



FEDERAL ELECTION COMMISSION
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AGENDA ITEM
For Meeting of: 11-30-06

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Vice Chairman Robert D. Leppard 
Commissioner Hans A. von Spakovsky 

DATE: November 28, 2006

RE: Notice of Proposed Rulemaking on Best Efforts in Administrative Fines

Attached please find a proposed notice of proposed rulemaking regarding incorporation of a "best efforts" defense into the administrative fines program. We plan to introduce this document at the Commission's Open Session on November 30, 2006.

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FEDERAL ELECTION COMMISSION

11 CFR Part 111

[Notice 2006 –]

Best Efforts in Administrative Fines Challenges

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission seeks public comment on proposed revisions to its regulations regarding the Commission’s administrative fines program. The administrative fines program is a streamlined process through which the Commission finds and penalizes violations of 2 U.S.C. § 434(a), which requires committees registered with the Commission to file periodic reports. Current Commission regulations set forth several grounds upon which a respondent may base a challenge to an administrative fine. The proposed regulations replace the current “extraordinary circumstances” defense with a “best efforts” defense. The proposed regulations would also provide for Commission statements of reasons on administrative fines final determinations. The Commission has made no final decision on the issues presented in this rulemaking. Further information is provided in the supplementary information that follows.

1 **DATES:** Comments must be received on or before [INSERT DATE 30
2 DAYS AFTER THE DATE OF PUBLICATION IN THE
3 FEDERAL REGISTER].

4 **ADDRESSES:** All comments must be in writing, must be addressed to Mr. J.
5 Duane Pugh Jr., Acting Assistant General Counsel, and must be
6 submitted in either e-mail, facsimile, or paper copy form.
7 Commenters are strongly encouraged to submit comments by e-
8 mail to ensure timely receipt and consideration. E-mail comments
9 must be sent to either afbestefforts@fec.gov or submitted through
10 the Federal eRegulations Portal at www.regulations.gov. If e-
11 mail comments include an attachment, the attachment must be in
12 either Adobe Acrobat (.pdf) or Microsoft Word (.doc) format.
13 Faxed comments must be sent to (202) 219-3923, with paper copy
14 follow-up. Paper comments and paper copy follow-up of faxed
15 comments must be sent to the Federal Election Commission, 999 E
16 Street, NW, Washington, DC 20463. All comments must include
17 the full name and postal service address of the commenter or they
18 will not be considered. The Commission will post comments on its
19 website after the comment period ends.

20 **FOR FURTHER**
21 **INFORMATION**
22 **CONTACT:**

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

1 **SUPPLEMENTARY**
2 **INFORMATION:**

3 Under the administrative fines program, the Commission may assess a civil
4 money penalty for a violation of the reporting requirements of 2 U.S.C. 434(a) (such as
5 not filing or filing late) without using the traditional enforcement procedures. 2 U.S.C.
6 437g(a)(4)(C). Congress intended the Commission to process these straightforward
7 violations through a “simplified procedure” that would ease the enforcement burden on
8 the Commission. H.R. Rep. No. 106-295 at 11 (1999). In the final rules establishing and
9 governing the administrative fines program, the Commission created a streamlined
10 procedure that balances the respondent’s rights to notice and opportunity to be heard with
11 the Congressional intent that the administrative fines program work in an expeditious
12 manner to resolve these reporting violations without additional administrative burden.
13 Explanation and Justification for Final Rule on Administrative Fines, 65 FR 31787-31788
14 (May 19, 2000).

15 The Federal Election Campaign Act (“FECA”) provides that “[w]hen a treasurer
16 of a political committee shows that best efforts have been used to obtain, maintain, and
17 submit the information required by this Act for the political committee, any report or any
18 records of such committee shall be considered in compliance with [FECA].” 2 U.S.C. §
19 432(i).¹ The current administrative fines regulations enumerate grounds upon which a
20 respondent may challenge a Commission determination that an administrative fine should
21 be imposed, but a best efforts defense is not explicitly listed among these grounds.

¹ The Commission has long interpreted the “best efforts” provision as a statutory safe harbor limited to political committees’ obligation to report certain substantive information that may be beyond the control of the committees to obtain. 11 CFR 104.7 (defining “best efforts” for purposes of obtaining and submitting contributor information).

