



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2006 NOV 22 A 11:03

AGENDA ITEM
For Meeting of: 11-30-06

MEMORANDUM

TO: The Commission
FROM: Commissioner Hans A. von Spakovsky
SUBJECT: Best Efforts Policy Statement

A handwritten signature in black ink, appearing to be "H. von Spakovsky".

Attached please find a proposed draft of the subject policy statement. We respectfully request the draft be placed on the agenda for November 30, 2006.

Thank you.

FEDERAL ELECTION COMMISSION

11 CFR 104.7

[Notice 2006-??]

Proposed Statement of Policy Regarding Treasurer's Best Efforts to Obtain, Maintain, and Submit Information as Required by the Federal Election Campaign Act

AGENCY: Federal Election Commission

ACTION: Proposed Statement of Policy

SUMMARY: The Federal Election Commission (the "Commission") seeks comments on a proposal to clarify its enforcement policy with respect to the circumstances under which it intends to consider a political committee and its treasurer to be in compliance with the record keeping and reporting requirements of the Federal Election Campaign Act, as amended ("FECA"), based on the "best efforts" defense. Section 432(i) of FECA provides that when the treasurer of a political committee demonstrates that best efforts were used to obtain, maintain, and submit the information required by FECA, any report or any records of such committee shall be considered in compliance with FECA (and/or chapters 95 and 96 of Title 26). In the past, the Commission has interpreted this section to apply only to a treasurer's efforts to obtain required information from contributors to a political committee, and not to maintaining information or the submission of reports. However, in light of *Lovely v. Federal Election Commission*, 307 F.Supp.2d 294 (D.Mass. 2004), the Commission intends to apply Section 432(i) to obtaining, maintaining, and submitting information and records to the Commission for the purpose of complying with FECA's disclosure and reporting requirements.

The Commission's regulation implementing Section 432(i) is promulgated at 11 CFR 104.7. This proposed policy statement makes clear that the Commission's intent is to apply this regulation consistent with the holding of the federal court in *Lovely*. A political committee and its treasurer, regardless of the type of enforcement action before the Commission (the administrative fines program excepted, see below), will be considered to be in compliance with FECA's requirements if the committee or its treasurer can show that best efforts were made to obtain, maintain, and submit all information required to be reported to the Commission. With respect to 11 CFR 104.7(a), the Commission intends to consider that best efforts were made when the treasurer of a political committee demonstrates that the committee took all reasonable steps to properly obtain, maintain or submit information and reports to the Commission as required by FECA, and that the failure to properly obtain, maintain or submit required information and reports was beyond the control of the committee. The Commission intends to generally consider the following: (1) the actions taken, or systems implemented, by the committee to ensure that required information is obtained, maintained, and submitted; (2) the cause of the failure to obtain, maintain, or submit the information or reports at issue; and (3) the specific efforts of the committee to obtain,

maintain, and submit the information or reports at issue. Where appropriate, the Commission may issue additional policy statements or implement regulations setting forth more specific requirements to govern the best efforts defense in particular contexts.

This policy does not affect or modify the Commission's best efforts standards set forth at 11 CFR 104.7(b) that apply specifically with respect to obtaining the identification (see 11 CFR 100.12) of each person whose contributions aggregate more than \$200 in a calendar year. Additionally, this policy does not affect or modify the Commission's current administrative fine program. The Commission will consider the applicability of the best efforts defense in the context of the administrative fines program in a separate rulemaking. Current 11 CFR 111.35 sets forth the defenses available to a respondent in the administrative fines context. Any revisions to those available defenses will be addressed in a separate rulemaking, which will allow the Commission to give due consideration to the special issues raised by the administrative fines program not present in other portions of the Commission's enforcement docket.

The Commission requests comments on all aspects of this proposed policy statement.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER]. The Commission intends to issue a final policy statement after the close of the comment period.

