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March 16, 2007

MEMORANDUM

AGENDA ITEM
For Meeting of: 03-22-07

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan ^{TPD}
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SUBJECT: Draft Final Rule and Explanation and Justification for Best Efforts in Administrative Fine Challenges

Attached is a draft Final Rule and Explanation and Justification for Best Efforts in Administrative Fine Challenges. The Final Rule amends the regulations governing the Administrative Fines Program in four ways: (1) clarifying the scope of the "factual errors" defense in 11 CFR 111.35(b)(1); (2) replacing the "extraordinary circumstances" defense with a "best efforts" defense in 11 CFR 111.35(b)(3); (3) clarifying when the Commission finds no violation under 11 CFR 111.37(b); and (4) explaining that the Commission's statement of reasons will usually consist of the reviewing officer's recommendation, as adopted by the Commission under 11 CFR 111.37(d). These changes are consistent with the district court's holding in *Lovely v. FEC*, 307 F. Supp. 2d 294 (D. Mass. 2004). Most of the changes are in the form proposed in the Notice of Proposed Rulemaking, and the Explanation and Justification notes the few differences.

We request that this draft be placed on the agenda for March 22, 2007.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 111**

3 **[Notice 2007-XX]**

4 **Best Efforts in Administrative Fines Challenges**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Final Rules and Transmittal of Rules to Congress.

7 **SUMMARY:** The Federal Election Commission is revising its regulations to amend four
8 aspects of its Administrative Fines Program (“AFP”), a streamlined
9 process through which the Commission assesses civil money penalties for
10 late filers and non-filers under the Federal Election Campaign Act of
11 1971, as amended (“FECA”). First, the Commission is revising its rules
12 regarding the permissible grounds for challenging a proposed civil money
13 penalty by clarifying the scope of the defense based on factual errors.
14 Second, the Commission is incorporating a defense for political
15 committees that demonstrate that they used their best efforts to file reports
16 timely. Third, the Commission is revising its rules regarding its final
17 determinations to clarify when the Commission finds that no violation has
18 occurred. Lastly, the rules are being amended to explain that the
19 Commission’s statement of reasons for its final decision in an AFP matter
20 usually consists of the reasons set forth by the Commission’s reviewing
21 officer as adopted by the Commission. The supplementary information
22 that follows provides further information.

1 **EFFECTIVE**
2 **DATE:** [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN
3 THE FEDERAL REGISTER].

4 **FOR FURTHER**
5 **INFORMATION**

6 **CONTACT:** Mr. J. Duane Pugh Jr., Acting Assistant General Counsel, or Ms. Margaret
7 G. Perl, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-
8 1650 or (800) 424-9530.

9 **SUPPLEMENTARY**
10 **INFORMATION:**

11 Through the AFP, the Commission may assess a civil money penalty for a violation of
12 the reporting requirements of 2 U.S.C. 434(a) (such as not filing or filing late) without using the
13 traditional enforcement procedures reserved for more serious violations under 2 U.S.C. 437g.
14 See 2 U.S.C. 437g(a)(4)(C).¹ Congress intended the Commission to process these
15 straightforward violations through a “simplified procedure” that would ease the enforcement
16 burden on the Commission. See H.R. Rep. No. 106-295, at 11-12 (1999). The rules governing
17 the AFP create a streamlined procedure that balances the respondent’s rights to notice and
18 opportunity to be heard with the need to operate the AFP in an expeditious manner without
19 undue administrative burden. See Explanation and Justification for Final Rule on Administrative
20 Fines, 65 FR 31787, 31788 (May 19, 2000) (“Admin Fines E&J”).²

21 When the Commission finds reason to believe (“RTB”) that a political committee and its
22 treasurer (“respondents”) violated the reporting requirements, the respondents may challenge the
23 finding and the proposed civil money penalty only for certain specified reasons. See revised

¹ The AFP applies to violations of the reporting requirements by political committees and their treasurers. See 11 CFR 111.30.

² The AFP is set to expire on December 31, 2008. See Pub. L. No. 109-115, sec. 721, 119 Stat. 2396, 2493-94 (2005); Final Rule on Extension of Administrative Fines Program, 70 FR 75717 (Dec. 21, 2005) (extending the sunset date in 11 CFR 111.30 to Dec. 31, 2008).

1 11 CFR 111.35. The Commission’s reviewing officer considers the challenge and forwards a
2 recommendation to the Commission. See 11 CFR 111.36(e). After considering the challenge,
3 the reviewing officer’s recommendation, and any subsequent comments from the respondent
4 regarding the recommendation, the Commission makes a final determination. See revised 11
5 CFR 111.37. The Commission assesses civil money penalties based on published penalty
6 schedules set forth in 11 CFR 111.43. Respondents may challenge the Commission’s final
7 determination in U.S. District Court. See 2 U.S.C. 437g(a)(4)(C)(iii); 11 CFR 111.38.