1 In Lovely v. Federal Election Commission, 307 F.Supp.2d 294 (D.Mass. 2004),
2 the court addressed a political committee’s challenge to an administrative fine assessed
3 by the Commission for the committee’s failure to timely file a report. The committee
4 argued that it had made best efforts to file the report and that this constituted a valid and
5 complete defense to the fine. The court concluded that the plain language of the Act
6 requires the Commission to entertain a best efforts defense in the administrative fines
7 context, and that it was unclear from the record in the Lovely case whether the
8 Commission had considered the best efforts defense raised by the committee. The court
9 remanded the case to the Commission for further proceedings.² On remand, the
10 Commission determined that the committee had failed to show best efforts and left the
11 administrative fine in place. Commission’s Statement of Reasons in Administrative
12 Fines Case #549 on Remand From the United States District Court for the District of
13 Massachusetts, Oct. 4, 2005, available at
14 <http://www.fec.gov/members/toner/sor/soraf549.pdf>.

15 The proposed regulations would explicitly incorporate a best efforts defense into
16 the process for challenging an administrative fine, would clarify the scope of the “factual
17 errors” defense, and would provide for statements of reasons for administrative fines final
18 determinations. These proposed changes are intended to address the concerns raised by
19 the Lovely court as well as to provide greater clarity regarding permissible grounds for
20 challenging administrative fines.

² The Lovely case did not involve a challenge to the validity of the administrative fines program rules, and those rules have continued in full force and effect since the district court order. However, the court stated that the Commission could “refine by regulation what best efforts means in the context of submitting a report.” Lovely, 307 F. Supp. 2d at 300.

1 **I. 11 CFR 111.35 – Grounds for Challenging an Administrative Fines Reason**
2 **to Believe Finding**

3 Under the administrative fines regulations, if the Commission determines that it
4 has reason to believe (“RTB”) that a committee has failed to timely file a required report,
5 it notifies the respondent of this finding and of the proposed civil penalty. 11 CFR
6 111.32. The Commission makes RTB findings based on an internal process that
7 identifies late filers. The amount of the penalty is determined using the schedules at 11
8 CFR 111.43. Following an RTB finding, a respondent has forty days to challenge the
9 alleged violation. 11 CFR 111.35. Challenges are reviewed by Commission staff and
10 ultimately decided by the Commission. 11 CFR 111.36, 111.37.

11 The current regulations set forth three permissible grounds upon which to
12 challenge an administrative fines reason to believe finding. Respondents are permitted to
13 challenge administrative fines on the basis of “factual errors,” the improper calculation of
14 a penalty, or “extraordinary circumstances that were beyond the control of the respondent
15 and that were for a duration of at least 48 hours and that prevented the respondent from
16 filing the report in a timely manner.” 11 CFR 111.35(b)(1). The regulations also provide
17 examples of situations that will not be considered “extraordinary circumstances,”
18 including negligence, problems with vendors or contractors, illness, inexperience, or
19 unavailability of staff, and computer failures (except failures of the Commission’s
20 computers). 11 CFR 111.35(b)(4).

21 This NPRM proposes a revision of 11 CFR 111.35 that clarifies the scope of the
22 regulation’s “factual errors” defense and also replaces the “extraordinary circumstances”
23 defense with a best efforts defense.

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

2 The proposed regulation retains a “factual errors” defense, currently at 11 CFR
3 111.35(b)(1)(i), but clarifies the boundaries of this defense by stating that the facts
4 alleged to be in error must be facts upon which the Commission relied in its RTB finding.
5 Proposed 11 CFR 111.35(b)(1). The proposed regulation also provides two examples of
6 such factual errors: that the respondent was not required to file the report in question,
7 and that the respondent did in fact timely file as described in 11 CFR 100.19. Id. For
8 instance, a paper filer that has “timely filed” a report under the definition in 11 CFR
9 100.19 would be considered to have timely filed for purposes of the administrative fines
10 program. This would be true even if the Commission does not ultimately receive the
11 filing, due, for instance, to errors by the overnight delivery service or in the handling of
12 the mail. The Commission seeks comment on this approach. Should other types of
13 factual errors be allowed as grounds for challenge to the finding of a violation? Should
14 the regulation include additional examples of qualifying factual errors?