ADDRESSES: All comments must be in writing, must be addressed to Mr. J. Duane Pugh Jr., Acting Assistant General Counsel, and must be submitted in e-mail, facsimile, or paper copy form. Commenters are strongly encouraged to submit comments by e-mail or fax to ensure timely receipt and consideration. E-mail comments must be sent to bepolicy@fec.gov. If e-mail comments include an attachment, the attachment must be in either Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments must be sent to (202) 219-3923, with paper copy follow-up. Mailed comments and paper copy follow-up of faxed comments must be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. All comments must include the full name and postal service address of the commenter or they will not be considered. The Commission will post comments on its website after the comment period ends.

FOR FURTHER INFORMATION CONTACT: Mr. J. Duane Pugh Jr., Acting Assistant General Counsel, or Ms. Margaret G. Perl, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Provision

The Commission proposes clarifying its current enforcement practice with respect to consideration of the best efforts of the treasurer of a political committee to comply

with the record keeping and reporting requirements of FECA, as interpreted by the *Lovely* court. Pursuant to 2 U.S.C. § 432(i), FECA provides that:

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

This provision of FECA was implemented by the Commission at 11 CFR 104.7. Paragraph (a) of this section is virtually identical to the statutory provision:

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

Paragraph (b) of section 104.7 provides standards for a treasurer of a political committee to satisfy in obtaining and reporting “the identification as defined at 11 CFR 100.12 of each person whose contribution(s) to the political committee and its affiliated political committees aggregate in excess of \$200 in a calendar year (or in an election cycle in the case of an authorized committee).”¹ “Identification” includes the person’s full name, mailing address, occupation, and name of employer. *See* 11 CFR 100.12.

The language of FECA, and the Commission’s regulation at section 104.7(a), applies the best efforts defense broadly to efforts by treasurers to “obtain, maintain and submit” the information required to be disclosed by FECA. However, the Commission has in past enforcement actions interpreted the statutory language to apply only to efforts to “obtain” contributor information.² This interpretation is based on an example

¹ The 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 National Committee v. FEC*, 76 F.3d 400, 403 (DC 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” (emphasis added). 45 FR 15080, 15086 (March 7, 1980). 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 Recording Keeping and Reporting by Political Committees: Best Efforts*, 58 FR 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 Recording Keeping and Reporting by Political Committees: Best Efforts*, 62 FR 23335 (April 30, 1997). In 2003, the Commission asserted in its Supplemental Brief in the *Lovely* litigation that “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.” Commission’s Supplemental Brief in *Lovely v. Federal Election Committee* at 1. 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

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

II. Administrative Fines Program

Congress authorized the Commission's administrative fines program in 1999 to “create[] a simplified procedure for the FEC to administratively handle reporting violations.”³ H.R. Rep. No. 106-295 at 11 (1999). As the Commission explained in its *Final Rule on Administrative Fines*, 65 Fed. Reg. 31787 (May 19, 2000),

[p]rior to enactment of the [administrative fines program] amendment to FECA, the Commission handled failures to file the reports in a timely manner under the enforcement procedures in 11 CFR part 111. The purpose of the administrative fines program is to institute streamlined procedures, while preserving the respondents' due process rights, to process violations of the reporting requirements of 2 U.S.C. 434(a) and assess a civil money penalty based on the schedules for penalties for such violations.

65 Fed. Reg. at 31,787. However, “the Commission has discretion to apply either the administrative fines procedures or the current enforcement procedures set forth in §§ 111.9 through 111.19 to violations of the reporting requirements of 2 U.S.C. 434(a).” *Id.* at 31,788; 11 CFR 111.31.

Under current Commission regulations, a respondent may challenge a proposed civil penalty in the administrative fines program for three reasons: “(i) [t]he existence of factual errors; and/or (ii) [t]he improper calculation of the civil money penalty; and/or (iii) [t]he existence of extraordinary circumstances that were beyond the control of the respondent and that were for a duration of at least 48 hours and that prevented the respondent from filing the report in a timely manner.” 11 CFR 111.35(b)(1). The regulation limits the scope of circumstances that will be considered “extraordinary” to exclude negligence, problems with vendors or contractors, illness, inexperience, or

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.