8 In Lovely v. FEC, 307 F. Supp. 2d 294 (D. Mass. 2004), a political committee challenged
9 a civil money penalty assessed by the Commission through the AFP. The political committee
10 argued that it had used its best efforts to file the report in question and that this constituted a
11 valid and complete defense under FECA’s “best efforts” provision in 2 U.S.C. 432(i). See
12 Lovely, 307 F. Supp. 2d at 299. Section 432(i) provides that “[w]hen the treasurer of a political
13 committee shows that best efforts have been used to obtain, maintain, and submit the information
14 required by this Act for the political committee, any report or any records of such committee
15 shall be considered in compliance with [FECA].” 2 U.S.C. 432(i).³ The Lovely court concluded
16 that the plain language of FECA requires the Commission to consider the “best efforts” defense
17 in the AFP, and that the record in the Lovely case did not establish whether the Commission had
18 considered that defense. See Lovely, 307 F. Supp. 2d at 300-01. The court remanded the case to
19 the Commission for further proceedings. See id. at 301. On remand, the Commission
20 determined that the political committee had failed to show it used best efforts to file timely and

³ The Commission had long interpreted the “best efforts” safe harbor to be limited to political committees’ obligation to report certain substantive information that may be beyond the control of the committees to obtain. See 11 CFR 104.7 (defining “best efforts” for purposes of obtaining and submitting contributor information). The Commission is currently considering in a separate proceeding whether to revise its application of this provision in enforcement matters outside the scope of the AFP. See Proposed Statement of Policy Regarding Treasurer’s Best Efforts to Obtain, Maintain, and Submit Information as Required by the Federal Election Campaign Act, 71 FR 71084 (Dec. 8, 2006). The Commission anticipates issuing a final policy statement this year.

1 confirmed the earlier imposition of the civil money penalty. See Statement of Reasons in
2 Administrative Fines Case 549 (Oct. 4, 2005), available at
3 http://www.fec.gov/law/law_rulemakings.shtml under the heading “Best Efforts in
4 Administrative Fines Challenges.”

5 Although the Lovely decision did not directly challenge the AFP rules, and did not affect
6 the validity of 11 CFR 111.35 or the Commission’s consideration of any other AFP matters, the
7 Commission opted to open a rulemaking by publishing a Notice of Proposed Rulemaking on
8 December 8, 2006, to seek public comment on proposed revisions to the AFP based on the
9 court’s concerns. See Notice of Proposed Rulemaking for Best Efforts in Administrative Fines
10 Challenges, 71 FR 71093 (Dec. 8, 2006) (“NPRM”). The Commission received two comments,
11 which are available at http://www.fec.gov/law/law_rulemakings.shtml under the heading “Best
12 Efforts in Administrative Fines Challenges.”⁴ One comment made several recommendations as
13 to how the Commission could further clarify the “best efforts” defense by incorporating the
14 business management concept of “best practices” regarding corporate operation, financial
15 controls, risk prevention and risk assessment, while the other comment was not relevant to this
16 rulemaking.

17 After consideration of the relevant comment, the Commission has decided to revise its
18 rules governing the AFP in four ways, as described below: (1) clarifying the scope of the “factual
19 errors” defense; (2) incorporating a “best efforts” defense for challenges to RTB findings; (3)
20 clarifying when the Commission may find that no violation has occurred in an AFP matter; and
21 (4) explaining the procedure for issuing Commission statements of reasons for AFP final
22 determinations. These changes address the concerns raised by the Lovely court and provide

⁴ The Internal Revenue Service did not comment on the NPRM.

1 greater clarity regarding permissible grounds for challenging an RTB finding. The revisions are
2 substantially similar to those proposed in the NPRM.

3 Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review
4 of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker
5 of the House of Representatives and the President of the Senate and publish them in the Federal
6 Register at least 30 calendar days before they take effect. The final rules that follow were
7 transmitted to Congress on _____, 2007.

8 **EXPLANATION AND JUSTIFICATION**

9 **I. Revised 11 CFR 111.35 – Respondent Challenges to Reason to Believe Finding or** 10 **Proposed Civil Money Penalty**

11 Revised section 111.35 sets forth the requirements for AFP respondents' challenges to
12 RTB findings and proposed civil money penalties. Revised section 111.35(a) is clarified so that
13 it applies only to respondents that seek to challenge an RTB finding or proposed civil money
14 penalty.⁵ The Commission is reorganizing and clarifying section 111.35 so that respondents may
15 easily identify the basis for challenges in the AFP. See revised 11 CFR 111.35(b).

16 A. Revised 11 CFR 111.35(b)(1) – Changes to the “Factual Errors” Defense

17 The NPRM sought comment on proposed clarifications to the “factual errors” defense
18 and asked whether the regulation should include examples of the types of factual errors that
19 would suffice as grounds for challenging an RTB finding. See NPRM, 71 FR at 71094. The
20 comment did not address this issue. The Commission has decided to revise the rule regarding
21 the “factual errors” defense as proposed in the NPRM, except for stylistic changes. The revised
22 rule states that the facts alleged to be in error must be facts upon which the Commission relied in

⁵ The revisions to section 111.35(a) did not alter the basic timing requirement that a respondent must file a challenge with the Commission within forty (40) days of when the Commission issues its reason to believe finding. See revised 111.35(a); Admin Fines E&J, 65 FR at 31789.