15 B. 11 CFR 111.35(b)(1)(iii) – Replacing the “Extraordinary Circumstances” Defense
16 with a Best Efforts Defense

17 The proposed regulation replaces the “extraordinary circumstances” defense
18 currently at 11 CFR 111.35(b)(1)(iii) with a best efforts defense. The proposed
19 regulation makes clear that a respondent may base a challenge to an administrative fine
20 on a showing that respondent made best efforts to timely file the report in question. To
21 show that it made best efforts to timely file, a respondent would be required to
22 demonstrate that both (i) respondent was prevented from filing in a timely manner
23 because of unforeseen circumstances that were beyond the control of the respondent, and

1 (ii) respondent filed the report in question within 24 hours of the respondent's no longer
2 being prevented from filing. Proposed 11 CFR 111.35(b)(3). The proposed regulation
3 gives two examples of unforeseen circumstances that were beyond the control of the
4 respondent: a failure of Commission computers, Commission software, or the internet;
5 and severe weather or other disaster-related incident. Proposed 11 CFR 111.35(c). The
6 proposed regulation also gives examples of circumstances that will not be considered
7 unforeseen and beyond the control of the respondent, including negligence; delays caused
8 by committee vendors or contractors; illness, inexperience, or unavailability of the
9 treasurer or other staff; committee computer or software failures; a committee's failure to
10 know filing dates; or a committee's failure to use FEC filing software properly. Proposed
11 11 CFR 111.35(d). Like the current regulations, the proposed regulations would require a
12 respondent to explain the factual basis supporting the respondent's challenge. Proposed
13 11 CFR 111.35(e).

14 The best efforts defense set forth in the proposed regulation would serve as a
15 proxy for a full factual investigation of a respondent committee's internal practices
16 regarding filing of reports and an analysis of whether such practices were sufficient to
17 constitute best efforts. Such an investigation would be particularly burdensome in the
18 context of the administrative fines program, which is meant to be a "streamlined
19 procedure." Final Rule on Administrative Fines, 65 Fed. Reg. 31787 (May 19, 2000).

20 The Commission seeks comment on the proposed best efforts defense. Will the
21 proposed test serve as a sufficient proxy for a full best efforts investigation? Are there
22 other circumstances not contemplated by the proposed regulations that could prevent a
23 respondent from timely filing, notwithstanding the respondent having taken best efforts to

1 ensure that the report would be timely filed? Should the Commission apply a “but for”
2 test, a “contributing factor” test, or some other test for determining whether a respondent
3 was prevented from timely filing by particular circumstances? Should the Commission
4 retain an extraordinary circumstances defense? Should the Commission entertain
5 defenses based on extreme financial hardship? Should the regulations be more specific
6 as to what constitutes computer or internet failures, or severe weather or disaster? Should
7 the list of circumstances that will not be considered unforeseen and beyond the control of
8 respondent be expanded or contracted, and if so by which elements? Should the 24 hour
9 period be longer or shorter, or should committees be required to file as soon as would be
10 practicable? What sort of supporting evidence should a respondent be required to
11 provide? Are there other important factors that the Commission should incorporate into
12 a best efforts defense? Alternatively, should the Commission refrain from adding a
13 specific best efforts defense to the administrative fines regulation? Does Lovely
14 preclude this approach?

15 **II. 11 CFR 111.37 – Commission Action on Administrative Fines Challenges**

16 Section 111.37 of the Commission’s rules guides Commission decisions regarding
17 the final determination of administrative fines challenges. The proposed regulations
18 direct the Commission to conclude that no violation has occurred if the Commission
19 based its reason to believe finding on a factual error or if the respondent made best efforts
20 to timely file. Proposed 11 CFR 111.37(b). The proposed regulations also include a new
21 Section 111.37(d), which makes clear that the staff recommendation regarding the
22 challenge, including any changes made by the Commission, will serve as the
23 Commission’s statement of reasons regarding the administrative fine at issue. This

1 change is intended to satisfy the Lovely court’s concern that, in that case, the
2 Commission had issued no opinion or statement of reasons along with its final
3 determination. Lovely, 307 F. Supp. 2d at 301. Finally, the proposed regulations amend
4 Section 111.37(d) to eliminate reference to the “extraordinary circumstances” defense,
5 which would no longer be applicable.