³ *See* Treasury and General Government Appropriations Act, 2000, Public Law 106-58, § 640, 113 Stat. 430, 476-477 (1999). The program has been reauthorized twice, *see* Consolidated Appropriations Act, 2004, Public Law 108-199, § 639, 118 Stat. 3, 359 (2004) and 2006 Appropriations Act, Public Law 109-115, 119 Stat. 2396 (Nov. 2005), and will sunset on December 31, 2008. *See Final Rule on Extension of Administrative Fines Program*, 70 Fed. Reg. 75,717 (Dec. 21, 2005).

unavailability of staff, computer failures (except failures of the Commission's computers), and other similar circumstances. 11 CFR 111.35(b)(4).

The Commission deemed this limitation of defenses to be an appropriate component of the administrative fines program, and asserted that it had

sound policy reasons for limiting the respondents' defenses beyond streamlining the administrative process. A key cornerstone of campaign finance law is the full and timely disclosure of the political committee's financial activity. Such disclosure is essential to providing the public with accurate and complete information regarding the financing of federal candidates and political campaigns. Thus, violations of the reporting requirements of 2 U.S.C. 434(a) are strict liability offenses Absent extraordinary circumstances beyond the committees' control, the Commission sees no reason why committees cannot file their reports by the deadline. The rationale behind the '48-hour extraordinary circumstances' exception is that the Commission recognizes there may be instances such as natural disasters where a committee's office is located in a disaster area and the committee cannot timely file a report because of lack of electricity or flooding or destruction of committee records.

65 Fed. Reg. at 31,789-90.

In light of these considerations, this proposed policy statement shall not affect the Commission's current administrative fines program. Rather, the Commission's position will be re-evaluated in the context of a separate rulemaking concerning the application of the best efforts defense in the administrative fines program.

III. The *Lovely* Decision

In *Lovely v. Federal Election Commission*, 307 F.Supp.2d 294 (D. Mass. 2004), a congressional candidate's political committee and its treasurer brought an action against the Commission challenging the imposition of an administrative fine for allegedly late filing of a required report. On the day of the filing deadline, the committee's treasurer experienced difficulty electronically filing the committee's report via the Internet. Upon advice of Commission staff, the treasurer mailed a paper copy of the committee's report, along with a copy on computer diskette, to the Commission. The diskette was improperly formatted, and rejected by the Commission, but the paper copy was made public and posted to the Commission's website. The committee filed a properly formatted report 27 days after the filing deadline. Pursuant to the Commission's administrative fines program, the Commission's Office of Administrative Review recommended a \$3,100 civil penalty, based on the number of days the report was late, the committee's lack of prior violations, and the fact that the treasurer had not raised any of the three defenses permitted by 11 CFR 111.35(b) to contest the imposition of a civil penalty. The Commission found reason to believe that the committee and the treasurer violated FECA with the late filing. Subsequently, the Commission made a final determination that

plaintiff had violated 2 U.S.C. § 434(a), but also voted to decrease the civil penalty to \$1,800. *Lovely* at 296-297.

In its lawsuit, the plaintiff argued that the Commission's imposition of a fine was contrary to FECA's best efforts provision. *Id.* at 296. The Commission argued that "it limits the reach of the best efforts statute to best efforts to 'obtain' contributor information." *Lovely* at 300. The Court concluded that "the FEC's argument that the phrase does not apply to the submission of reports conflicts with the plain statutory language. While the Commission can refine by regulation what best efforts means in the context of submitting a report, it cannot define it away by providing that submission of reports is governed by a 'strict liability' standard." *Id.* Thus, the court rejected the Commission's primary rationale for limiting respondents' potential defenses to late- or non-reporting in the administrative fines program, holding that the submission of reports is *not* governed by a strict liability standard. Rather, the fault-based standard of the best efforts defense must apply.