1 its RTB finding. See revised 11 CFR 111.35(b)(1). Thus, a respondent may not challenge an
2 RTB finding based on factual errors that are irrelevant to the Commission’s actual RTB finding,
3 such as errors in the RTB finding regarding individual names or titles of committee staff.

4 The revised rule provides two examples of the type of factual errors that would properly
5 support a challenge: the respondent was not required to file the report in question, and the
6 respondent did in fact timely file as described in 11 CFR 100.19. See revised
7 11 CFR 111.35(b)(1). For example, a political committee that is not subject to electronic filing
8 requirements could challenge an RTB finding and proposed civil money penalty under
9 section 111.35(b)(1) by showing that the paper copy was filed on time and the Commission
10 relied on the factual error that the committee was required instead to file electronically. See
11 11 CFR 104.18(a). As referenced in the rule’s second example, Commission rules currently state
12 that certain reports are “timely filed” if they are deposited as registered or certified mail with the
13 U.S. Post Office, as Priority Mail or Express Mail through the U.S. Post Office, or with an
14 overnight delivery service to be delivered the next business day with a postmark no later than
15 11:59 p.m. EST on the filing date. See 11 CFR 100.19(b). Thus, a respondent who is not
16 required to file electronically could challenge an RTB finding based on evidence that it deposited
17 the report in the proper manner pursuant to section 100.19(b) on the filing date, even if the
18 Commission did not receive the report because of a delivery failure by the U.S. Post Office or
19 other delivery service. The Commission emphasizes that the revisions to section 111.35(b)(1) do
20 not create any new “factual errors” defenses, but simply recognize the types of errors that the
21 Commission has accepted previously as a defense in the AFP.

1 B. Revised 11 CFR 111.35(b)(3) – “Best Efforts” Defense

2 The NPRM also sought comment on whether to replace the “extraordinary
3 circumstances” defense in the prior rule with a “best efforts” defense for challenging an RTB
4 finding based upon 2 U.S.C. 432(i). See NPRM, 71 FR at 71094-95 and former
5 11 CFR 111.35(b)(1)(iii). The comment generally supported the idea of a “best efforts” defense.
6 The Commission has decided to adopt the Lovely court’s interpretation of 2 U.S.C. 432(i) and to
7 incorporate a “best efforts” defense into the AFP. It appears in revised 11 CFR 111.35(b)(3) and
8 is the same as the proposed rule, except for the changes noted below. The “best efforts” defense
9 in the revised rule completely replaces the prior “extraordinary circumstances” defense because
10 the two defenses are largely coextensive. The Commission reiterates its policy determination, as
11 stated in the initial rulemaking for the AFP, that respondents’ defenses in the AFP should be
12 limited because the complete and timely disclosure of the political committee’s financial activity
13 is a “cornerstone of campaign finance law.” See Admin Fines E&J, 65 FR at 31789.

14 The Lovely court recognized that the Commission could “refine by regulation what best
15 efforts means in the context of submitting a report.” Lovely, 307 F. Supp. 2d at 300. In
16 exercising its authority to interpret how to incorporate a “best efforts” defense into the AFP
17 rules, the Commission is mindful of the statutory terms chosen by Congress. As also explained
18 by the Commission in its statement of reasons in the Lovely case after remand, section 432(i)
19 creates a safe harbor for treasurers who demonstrate that best efforts have been used to submit
20 reports required by FECA. “Best” is an adjective of the superlative degree. Therefore, best
21 efforts requires more than “some” or “good” efforts. Section 432(i)’s use of the phrase “best
22 efforts,” instead of a “good faith” standard, means that an AFP respondent cannot rely upon the

1 state of mind of the committee’s treasurer or staff to claim this defense.⁶ Instead, the
2 Commission’s revised rule at 11 CFR 111.35(b)(3), which sets forth the “best efforts” defense,
3 focuses on actions taken by the respondent committee or treasurer to comply with reporting
4 deadlines.

5 The “best efforts” defense is described in the revised rule as a two-part test. The AFP
6 respondent must demonstrate that: (1) the respondent was prevented from filing in a timely
7 manner by “reasonably unforeseen circumstances that were beyond the control” of the
8 respondent; and (2) the respondent filed the report in question no later than 24 hours after the end
9 of the reasonably unforeseen circumstances preventing the timely filing. See revised 11 CFR
10 111.35(b)(3). The Commission believes this test is straightforward and should be easy for
11 respondents to understand and document in their written responses. The final rule differs slightly
12 from the proposed rule, which would have stated that the respondent must be prevented from
13 filing in a timely manner by “unforeseen” circumstances. The Commission is making this
14 change to emphasize that the “best efforts” defense is an objective test, which uses a reasonable
15 person standard and does not depend upon the committee’s treasurer or staff’s subjective ability
16 to foresee a particular circumstance. The examples included in the rule in 11 CFR 111.35(c) and
17 (d), described below, illustrate how this defense operates as an objective test.

