemaking, which contains information that was not available at the time the question originally arose, supports the conclusion that this balance has now shifted so as to justify a broader interpretation. For example, a comment from an authorized committee of a major party presidential candidate stated that an unauthorized project using that candidate's name raised over $10,000,000 during the 1988 presidential election cycle, despite the candidate's disavowal of and efforts to stop these activities. The same committee is raising money by means of a comparable project, using that same candidate's name, in the current election cycle.

This comment added that two other unauthorized projects by that same committee raised over $4,000,000 and nearly $400,000 in the name of two other presidential candidates in the 1988 election cycle. None of the named candidates received any of the money that was collected in their names. One of these candidates, a United States Senator, also submitted comments asking that the pertinent rules be strengthened.

In addition, a recent television documentary, a videotape of which was placed in the rulemakng record, detailed how an unauthorized Political Action Committee has, over several election cycles, established numerous projects whose titles included the names of federal candidates. The named candidates had no connection with the projects, had not authorized the use of their names in this manner, and received no money from the $9 million raised in response to these appeals. Program investigators found that elderly people are particularly vulnerable to being misled in this manner, since they may not notice or fail to fully comprehend the disclaimers included with the solicitations.

The commenters who opposed tightening the rules on use of candidates' names cited First Amendment concerns as the basis for their opposition. Some cited such cases as *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and *FEC* v. *National Conservative Political Action Committee*, 4702 U.S. 480 (1985), to support their argument that independent expenditures enjoy full constitutional protection.

However, it is well established that First Amendment rights are not absolute when balanced against the government's interest in protecting the integrity of the electoral process. The cases cited involved total bans on independent expenditures, or certain types of independent expenditures. In contrast, this new rule is narrowly designed to further the legitimate governmental interest in minimizing the possibility of fraud and abuse in this situation. Committees are not barred from establishing specially designated projects: they are free to choose whatever project title they desire, as long as it does not include the name of a federal candidate. Also, committees may freely discuss any number of candidates, by name, in the body of a communication. The Commission notes, again, that the Court of Appeals has specifically stated that this new approach is a reasonable interpretation of the statutory language.

Some commenters argued that legislative action is necessary to effectuate this change, noting that the Commission has in the past included this issue in the legislative recommendations it submits to Congress each year. However, it is well established that courts will not rely on an agency's legislative recommendation to undermine the agency's construction of a statute as authorizing it to act. The Supreme Court has stated that holding an agency's legislative recommendation against it is disfavored, because "[p]ublic policy requires that agencies feel free to ask [Congress for] legislation," and this freedom to act would be chilled if such requests could later be held against them. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47 (1950); *see also, Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, 758 n. 39 and cases cited therein (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

The NPRM requested comments on whether party committees should be treated differently from other political committees in dealing with this situation, given party committees' interest in using the name of a candidate in a fundraising event for another candidate or as part of a general fundraising appeal. Most of the comments which responded on this point saw no justification for this disparate treatment, and the Commission agrees that the potential for confusion in this context is not significantly different whether a party or a non-party committee is involved. The final rule at § 102.14 thus does not distinguish between these two types of committees.

Finally, the NPRM proposed an amendment to 11 CFR 110.11(a)(1)(iv)(A), to bring that paragraph into conformance with 2 U.S.C. 441d(a)(3). This rule provides that, whenever an unauthorized committee solicits contributions through general public political advertising, the communication must include a disclaimer, "presented in a clear and conspicuous manner," that clearly identifies who paid for the solicitation. The Act, at 2 U.S.C. 441d, also requires the disclaimer to state whether the communication is authorized by any candidate or candidate's committee.

The proposed revision would have included this further statutory requirement in the text of 11 CFR 110.11(a)(1)(iv)(A); except that, because of their special circumstances, it would have not applied to national party committees. It was included in the Notice to help implement the expanded disclaimer requirements that were also proposed in the Notice.

Since these expanded disclaimer requirements have not been included in the final rule, the Commission has decided to reserve action on that aspect of the NPRM. A rulemaking which examines several aspects of the disclaimer requirements is currently in progress, and the Commission believes it is appropriate to incorporate this

110.11(a)(1)(iv)(A) question into that rulemaking.

Effective Date

All of the comments which addressed this point asked that, if changes are made in this area, they not become effective until after the November 1992 elections. The Commission recognizes many committees will have largely planned their campaign communications for this election at the time the rules would ordinarily become effective. Accordingly, the Commission plans to include in its announcement of effective date a statement that the revisions contained in the Announcement will take effect on November 4, 1992.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]

These rules will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that any small entities affected are already required to comply with the requirements of the Act in these areas.

List of Subjects in 11 CFR Part 102

Campaign funds, Political candidates, Political committees and parties, Reporting requirements.

For the reasons set out in the preamble, subchapter A, chapter I of title 11 of the Code of Federal Regulations is amended as follows:

PART 102—REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES (2 U.S.C. 433)

1. The authority citation for part 102 continues to read as follows:

Authority: 2 U.S.C. 432, 433, 438(a)(8), 441d.

2. Section 102.14 is amended by revising paragraph (a) to read as follows:

§ 102.14 Names of political committees (2 U.S.C. 432(e) (4) and (5)).

(a) The name of each authorized committee shall include the name of the candidate who authorized such committee. Except as provided in paragraph (b) of this section, no unauthorized committee shall include the name of any candidate in its name. For purposes of this paragraph, "name" includes any name under which a committee conducts activities, such as solicitations or other communications, including a special project name or other designation.

* * * * *

Dated: July 10, 1992.

Joan D. Aikens,

Chairman, Federal Election Commission.

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