The court also drew on the legislative history of the best efforts provision. As noted, the 1979 amendments to FECA specifically amended the best efforts provision to make it "applicable to the entirety of FECA, rather than merely to one subsection." *Lovely* at 299. The court cited the provision's legislative history:

The best efforts test is *specifically made applicable to recordkeeping and reporting requirements in both Title 2 and Title 26*. The test of whether a committee has complied with the statutory requirements is whether its treasurer has exercised his or her best efforts to obtain, maintain, and submit the information required by the Act. If the treasurer has exercised his or her best efforts, the committee is in compliance. Accordingly, *the application of the best efforts test is central to the enforcement of the recordkeeping and reporting provisions of the Act*. It is the opinion of the Committee that the Commission has not adequately incorporated the best efforts test into its administration procedures, such as the systematic review of reports.

H.R.Rep. No. 96-422, at 14 (1979), U.S. Code Cong. & Admin. News 1979, 2860, 2873 (emphasis added) (cited in *Lovely* at 299).

As the Commission stated in its Statement of Reasons after remand of the *Lovely* case, "the Court held that FECA's 'best efforts' provision . . . requires the Commission to consider whether a committee's treasurer exercised best efforts to submit timely disclosure reports." *Commission's Statement of Reasons in Administrative Fines Case #549 on Remand From the United States District Court for the District of Massachusetts*, Oct. 4, 2005, at 1. On remand, the Commission indicated its intention to "pursue its view that 2 U.S.C. 432(i) does not require the Commission to recognize a 'best efforts' defense as part of the administrative fines program," and decided that the court had not "construe[d] Section 432(i) beyond requiring its application in this instance." *Id.* at 1-2. The Commission determined that the committee's treasurer had not put forth best efforts in filing the report in question. *Id.* at 5.

IV. Application of the Court's Holding

Upon further consideration, the Commission has determined that despite the limited breadth of *Lovely*, implementation of the *Lovely* court's interpretation of the best efforts defense best reflects the language of FECA and the intent of Congress. While the Commission's enforcement practices formerly reflected the view that the best efforts defense was limited to obtaining certain contributor identification information, *see supra* footnote 2, the Commission recognizes that its application of the defense in previous enforcement matters derives from a single example of the defense's application in its 1979 legislative history.⁴ In light of these considerations, the Commission hereby notifies the public and the regulated community through this proposed policy statement that henceforth it intends to apply the best efforts defense of 2 U.S.C. 432(i), as promulgated at 11 CFR 104.7, with respect to obtaining contributor information as currently set forth at 11 CFR 104.7(b), and also to obtaining other information, maintaining any and all information required by the statute, and submitting said information in the form of disclosure reports.

The standards for determining whether the best efforts defense is applicable in the context of obtaining specific contributor information is set forth at current 11 CFR 104.7(b). This proposed policy statement does not affect or modify those standards.

With respect to 11 CFR 104.7(a), which applies to obtaining, maintaining and submitting information and reports, the Commission intends to consider that best efforts were made when the treasurer of a political committee demonstrates that the failure to properly obtain, maintain or submit required information and reports to the Commission was beyond the control of the committee. The Commission intends to generally consider the following: (1) the actions taken, or systems implemented, by the committee to ensure that required information is obtained, maintained, and submitted; (2) the cause of the failure to obtain, maintain, or submit the information or reports at issue; and (3) the specific efforts of the committee to obtain, maintain, and submit the information or reports at issue.