18 Under the first part of the defense, the respondent bears the burden of showing that the
19 reasonably unforeseen circumstances in fact prevented the timely and proper filing of the
20 required report. The NPRM requested public comment regarding whether the Commission
21 should apply a “but for” or “contributing factor” test for determining whether a respondent was
22 prevented from timely filing under the rule. See NPRM, 71 FR at 71095. The comment did not

⁶ See Statement of Reasons in Administrative Fines Case 549 (Oct. 4, 2005).

1 address this issue. The Commission has decided that this rule requires a strict causal relationship
2 between the circumstances described in the challenge (such as a natural disaster) and the
3 respondent's inability to file the report timely. It is not sufficient for reasonably unforeseen
4 circumstances to make it merely more difficult than usual for the respondent to file on time. The
5 circumstance must cause the respondent to be unable to file in a timely and proper manner,
6 despite the respondent attempting to use all available methods of filing. "Best efforts" is a high
7 standard set by FECA, and the Commission reminds respondents that there are multiple ways for
8 a committee to file required reports properly and timely. See, e.g., 11 CFR 100.19(b) (political
9 committees not required to file electronically may file on paper by hand delivery, first class,
10 registered, certified, Priority or Express U.S. Mail, or overnight delivery service); 11 CFR
11 104.18 (mandatory electronic filings accepted through the Commission's filing system via
12 internet, modem, or by submission of diskette or CD). If the respondent is prevented from using
13 one method of filing by a problem (such as a technical problem with the Commission's
14 modems), the respondent cannot claim the "best efforts" defense if it did not attempt to use other
15 available methods to file timely (such as submission on a diskette or CD).⁷ Therefore, to satisfy
16 the "best efforts" defense, a respondent must demonstrate that it attempted to use all available
17 methods to file, but that timely filing by each method was prevented by the reasonably
18 unforeseen circumstances beyond the control of the respondent.

19 The direct causal link between the reasonably unforeseen circumstances and the ability of
20 the respondent to file the report also underlies the second part of the test for the "best efforts"

⁷ The Commission's guidance and instructions to political committees required to file electronically makes clear that if a report is successfully uploaded and accepted by the Commission, a confirmation receipt (including a validation number) is immediately sent to the committee via email, fax or both. If a committee does not receive such a receipt, the committee should not assume the filing was received and should contact the Commission's technical support personnel. See, e.g., "Frequently Asked Questions About Electronic Filing," available at http://www.fec.gov/support/faq_filing.shtml (last visited Mar. 16, 2007); "Common Electronic Filing Mistakes," available at <http://www.fec.gov/electfil/mistakes.shtml> (last visited Mar. 16, 2007).

1 defense. A respondent must show that the report was properly filed no later than 24 hours after
2 the resolution of the circumstances preventing the timely filing. When the situation (such as a
3 problem with Commission computers) is resolved, the Act’s high standard of “best efforts”
4 requires that the respondent file the report within a reasonably short period of time. The NPRM
5 requested public comment regarding whether the 24-hour period in the proposed rule was
6 appropriate for the “best efforts” defense. See NPRM, 71 FR at 71095. The comment did not
7 address this issue. The Commission has determined that a 24-hour period best serves the interest
8 in disclosure of the information as soon as practicable after the circumstances preventing the
9 timely disclosure are resolved.

10 C. Examples of Circumstances Under the “Best Efforts” Defense

11 To provide further guidance to respondents regarding the scope of the “best efforts”
12 defense, the revised rule includes examples of circumstances that will be considered “reasonably
13 unforeseen and beyond the control of the respondent,” and examples of circumstances that will
14 not be considered “reasonably unforeseen and beyond the control of the respondent.” See
15 revised 11 CFR 111.35(c) and (d). The comment argued that the rule should not be limited to
16 examples of defenses that would be unacceptable under the new “best efforts” defense, but
17 should also include examples of defenses that would meet the new defense to provide guidance
18 to committees and treasurers. The revised rule provides such illustrations. The examples of
19 defenses in the revised rule are the same as proposed in the NPRM, except as noted otherwise
20 below. Both sets of examples in revised section 111.35(c) and (d) are non-exhaustive lists and
21 should not be read to override the general requirements of the defense in revised
22 section 111.35(b)(3) as discussed above.

