



FEDERAL ELECTION COMMISSION
Washington, DC 20463

SECRETARIAT

2007 MAY 30 A 11:49

May 30, 2007

MEMORANDUM

AGENDA ITEM
For Meeting of: 05-31-07

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*
General Counsel
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Assistant General Counsel
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SUBJECT: Draft Statement of Policy Regarding Treasurers' Best Efforts to Obtain, Maintain, and Submit Information as Required by the Federal Election Campaign Act.

Attached is a draft Statement of Policy Regarding Treasurers' Best Efforts to Obtain, Maintain, and Submit Information as Required by the Federal Election Campaign Act.

We request that this draft be placed on the agenda for May 31, 2007.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 104**

3 **[Notice 2007-XX]**

4 **Statement of Policy Regarding Treasurers' Best Efforts to Obtain, Maintain, and**
5 **Submit Information as Required by the Federal Election Campaign Act**

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Statement of Policy.

8 **SUMMARY:** The Federal Election Commission (the "Commission") is issuing a
9 Policy Statement to clarify its enforcement policy with respect to
10 the circumstances under which it intends to consider a political
11 committee and its treasurer to be in compliance with the
12 recordkeeping and reporting requirements of the Federal Election
13 Campaign Act, as amended ("FECA"). Section 432(i) of FECA
14 provides that when the treasurer of a political committee
15 demonstrates that best efforts were used to obtain, maintain, and
16 submit the information required by FECA, any report or records of
17 such committee shall be considered in compliance with FECA or
18 the statutes governing the public financing of Presidential
19 candidates. In the past, the Commission has interpreted this
20 section to apply only to a treasurer's efforts to obtain required
21 information from contributors to a political committee, and not to
22 maintaining information or to submitting reports. However, the
23 district court in Lovely v. FEC, 307 F. Supp. 2d 294 (D. Mass.

1 2004), held that the Commission should consider whether a
2 treasurer used best efforts under FECA with regard to efforts made
3 to submit a report in a timely manner. This Policy Statement
4 makes clear that the Commission intends to apply FECA’s best
5 efforts provision to treasurers’ and committees’ efforts to obtain,
6 maintain, and submit information and records to the Commission
7 consistent with the holding of the Federal court in Lovely. Further
8 information is provided in the supplementary information that
9 follows.

10 **EFFECTIVE**
11 **DATE:** [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER].

12 **FOR FURTHER**
13 **INFORMATION**
14 **CONTACT:** Mr. Ron B. Katwan, Assistant General Counsel, or Ms. Margaret
15 G. Perl, Attorney, 999 E Street, N.W., Washington, DC 20463,
16 (202) 694-1650 or (800) 424-9530.

17 **SUPPLEMENTARY**
18 **INFORMATION:**

19 **I. Background**

20 **A. Statutory and Regulatory Provisions**

21 FECA states the “best efforts defense” in 2 U.S.C. 432(i) as follows:

22 When the treasurer of a political committee shows that best efforts have
23 been used to obtain, maintain, and submit the information required by
24 this Act for the political committee, any report or any records of such
25 committee shall be considered in compliance with this Act or chapter
26 95 or chapter 96 of title 26.
27

1 The Commission implemented this provision in 11 CFR 104.7(a) with regulatory
2 language virtually identical to the statutory provision:

3 When the treasurer of a political committee shows that best efforts have
4 been used to obtain, maintain and submit the information required by
5 the Act for the political committee, any report of such committee shall
6 be considered in compliance with the Act.

7
8 Paragraph (b) of 11 CFR 104.7 specifies the actions that treasurers of a political
9 committee must take to demonstrate that they have exercised best efforts to obtain and
10 report the “identification” of each person whose contribution(s) to the political committee
11 and its affiliated political committees aggregate in excess of \$200 in a calendar year (or
12 in an election cycle in the case of an authorized committee).¹ “Identification” includes
13 the person’s full name, mailing address, occupation, and name of employer. See 11 CFR
14 100.12.

15 Both the language of FECA and the Commission’s regulation at 11 CFR 104.7(a)
16 apply the best efforts defense broadly to efforts by treasurers to “obtain, maintain and
17 submit” the information required to be disclosed by FECA. In past enforcement actions,
18 however, the Commission has interpreted this statutory and regulatory language to apply
19 only to efforts to “obtain” contributor information.² This interpretation draws from an

¹ The U.S. Court of Appeals for the District of Columbia Circuit referred to 11 CFR 104.7(b) as a
“Commission regulation interpreting what political committees must do under [FECA] to demonstrate that
they have exercised their ‘best efforts’ to encourage donors to disclose certain personally identifying
information.” Republican Nat’l Comm. v. FEC, 76 F.3d 400, 403 (D.C. Cir. 1996).

