

communication on behalf of the unauthorized committee. The amendment permits such use, if the title clearly indicates opposition to the named candidate.

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, 999 E Street NW., Washington, DC 20463, (202) 219-3690 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: On July 10, 1992, the Commission sent to Congress new rules on special fundraising projects and other uses of candidate names by unauthorized committees. The rules prohibit the use of a candidate's name in the title of any fundraising project or other communication by any committee that has not been authorized by the named candidate. 11 CFR 102.14(a). The rules became effective on November 4, 1992. 57 FR 47258 (Oct. 15, 1992).

The rules construe 2 U.S.C. 432(e)(4), a provision of the Federal Election Campaign Act ["FECA" or "the Act"] that prohibits the use of a candidate's name in the name of an unauthorized political committee. Prior to the 1992 revision, the Commission had construed this prohibition as applying only to the name under which a committee registers with the Commission [the "registered name"].

The Notice of Proposed Rulemaking ["NPRM"] was published in the Federal Register on April 15, 1992, 57 FR 13056. The Commission received 14 comments in response to this Notice. The final rules were published on July 15, 1992. 57 FR 31424.

On February 5, 1993, the Commission received a Petition for Rulemaking from Citizens Against David Duke ["CADD"], a proposed project of the American Ideas Foundation. The petition requested that the Commission reconsider and repeal the new rules, with particular emphasis on those titles that indicate opposition to, rather than support for, a named candidate.

The Commission published a Notice of Availability in the Federal Register on March 3, 1993. 58 FR 12189. Three comments were received in response to this Notice.

In response to these comments, the Commission published an NPRM proposing that the rule be amended so as to permit the use of candidate names

in titles that clearly indicate opposition to the named candidate. 58 FR 65559 (Dec. 15, 1993). The Commission received four comments in response to this Notice, three of which reflected in whole or in part comments submitted earlier in the course of the rulemaking.

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 April 6, 1994.

Explanation and Justification

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 the prohibition at 2 U.S.C. 432(e)(4) on the use of a candidate's name in the name of an unauthorized committee as applying only to the name under which the committee registered with the Commission, since "[an] agency's construction, if reasonable, must ordinarily be honored." *Id.* at 439-40. However, the court recognized that an interpretation imposing a more extensive ban on the use of candidate names by unauthorized committees, such as prohibiting their use in the titles of any fundraising projects sponsored by an unauthorized committee, "could also be accommodated within the provision's literal language." *Id.* at 440.

Some commenters on both the 1992 and the current NPRM noted that this rulemaking implicates protected first amendment rights, and that any infringement on these rights is subject to strict scrutiny by reviewing courts. 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. "Even a 'significant interference' with protected rights [] may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment" of those rights. *Buckley v. Valeo*, 424 U.S. 1, 25 (1975) (citations omitted). The *Common Cause* court deferred to the Commission's judgment that literal adherence to the language of section 432(e)(4), coupled with the disclaimer requirements of 2 U.S.C. 441d(a), struck the proper balance at that time. 842 F.2d at 440. Section 441d(a)(3) requires that communications by unauthorized committees include a

FEDERAL ELECTION COMMISSION

11 CFR Part 102

[Notice 1994-5]

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 Commission is amending its regulations regarding an unauthorized committee's use of a candidate's name in the title of a special fundraising project or other

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disclaimer that clearly identifies who paid for the communication, and states whether it was authorized by any candidate or candidate's committee.

The *Common Cause* decision grew out of the 1980 presidential election. Since that time, the Commission has become increasingly concerned over the possibility for confusion or abuse under the interpretation upheld in that case, that is, limiting the FECA's "name" prohibition to a committee's registered name. Aware of these constitutional concerns, the 1992 NPRM sought comments on two modifications to the rules then in effect that fell short of an overall ban.

Under the first proposal, 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 had 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 in this situation. 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.

However, the Commission also sought comments on a proposed total bar on the use of a candidate's name in the project title of an unauthorized committee's special fundraising project; and several commenters endorsed this approach. After considering all comments received in response to that Notice, the Commission decided that the total ban was justified.

The rulemaking record contains substantial evidence that potential contributors often confuse an unauthorized committee's registered name with the names of its fundraising projects, and wrongly believe that their contributions will be used in support of the candidate(s) named in the project titles. Although one commenter on the present rulemaking stated that the Commission had overstated the potential for fraud and abuse in this area, no comment provided information to refute this earlier determination.