1 1. Revised 11 CFR 111.35(c) – Reasonably Unforeseen Circumstances Beyond
2 Respondents’ Control

3 Revised section 111.35(c) provides three examples of circumstances that the Commission
4 will consider “reasonably unforeseen and beyond the control” of the respondent under a “best
5 efforts” defense. The first example is that a failure of Commission computers or Commission-
6 provided software, despite the respondent seeking technical assistance, caused the respondent’s
7 untimely electronic filing. See revised 11 CFR 111.35(c)(1). This example is similar to the
8 example in the prior rules, in which a failure of Commission computers satisfied the
9 “extraordinary circumstances” defense. See former 11 CFR 111.35(b)(4)(iv); Admin Fines E&J,
10 65 FR at 31790 (“Any failure of the Commission’s system that prevents committees from filing
11 their reports when due would be recognized as an extraordinary circumstance beyond the
12 respondents’ control.”).⁸ The revised rule differs from the proposed rule by including the
13 respondent’s seeking technical assistance as part of the example. Consistent with the prior
14 defense based on Commission computer failures, the revised example clarifies that political
15 committees must use all Commission resources available to aid with electronic filing, such as
16 technical support manuals and personnel, before a respondent will be considered “prevented”
17 from timely filing by Commission computer or software failures. Thus, any failure of
18 Commission computers, servers, filing system or Commission-provided software of sufficient
19 severity that it results in a respondent being unable to file, despite the respondent seeking
20 assistance from the Commission’s technical support personnel, is a reasonably unforeseen
21 circumstance beyond the respondent’s control.

⁸ In order to satisfy the prior “extraordinary circumstances” defense, the failure of Commission computers had to last at least 48 hours. See former 11 CFR 111.35(b)(1)(iii). The new “best efforts” defense does not contain any minimum time period for the “reasonably unforeseen circumstances that were beyond the control” of the respondent. See revised 11 CFR 111.35(b)(3).

1 The second example in revised section 111.35(c)(2) is a “widespread disruption of
2 information transmissions over the Internet not caused by any failure of the Commission’s or
3 respondent’s computer systems or Internet service provider.” This example covers
4 circumstances in which technological problems at a third-party hub or information transfer
5 location, rather than the Commission’s or respondent’s computer systems, caused widespread
6 communication failures on the Internet that left the respondent unable to send, or the
7 Commission unable to receive, an electronically filed report. This failure to transmit information
8 must occur irrespective of any failures of the Commission’s or respondent’s computer systems or
9 Internet service providers. If a respondent demonstrates such a widespread disruption of
10 information transmissions occurred, the Commission will consider it “reasonably unforeseen
11 circumstances that were beyond the control” of the respondent. As with all the examples in
12 revised section 111.35(c)(2), the respondent bears the burden of showing that these reasonably
13 unforeseen circumstances in fact prevented the respondent from filing timely, despite attempts to
14 file by any available alternative methods permitted under Commission regulations.⁹ This
15 example has been refined from the proposed rule to clarify the types of transmission failures
16 contemplated.

17 The final example in the rule states that a “[s]evere weather or other disaster-related
18 incident” is a reasonably unforeseen circumstance beyond the control of the respondent. See
19 revised 11 CFR 111.35(c)(3). Under the prior rule, the Commission deemed certain weather
20 conditions (lasting more than 48 hours) met the “extraordinary circumstances” test, explaining
21 that “natural disasters where a committee’s office is located in the disaster area and the

⁹ The Commission’s electronic filing manuals detail step-by-step instructions for the various methods of acceptable electronic filing via the Internet, modem, or by saving the report to a diskette or CD. See, e.g., “FECElectronic Filing User Manual for Candidate Committees,” available at http://www.fec.gov/electfil/authorized_manual/manual.shtml (last visited Mar. 16, 2007).

1 committee cannot timely file a report because of lack of electricity or flooding or destruction of
2 committee records” would satisfy the defense. See previous 11 CFR 111.35(b)(1)(iii); Admin
3 Fines E&J, 65 FR at 31790. The revised rule permits such severe weather-related events
4 occurring at the respondent’s or Commission’s location to form the basis for a “best efforts”
5 defense. The Commission is not defining with specificity the level of severity for weather or
6 other disaster-related incidents in revised section 111.35(c)(3) because a respondent’s challenge
7 must show that the weather or disaster-related incident in fact prevented the respondent from
8 filing timely. Given that the effects upon the respondent of each weather or disaster-related
9 incident will vary, the Commission will evaluate the particular facts contained in individual
10 challenges, instead of mandating such details in a rule of general application.

11 2. Revised 11 CFR 111.35(d) – Circumstances That Are Not Reasonably Unforeseen or
12 Beyond Respondents’ Control

13 Revised section 111.35(d) includes a non-exhaustive list of circumstances that are not
14 considered “reasonably unforeseen and beyond the control” of the respondent, and will not
15 support a “best efforts” finding. See revised 11 CFR 111.35(d)(1) through (6). All but two of
16 these examples are drawn from the list of events that did not constitute “extraordinary
17 circumstances” under the Commission’s prior rule: negligence; delays caused by committee
18 vendors or contractors; illness, inexperience or unavailability (including death) of the treasurer or
19 other staff; and committee computer, software or Internet service provider failures. Compare
20 revised 11 CFR 111.35(d)(1) through (4) with former 11 CFR 111.35(b)(4). One example
21 concerns Internet service provider failures. See revised 11 CFR 111.35(d)(4). The proposed rule
22 described this example as failures of committee computers or software. The final rule also
23 includes Internet service provider failures. Because many Internet service providers are

1 available, a failure limited to one provider is not a defense for late filing or not filing. The
2 revised rule adds two examples to this list based upon the Commission’s experience with
3 respondent challenges in the AFP: a failure to know filing dates and a failure to use Commission
4 software properly. See revised 11 CFR 111.35(d)(5) and (6).