² In 1980, the Commission explained that “[i]n determining whether or not a committee has
exercised ‘best efforts,’ the Commission’s primary focus will be on the system established by the
committee for obtaining disclosure information.” Amendments to Federal Election Campaign Act of 1971;
Regulations Transmitted to Congress, 45 FR 15080, 15086 (Mar. 7, 1980) (emphasis added). In 1993, the
Commission referred to “the requirement of [FECA] that treasurers of political committees exercise best
efforts to obtain, maintain and report the complete identification of each contributor whose contributions
aggregate more than \$200 per calendar year.” Final Rule on Recordkeeping and Reporting by Political
Committees: Best Efforts, 58 FR 57725, 57725 (Oct. 27, 1993). And in 1997, the Commission stated that
“[t]reasurers of political committees must be able to show they have exercised their best efforts to obtain,
maintain and report [contributor identification information].” Final Rule on Recordkeeping and Reporting
by Political Committees: Best Efforts, 62 FR 23335, 23335 (Apr. 30, 1997). In 2003, the Commission

1 example contained in the provision’s legislative history. See H.R. Rep. No. 96-422, at 14
2 (1979) (“One illustration of the application of this [best efforts] test is the current
3 requirement for a committee to report the occupation and principal place of business of
4 individual contributors who give in excess of \$100”).

5 B. The Lovely Decision

6 In Lovely, a political committee challenged an administrative fine the
7 Commission had assessed for failing to file timely a report. The committee argued that it
8 had made best efforts to file the report and that this constituted a complete defense to the
9 fine. The court concluded that the plain language of the Act requires the Commission to
10 entertain a best efforts defense in the Administrative Fine Program (“AFP”), and that it
11 was unclear from the record if the Commission had done so.

12 In so holding, the court drew on the legislative history of the best efforts
13 provision, and specifically noted the 1979 amendments to FECA that made the best
14 efforts defense “applicable to the entirety of FECA, rather than merely to one
15 subsection.” Lovely, 307 F. Supp. 2d at 299. The court quoted the provision’s legislative
16 history:

17 The best efforts test is specifically made applicable to recordkeeping
18 and reporting requirements in both Title 2 and Title 26. The test of
19 whether a committee has complied with the statutory requirements is
20 whether its treasurer has exercised his or her best efforts to obtain,
21 maintain, and submit the information required by the Act. If the
22 treasurer has exercised his or her best efforts, the committee is in
23 compliance. Accordingly, the application of the best efforts test is

asserted in the Lovely litigation: “the Commission has long interpreted the best efforts provision as creating a limited safe harbor regarding committees’ obligations to report substantive information that may be beyond their ability to obtain.” FEC Supplemental Brief at 1, Lovely (Civil Action No. 02-12496-PBS). Furthermore, “when Congress originally enacted the ‘best efforts’ provision, it could not have been more clear that it was creating a limited defense regarding the inability to obtain specific information that was supposed to be disclosed, not the failure to file reports on time.” Id. at 12-13. The Lovely court summarized the Commission’s argument: “The FEC in its briefing claims that it limits the reach of the best efforts statute to best efforts to ‘obtain’ contributor information.” Lovely, 307 F. Supp. 2d at 300.

1 central to the enforcement of the recordkeeping and reporting
2 provisions of the Act. It is the opinion of the Committee that the
3 Commission has not adequately incorporated the best efforts test into
4 its administration procedures, such as the systematic review of reports.
5

6 Id. (emphasis added) (quoting H.R. Rep. No. 96-422, at 14 (1979), reprinted in 1979
7 U.S.C.C.A.N. 2860, 2873).

8 After remand of the Lovely case, the Commission acknowledged in its Statement
9 of Reasons that “[t]he Court held that FECA’s ‘best efforts’ provision . . . requires the
10 Commission to consider whether a committee’s treasurer exercised best efforts to submit
11 timely disclosure reports.” Statement of Reasons in Administrative Fines Case #549 at 1
12 (Oct. 4, 2005), available at http://www.fec.gov/law/law_rulemakings.shtml under the
13 heading “Best Efforts in Administrative Fine Challenges.” (“Lovely Statement of
14 Reasons”). Upon further review, the Commission determined that the committee’s
15 treasurer had not made best efforts in filing the report in question and assessed a civil
16 money penalty. Id. at 5.