This 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 newly-revised rule further enhances unauthorized committees' constitutional rights by exempting from the ban those titles that clearly indicate opposition to the named candidate.

It is clear from the rulemaking record that the situation today differs significantly from that of the early 1980's, when the *Common Cause* case was litigated. Prior to the adoption of the 1992 rules, the use of candidate names in the titles of projects or other unauthorized communications had 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, and/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.

An examination of the record in the 1992 rulemaking, which contains information that was not available when that NPRM was put out for comment, further supports the Commission's 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 unauthorized committee was raising money by means of a comparable project, using that same candidate's name, in the 1992 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

saying that the pertinent rules be strengthened.

In addition, a television documentary, a videotape of which was placed in the rulemaking record, detailed how an unauthorized Political Action Committee had, 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.

Such cases point up the potential for confusion or abuse when an unauthorized committee uses a candidate's name in the title of a special fundraising project, or other designation under which the committee operates. A person who receives such a communication may confuse the project name with the committee's registered name, and thus may not understand that the communication is made on behalf of the unauthorized committee rather than the candidate whose name appears in the project's title. Potential donors may think they are giving money to the candidate named in the project's title, when this is not the case.

Some comments that opposed any modifications to the former standard argued that current disclaimer requirements at section 441d(a)(3) were sufficient to minimize the potential for confusion in this area. Others suggested stronger, or larger, disclaimers, in place of the overall ban. One suggested that the disclaimer be in as large and as bold a typeface as the largest, boldest use of the candidate's name anywhere in the communication. The Commission believes that such an approach could be more burdensome than the current ban, while still not solving the potential for fraud and abuse in this area. The requirement that checks be made only to the sponsoring committee's registered name would similarly not ensure that the contributor did not erroneously believe the money would be used to support the candidate(s) named in the project's title. It also would be difficult, if not practically impossible, to monitor and enforce, since nothing on the public record reflects who the payee is on a contributor's check.

It is important to note that the ban applies only to project titles, and not to the body of the accompanying communication. Unauthorized

committees remain free to discuss candidates throughout the communication; and to use candidates' names as frequently, and highlight them as prominently (in terms of size, typeface, location, and so forth) as they choose. In other words, while a committee could not establish a fundraising project called "Citizens for Doe," if Doe is a federal candidate, it could use a subheading such as "Help Us Elect Doe to Federal Office," and urge Doe's election, by name, in large, highlighted type, throughout the communication.

Also, by amending the regulation to exclude from the ban names that indicate opposition to the named candidate, the Commission has acceded to the petitioner's main concern, amending the rules to permit the American Ideas Foundation to use the names of federal candidates in titles that clearly indicate opposition to such candidates. As stated in its summary of the petition (petition, p. 1), "There is no danger of confusion or abuse inherent in the use of a candidate's name by a committee or project which opposes the candidate." The Commission recognizes that the potential for fraud and abuse is significantly reduced in the case of such titles, and has accordingly revised its rules to permit them.

The petition also asked that the rule exclude from the ban the use of candidate names in titles by those committees "that are authorized to use the candidate's name, which are engaged in activities which will not actively mislead the public or injure the candidate, or which otherwise clearly indicate that they are unauthorized." However, if a candidate authorizes the use of his or her name in a fundraising project, the committee becomes an authorized committee, and this rule would not apply. The phrase "engaged in activities which will not actively mislead the public or injure the candidate" is vague and would result in the need to determine on a case-by-case basis whether covered communications met this test. The Commission has already determined that a stronger disclaimer requirement would not be sufficient in and of itself to meet this concern. Given the wide range of options that committees continue to have regarding use of candidate names, imposing further requirements could well prove more burdensome than the present approach.

The NPRM proposed that exempted titles would have to "clearly and unambiguously [show] opposition to the named candidate by using words such as 'defeat' or 'oppose.'" The requirement that such specific

"triggering words" be included in the title has been deleted from the final rule, since the Commission recognizes that certain titles, such as "Citizens Fed Up with Doe," may clearly and unambiguously indicate opposition to a candidate even though no individual word in the title has that import.

One commenter 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 Commission notes that David Duke is not currently a candidate for federal office, so the use of his name in a project title is not prohibited by these rules. Should he again become a federal candidate, such use of his name would be governed by these revised rules.