5 Under the revised rule, a respondent’s challenge will not succeed if its “best efforts”
6 defense is based on any of these circumstances as the cause of the failure to file timely. The
7 Commission notes that the examples in revised section 111.35(d) are not exhaustive, but are
8 illustrative of the types of situations that are not reasonably unforeseen and beyond the
9 respondent’s control. The Commission strongly encourages all political committees to name
10 assistant treasurers and have additional staff available so that their ability to file reports on time
11 will not be compromised due to the unavailability or inexperience of the treasurer or other staff.
12 See Final Rules on Administrative Fines, 68 FR 12572, 12573 (Mar. 17, 2003) (adding staff
13 “inexperience” and “unavailability” as examples of circumstances that will not be considered
14 “extraordinary” under former 11 CFR 111.35(b)(4)(iii)).

15 The Commission’s implementation of the “best efforts” defense set forth in this revised
16 rule serves as a proxy for the factual investigation of a respondent’s internal practices regarding
17 filing of reports that would ordinarily be necessary to determine whether such practices were
18 sufficient to constitute best efforts. The comment argued that the Commission should conduct a
19 full examination of the business models and management procedures of each committee to
20 determine whether the committee implemented proper back-up systems and other measures
21 reflecting management “best practices” in the relevant industry to reduce the risk of a late filing.
22 However, such an investigation would be resource-intensive for the Commission, burdensome
23 for the respondent, and inappropriate in the AFP, which is a streamlined procedure created by

1 Congress to alleviate the Commission’s enforcement burden for routine and minor filing
2 violations. Absent reasonably unforeseen circumstances that were beyond the control of the
3 respondent, the Commission sees no reason why political committees cannot file reports on
4 time.¹⁰ Thus, the Commission’s implementation of the “best efforts” defense appropriately
5 incorporates a statutory “best efforts” standard, while taking into account the unique streamlined
6 nature of the AFP.

7 D. Revised 11 CFR 111.35(e) – Factual Basis for Challenge

8 The Commission is adding paragraph (e) to 11 CFR 111.35 to require that the
9 respondent’s written response must detail the factual basis supporting its challenge.
10 Furthermore, respondents must provide supporting documentation for their challenges. The
11 comment did not address this provision, which is identical to the proposed rule.

12 The three defenses specified in sections 111.35(b)(1) through (3) (factual error,
13 miscalculation of civil money penalty, and best efforts) are the only permissible grounds for
14 challenging the Commission’s RTB finding or proposed civil money penalty, and a respondent’s
15 written response must be based on one of these grounds to be considered by the reviewing officer
16 and the Commission. Respondents bear the burden of showing that a permissible defense is
17 satisfied.¹¹

18 **II. Revised 11 CFR 111.37 – Commission Review of Respondent’s Challenge and**
19 **Reviewing Officer’s Recommendation**

20 A. Revised 11 CFR 111.37(b) – Commission Finding That No Violation Has Occurred

21 Revised section 111.37 sets forth procedures regarding the Commission’s final

¹⁰ See Admin Fines E&J, 65 FR at 31790 (stating that political committees should be aware of their reporting duties and noting that the Commission makes efforts to send reminders of deadlines and political committees have ample time from the end of the reporting period to the filing deadline to prepare and file reports).

¹¹ The Commission considers affidavits more persuasive evidence than unsworn statements submitted in support of the respondent’s challenge.

1 determination for AFP matters upon receipt of the respondent's challenge and the reviewing
2 officer's recommendation. See revised 11 CFR 111.37(a) through (d). The NPRM sought
3 comment on proposed revisions to section 111.37(b) regarding Commission determinations that
4 no violation has occurred where the RTB finding is based on a factual error, and where the
5 respondent demonstrated it used best efforts to file timely. See NPRM, 71 FR at 71095. The
6 comment did not address these rules. The Commission is revising section 111.37(b) to clarify
7 that the existence of factual errors or a finding of best efforts are complete defenses. Thus, if one
8 of these defenses is satisfied, the Commission will conclude that no violation of FECA has
9 occurred. Please note that the defense based on an incorrect basis for calculating the civil money
10 penalty (section 111.35(b)(2)) is a defense only as to the amount of the civil money penalty and
11 does not serve as a basis for a finding of no violation under the AFP.