17 C. Proposed Policy Statement

18 The Commission sought public comment on a Proposed Statement of Policy that
19 would clarify the Commission’s current enforcement practice to consider whether the
20 treasurer and committee made best efforts to obtain, maintain or submit the required
21 information under 11 CFR 104.7(a). See Proposed Statement of Policy Regarding
22 Treasurer’s Best Efforts to Obtain, Maintain, and Submit Information as Required by the
23 Federal Election Campaign Act, 71 FR 71084 (Dec. 8, 2006). The Commission received
24 two comments, which are available at <http://www.fec.gov/law/policy.shtml> under the
25 heading “Best Efforts.” One comment made several recommendations as to how the
26 Commission could further clarify the best efforts defense by incorporating the business

1 management concept of “best practices” regarding corporate operation, financial controls,
2 risk prevention and risk assessment. The comment also suggested that the Policy
3 Statement provide guidance to political committees and treasurers regarding what
4 conduct would qualify under the best efforts defense, and not rely solely on examples of
5 conduct that would not qualify under the defense. The other comment was not relevant to
6 this Policy Statement.

7 **II. Policy Regarding the Best Efforts Defense**

8 Although the court decision in Lovely only concerned permissible defenses within
9 the AFP, the Commission has decided to adopt the court’s interpretation of the best
10 efforts defense with regard to other enforcement matters. While the Commission’s
11 enforcement practices formerly reflected the view that the best efforts defense was
12 limited to obtaining certain contributor identification information (see note 2 above) the
13 Commission recognizes that this narrow application of the defense in previous
14 enforcement matters derives from a single example of the defense’s application in its
15 1979 legislative history.³ In light of these considerations, the Commission hereby
16 notifies the public and the regulated community through this Policy Statement that
17 henceforth it intends to apply the best efforts defense of 2 U.S.C. 432(i), as promulgated
18 at 11 CFR 104.7, not only to efforts made to obtain contributor information as currently
19 set forth in section 104.7(b),⁴ but also to efforts made to obtain other information, to

³ A respondent’s assertion in an enforcement matter that best efforts were made to maintain and/or submit required information was formerly considered by the Commission to be a mitigating factor, but not an outright defense to an alleged violation of the recordkeeping and reporting requirements.

⁴ As stated above, the standards for determining whether the best efforts defense is applicable in the context of obtaining specific contributor information are set forth at current 11 CFR 104.7(b). This Policy Statement does not affect or modify those standards.

1 maintain all information required by the statute, and to submit required information on
2 disclosure reports.

3 This Policy Statement does not affect the Commission’s AFP, but applies only to
4 matters in the Commission’s traditional enforcement and audit programs, and in the
5 Alternative Dispute Resolution program (“ADR”). The Commission recently completed
6 a rulemaking adding a best efforts defense to the enumerated defenses available in the
7 AFP. See Final Rules for Best Efforts in Administrative Fines Challenges, 72 FR 14662
8 (Mar. 29, 2007). In that rulemaking, the Commission incorporated the statutory best
9 efforts standard, while taking into account the unique streamlined nature of the AFP. See
10 id. at 14666.

11 The Commission considers best efforts to be “a standard that has diligence as its
12 essence.” E. Allan Farnsworth, On Trying to Keep One’s Promises: The Duty of Best
13 Efforts in Contract Law, 46 U. Pitt. L. Rev. 1, 8 (1984). As the Commission explained in
14 its Lovely Statement of Reasons at 2:

15 Section 432(i) creates a safe harbor for treasurers who “show[] that
16 best efforts” have been made to report the information required to
17 be reported by the Act. “Best” is an adjective of the superlative
18 degree. “Best efforts” must therefore require more than “some” or
19 “good” efforts. Congress’s choice of a “best efforts” standard,
20 rather than a “good faith” standard, suggests that a treasurer cannot
21 rely upon his or her earnestness or state of mind to gain the shelter
22 of Section 432(i)’s safe harbor. Rather, a treasurer has the burden
23 of showing that the actions taken – the efforts he or she made to
24 comply with applicable reporting deadlines – meet the statute’s
25 demanding benchmark.