Under this proposed policy, the following list sets forth possible reasons for a committee's failure to obtain, maintain or submit information or reports that the Commission may consider to be indicative that the best efforts defense is applicable:

- A failure of Commission computers or Commission-provided software;
- Severe weather or other disaster-related incidents;
- Electronic filing problems caused by widespread and reported problems with the Internet;
- Utilization of the Commission's three approved filing methods (via Internet, direct modem, and mailing an electronic copy);

⁴ 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 record keeping and reporting requirements.

- Delivery failures caused by mail/courier services such as U.S. Postal Service, Federal Express, UPS, DHL, etc.; or
- Unforeseen circumstances beyond the control of the respondent.

The above-listed reasons, along with any other defenses presented, may be considered by the Commission in light of all the facts and circumstances relevant to the committee's obtaining and maintenance of information and efforts to submit reports (or other information) in a timely fashion in determining the applicability of the best efforts defense.

If a failure to obtain, maintain, or submit information or reports is due to committee staff unavailability, inexperience, illness, negligence or error; the committee's computer or software failure; delays caused by committee vendors or contractors; a committee's failure to know filing dates; or a committee's failure to use Commission software properly, then the Commission intends to conclude that the best efforts standard has not been met.

Under the proposed policy, if presented with information sufficient to form a best efforts defense, the Commission intends to consider the best efforts of a committee under Section 432(i) when reviewing all violations of the record keeping and reporting requirements of FECA, whether arising in its normal enforcement docket (Matters Under Review) or the Alternative Dispute Resolution Program. The "best efforts" standard is an affirmative defense and the burden rests with the political committee and its treasurer to present facts that demonstrate that "best efforts" were made. The Commission does not intend to consider the best efforts defense in any enforcement matter unless the facts that form the basis of that defense are asserted by a respondent.

The Commission considers "best efforts" to be "a standard that has diligence as its essence." E. Allan Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law*, 46 U. Pitt. L. Rev. 1, 7 (1984). As the Commission explained in its *Statement of Reasons in Administrative Fines Case #549* at 2,

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

As explained above, the Commission does not intend to apply 11 CFR 104.7(b) as limiting the applicability of the best efforts defense of 2 USC § 432(i) and 11 CFR 104.7(a) *only* to efforts made to obtain certain specific information from contributors. 11

CFR 104.7(b) does not in any way modify or limit the applicability of section 104.7(a) to the efforts of treasurers to obtain, maintain and submit information and reports.

The above provides general guidance concerning the applicability of the Commission's proposed best efforts defense and announces the general course of action that the Commission intends to follow. This proposed policy statement sets forth the Commission's intentions concerning the exercise of its discretion in its enforcement program. However, the Commission retains that discretion and will exercise it as appropriate with respect to the facts and circumstances of each matter it considers. Consequently, this policy statement does not bind the Commission or any member of the general public. As such, it does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay in effective date under 5 U.S.C. 553 of the Administrative Procedure Act ("APA"). The provisions of the Regulatory Flexibility Act, which apply when notice and comment are required by the APA or another statute, are not applicable. Where appropriate, the Commission may issue additional policy statements or initiate rulemakings to set forth more specific requirements to govern the best efforts defense in particular contexts.

V. Conclusion.

Effective as of the date that a final Policy Statement is published in the Federal Register, the Commission intends to apply the best efforts standard to all matters currently before the Commission in which a respondent has asserted such a defense, and that come before the Commission in the future involving information and reports that must be obtained, maintained, and submitted by the treasurers of political committees, although the Commission will consider the application of the best efforts defense to the administrative fines program in a separate rulemaking. The Commission intends to consider that "best efforts" were made when the treasurer of a political committee demonstrates that the failure to properly obtain, maintain or submit required information and reports was beyond the control of the committee. When treasurers are able to show that a committee made best efforts to comply with the Act's requirements to obtain, maintain, and submit information, the Commission intends that the treasurers or committees shall be considered in compliance with FECA and no civil penalties or other remedial measures shall be imposed.

Michael E. Toner
Chairman
Federal Election Commission

DATED _____
BILLING CODE: 6715-01-U