12 B. Revised 11 CFR 111.37(d) – Commission Statement of Reasons in AFP Final
13 Determinations

14 The NPRM sought comment on proposed revisions to section 111.37(d) to make clear
15 that the reasons for the reviewing officer's recommendation regarding the challenge, unless
16 modified or rejected by the Commission, will serve as the Commission's statement of reasons
17 regarding the final determination in the AFP matter.¹² See NPRM, 71 FR at 71095. This
18 proposed revision addresses the Lovely court's concerns that it was unclear what constituted the
19 statement of reasons for the Commission's final determination in that matter. The comment did
20 not address this issue.

21 The Commission is revising section 111.37(d) to indicate that, unless otherwise indicated
22 by the Commission, the statement of reasons for the Commission's final determination in an

¹² These revisions do not affect any statements of reasons the Commissioners may issue in enforcement matters under review.

1 AFP matter consists of the reasons provided by the reviewing officer for the recommendation, if
2 approved by the Commission. See Lovely, 307 F. Supp. 2d at 301 (stating that the
3 Commission’s “adoption of a reviewing officer’s recommendation may suffice in some
4 circumstances”). Statements setting forth additional or different reasons may also be issued.
5 The revised rule also recognizes that the Commission may modify or reject the reviewing
6 officer’s recommendation in whole or in part. See 11 CFR 111.37(d). In such cases, the
7 Commission will indicate the grounds for its action and it or individual Commissioners may
8 issue one or more statements of reasons.

9 Former section 111.37(d) provided that the Commission could determine that a violation
10 of 2 U.S.C. 434(a) had occurred, but waive the civil money penalty because the respondent
11 demonstrated the existence of “extraordinary circumstances” under former
12 section 111.35(b)(1)(iii). See former 11 CFR 111.37(d). As discussed above, the Commission is
13 removing the “extraordinary circumstances” defense and replacing it with a “best efforts”
14 defense in revised section 111.35(b)(3). Under 2 U.S.C. 432(i), if the Commission determines
15 that the treasurer used best efforts in compliance with this rule, there is no violation of FECA and
16 the Commission will so notify the respondent pursuant to revised section 111.37(b). See revised
17 11 CFR 111.37(b). Therefore, the Commission need not retain the former section 111.37(d).

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

19 The Commission certifies that the attached final rules will not have a significant
20 economic impact on a substantial number of small entities. The basis for this certification is that
21 any individuals and not-for-profit entities affected by these rule are not “small entities” under
22 5 U.S.C. 601(6). The definition of “small entity” does not include individuals, and classifies a
23 not-for-profit enterprise as a “small organization” if it is independently owned and operated and

1 not dominant in its field. 5 U.S.C. 601(4). The rules apply to all types of political committees
2 and their treasurers. State political party committees are not independently owned and operated
3 because they are not financed and controlled by a small identifiable group of individuals, and
4 they are affiliated with the larger national political party organizations. In addition, the State
5 political party committees representing the Democratic and Republican parties have a major
6 controlling influence within the political arena of their State and are thus dominant in their field.
7 District and local party committees are generally considered affiliated with the State committees
8 and need not be considered separately. To the extent that any State party committees
9 representing minor political parties or any other political committees might be considered “small
10 organizations,” the number that would be affected by this rule is not substantial.

11 Furthermore, any separate segregated funds affected by these rules are not-for-profit
12 political committees that do not meet the definition of “small organization” because they are
13 financed by a combination of individual contributions and financial support for certain expenses
14 from corporations, labor organizations, membership organizations, or trade associations, and
15 therefore are not independently owned and operated. Most of the other political committees
16 affected by these rules are not-for-profit committees that do not meet the definition of “small
17 organization.” Most political committees are not independently owned and operated because
18 they are not financed by a small identifiable group of individuals. Most political committees rely
19 on contributions from a large number of individuals to fund the committees’ operations and
20 activities.

21 The final rules also do not impose any additional restrictions or increase the costs of
22 compliance for respondents within the AFP. Instead, the final rules provide additional defenses
23 available to political committees and their treasurers, thereby potentially increasing the number

1 of situations in which the Commission assesses no civil money penalty. Moreover, these rules
2 apply only in the AFP, where penalties are proportionate to the amount of a political committee's
3 financial activity. Any political committee meeting the definition of "small entity" would be
4 subject to lower fines than larger committees with more financial activity. Therefore, the final
5 rules will not have a significant economic impact on a substantial number of small entities.

6 **List of Subjects**

7 11 CFR Part 111

8 Administrative practice and procedures, Elections, Law enforcement.

9

1 For the reasons set out in the preamble, the Federal Election Commission is amending
2 Subchapter A of Chapter I of Title 11 of the Code of Federal Regulations as follows:

3 **PART 111 – COMPLIANCE PROCEDURE (2 U.S.C. 437g, 437d(a))**

4 1. The authority citation for Part 111 is amended to read as follows:

5 **Authority:** 2 U.S.C. 432(i), 437g, 437d(a), 438(a)(8); 28 U.S.C. 2461 nt.