26
27 With respect to 11 CFR 104.7(a), the Commission intends to consider a
28 committee’s affirmative steps to keep adequate records and make accurate reports, as
29 well as the reasons for its failure to obtain, maintain, or submit information properly. The

1 Commission generally intends to consider the following: (1) the actions taken, or systems
2 implemented, by the committee to ensure that required information is obtained,
3 maintained, and submitted; (2) the cause of the failure to obtain, maintain, or submit the
4 information or reports at issue; and (3) the specific efforts of the committee to obtain,
5 maintain, and submit the information or reports at issue. This general policy does not
6 modify other guidance and policy standards issued by the Commission addressing
7 specific circumstances, such as the Internal Controls for Political Committees, and Policy
8 Statement Regarding Safe Harbor for Misreporting Due to Embezzlement, 72 FR 16695
9 (Apr. 5, 2007), both available at <http://www.fec.gov/law/policy.shtml>.

10 The Commission will generally conclude that a committee has shown best efforts
11 if the committee establishes the following:

- 12 • At the time of its failure, the committee took relevant precautions such as double
13 checking recordkeeping entries, regular reconciliation of committee records with
14 bank statements, and regular backup of all electronic files;
- 15 • The committee had trained staff responsible for obtaining, maintaining, and
16 submitting campaign finance information in the requirements of the Act as well as
17 the committee's procedures, recordkeeping systems, and filing systems;
- 18 • The failure was a result of reasonably unforeseen circumstances beyond the
19 control of the committee, such as a failure of Commission computers or
20 Commission-provided software; severe weather or other disaster-related
21 incidents; a widespread disruption of information transmission over the Internet
22 not caused by any failure of the committee's computer systems or Internet service

1 provider; or delivery failures caused by mail/courier services such as U.S. Postal
2 Service or Federal Express; and

- 3 • Upon discovering the failure, the committee promptly took all reasonable
4 additional steps to expeditiously file any unfiled reports and correct any
5 inaccurate reports.

6 In contrast, the Commission will generally conclude that a committee has not met
7 the best efforts standard if the committee's failure to obtain, maintain, or submit
8 information or reports is due to any of the following:

- 9 • Unavailability, inexperience, illness, negligence or error of committee staff,
10 agents, counsel or connected organization(s);
- 11 • The failure of a committee's computer system;
- 12 • Delays caused by committee vendors or contractors;
- 13 • A committee's failure to know or understand the recordkeeping and filing
14 requirements of the Act, or the Act's filing dates; or
- 15 • A committee's failure to use Commission- or vendor-provided software properly.

16 Under this policy, the Commission intends to consider the best efforts of a
17 committee under section 432(i) when reviewing all violations of the recordkeeping and
18 reporting requirements of FECA, whether arising in its traditional enforcement docket
19 (Matters Under Review), audits, or the ADR Program. The best efforts standard is an
20 affirmative defense and the burden rests with the political committee and its treasurer to
21 present evidence sufficient to demonstrate that best efforts were made. The Commission
22 does not intend to consider the best efforts defense in any enforcement or ADR matter, or

1 in an audit unless a respondent or audited committee asserts the facts that form the basis
2 of that defense.

3 Effective as of this date, the Commission intends to apply the best efforts standard
4 to all matters currently before the Commission in which a respondent has already asserted
5 such a defense, and any matters in the future involving treasurers' and political
6 committees' obligation to obtain, maintain, and submit information or reports. When
7 treasurers make a sufficient showing of best efforts, the treasurers or committees shall be
8 considered in compliance with FECA.

9 The above provides general guidance concerning the applicability of the
10 Commission's best efforts defense and announces the general course of action that the
11 Commission intends to follow. This Policy Statement sets forth the Commission's
12 intentions concerning the exercise of its discretion in its enforcement and audit programs.
13 However, the Commission retains that discretion and will exercise it as appropriate with
14 respect to the facts and circumstances of each matter or audit it considers. Consequently,
15 this Policy Statement does not bind the Commission or any member of the general public.
16 As such, it does not constitute an agency regulation requiring notice of proposed
17 rulemaking, opportunities for public participation, prior publication, and delay in
18 effective date under 5 U.S.C. 553 of the Administrative Procedure Act ("APA"). The
19

1 provisions of the Regulatory Flexibility Act, which apply when notice and comment are
2 required by the APA or another statute, are not applicable.

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Robert D. Lenhard
Chairman
Federal Election Commission

9 DATED _____
10 BILLING CODE: 6715-01-P