6 2. Section 111.35 is revised in its entirety to read as follows:

7 **§ 111.35 If the respondent decides to challenge the alleged violation or proposed civil**
8 **money penalty, what should the respondent do?**

9 (a) To challenge a reason to believe finding or proposed civil money penalty, ~~Within forty~~
10 ~~(40) days of the Commission's reason to believe finding,~~ the respondent must ~~shall~~ submit a
11 written response to the Commission within forty (40) days of the Commission's reason to believe
12 finding. ~~a written response.~~

13 (b) The respondent's ~~The~~ written response must assert ~~shall contain at least one of~~ the
14 following grounds for challenging the reason to believe finding or proposed civil money penalty:

15 (1) The Commission's reason to believe finding is based on a factual error including,
16 but not limited to, the committee was not required to file the report, or the
17 committee timely filed the report in accordance with 11 CFR 100.19;

18 (2) The Commission improperly calculated the civil money penalty; or

19 (3) The respondent used best efforts to file in a timely manner in that:

20 (i) The respondent was prevented from filing in a timely manner by
21 reasonably unforeseen circumstances that were beyond the control of the
22 respondent; and

1 (ii) The respondent filed no later than 24 hours after the end of these
2 circumstances.

3 (c) Circumstances that will be considered reasonably unforeseen and beyond the control of
4 respondent include, but are not limited to:

- 5 (1) A failure of Commission computers or Commission-provided software despite the
6 respondent seeking technical assistance from Commission personnel and
7 resources;
- 8 (2) A widespread disruption of information transmissions over the Internet not caused
9 by any failure of the Commission's or respondent's computer systems or Internet
10 service provider; and
- 11 (3) Severe weather or other disaster-related incident.

12 (d) Circumstances that will not be considered reasonably unforeseen and beyond the control
13 of respondent include, but are not limited to:

- 14 (1) Negligence;
- 15 (2) Delays caused by committee vendors or contractors;
- 16 (3) Illness, inexperience, or unavailability of the treasurer or other staff;
- 17 (4) Committee computer, software or Internet service provider failures;
- 18 (5) A committee's failure to know filing dates; and
- 19 (6) A committee's failure to use filing software properly.

20 (e) Respondent's written response must detail the factual basis supporting its challenge and
21 include supporting documentation.

22 ~~—— (1) Reason(s) why the respondent is challenging the reason to believe finding and/or civil~~
23 ~~money penalty which may consist of:~~

24 ~~—— (i) The existence of factual errors; and/or~~
25

- 1
2 ~~—— (ii) The improper calculation of the civil money penalty; and/or~~
3
4 ~~—— (iii) The existence of extraordinary circumstances that were beyond the control of the~~
5 ~~respondent and that were for a duration of at least 48 hours and that prevented the respondent~~
6 ~~from filing the report in a timely manner;~~
7
8 ~~—— (2) The factual basis supporting the reason(s); and~~
9
10 ~~—— (3) Supporting documentation.~~
11
12 ~~—— (4) Examples of circumstances that will not be considered extraordinary include, but are~~
13 ~~not limited to, the following:~~
14
15 ~~—— (i) Negligence;~~
16
17 ~~—— (ii) Problems with vendors or contractors;~~
18
19 ~~—— (iii) Illness, inexperience, or unavailability of staff, including the treasurer;~~
20
21 ~~—— (iv) Computer failures (except failures of the Commission's computers); and~~
22
23 ~~—— (v) Other similar circumstances.~~

24 3. In section 111.37, paragraphs (b) and (d) are revised to read as follows:

25 **§ 111.37 What will the Commission do once it receives the respondent's written response**
26 **and the reviewing officer's recommendation?**

27 * * * * *

28 (b) If the Commission, after reviewing the reason to believe finding, the respondent's written
29 response, and the reviewing officer's written recommendation, determines by an affirmative vote
30 of at least four (4) of its members, that no violation has occurred (either because the Commission
31 had based its reason to believe finding on a factual error or because the respondent used best
32 efforts to file in a timely manner) or otherwise terminates its proceedings, the Commission shall
33 authorize the reviewing officer to notify the respondent by letter of its final determination.

34 * * * * *

1 (d) When the Commission makes a final determination under this section, the statement of
2 reasons for the Commission action will, unless otherwise indicated by the Commission, consist
3 of the reasons provided by the reviewing officer for the recommendation, if approved by the
4 Commission, although statements setting forth additional or different reasons may also be issued.
5 If the reviewing officer's recommendation is modified or not approved, the Commission will
6 indicate the grounds for its action and one or more statements of reasons may be issued. The
7 ~~Commission may determine by an affirmative vote of at least four of its members, that a~~
8 ~~violation of 2 U.S.C. 434(a) has occurred but waive the penalty because the respondent has~~
9 ~~convincingly demonstrated the existence of extraordinary circumstances that were beyond the~~
10 ~~respondent's control and that were for a duration of at least 48 hours. The Commission shall~~
11 ~~authorize the reviewing officer to notify the respondent by letter of its final determination.~~

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Robert D. Lenhard
Chairman
Federal Election Commission

19 DATED _____
20 BILLING CODE: 6715-01-P