6 The Commission seeks comment on these changes. Are there additional
7 conforming amendments required to implement the proposed best efforts defense?

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

9 The Commission certifies that the attached proposed rules would not, if
10 promulgated, have a significant economic impact on a substantial number of small
11 entities. The basis for this certification is that any individuals and not-for-profit entities
12 that would be affected by these proposed rules are not “small entities” under 5 U.S.C.
13 601. The definition of “small entity” does not include individuals, but classifies a not-
14 for-profit enterprise as a “small organization” if it is independently owned and operated
15 and not dominant in its field. 5 U.S.C. 601(4). State political party committees are not
16 independently owned and operated because they are not financed and controlled by a
17 small identifiable group of individuals, and they are affiliated with the larger national
18 political party organizations. In addition, the State political party committees
19 representing the Democratic and Republican parties have a major controlling influence
20 within the political arena of their State and are thus dominant in their field. District and
21 local party committees are generally considered affiliated with the State committees and
22 need not be considered separately. To the extent that any State party committees
23 representing minor political parties or any other political committees might be considered

1 “small organizations,” the number that would be affected by this proposed rule is not
2 substantial.

3 Furthermore, any separate segregated funds that would be affected by these
4 proposed rules are not-for-profit political committees that do not meet the definition of
5 “small organization” because they are financed by a combination of individual
6 contributions and financial support for certain expenses from corporations, labor
7 organizations, membership organizations, or trade associations, and therefore are not
8 independently owned and operated. Most of the other political committees that would be
9 affected by these proposed rules are not-for-profit committees that do not meet the
10 definition of “small organization.” Most political committees are not independently
11 owned and operated because they are not financed by a small identifiable group of
12 individuals. In addition, most political committees rely on contributions from a large
13 number of individuals to fund the committees’ operations and activities.

14 The proposed rules also would not impose any additional restrictions or increase
15 the costs of compliance for respondents within the administrative fines program. Instead,
16 the proposed rules would provide additional defenses available to respondents in the
17 administrative fines program, thereby and potentially increasing the situations in which
18 the Commission imposes no civil money penalty. Moreover, the proposed rules would
19 apply only in the administrative fines program, where penalties are proportionate to the
20 amount of a political committee’s financial activity. Any political committee meeting the
21 definition of “small entity” would be subject to lower fines than larger committees with
22 more financial activity. Therefore, the attached proposed rules, if promulgated, would
23 not have a significant economic impact on a substantial number of small entities.

1

2 **List of Subjects**3 11 CFR Part 111

4 Administrative practice and procedures, Elections, Law enforcement.

5 For the reasons set out in the preamble, the Federal Election Commission

6 proposes to amend Subchapter A of Chapter I of Title 11 of the Code of Federal7 Regulations as follows:8 **PART 111 – COMPLIANCE PROCEDURES (2 U.S.C. 437g, 437d(a))**

9 1. The authority citation for Part 111 would be amended to read as follows:

10 **Authority:** 2 U.S.C. 432(i), 437g, 437d(a) 438(a)(8); 28 U.S.C. 2561 nt.

11 2. Section 111.35 would be amended in its entirety to read as follows:

12 **§ 111.35 If the respondent decides to challenge the alleged violation or proposed**
13 **civil money penalty, what should the respondent do?**

14

15 (a) To challenge a reason to believe finding or proposed civil money penalty, within
16 forty (40) days of the Commission's reason to believe finding, the respondent shall
17 must submit a written response to the Commission within forty days of the
18 Commission's reason to believe finding a written response.

19

20 (b) The respondent's~~The written response must establish~~~~shall contain~~ at least one of
21 the following grounds for challenging the reason to believe finding and/or civil
22 money penalty:

23

24 (1) The Commission's reason to believe finding is based on a factual error.
25 Examples of a factual error include, but are not limited to, that the committee
26 was not required to file or that the committee timely filed as described in 11
27 CFR 100.19 (such as by timely depositing a paper filing with an overnight
28 delivery service);

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

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32 (3) The respondent made best efforts to file in a timely manner in that:

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34 (i) The respondent was prevented from filing in a timely manner because of
35 unforeseen circumstances that were beyond the control of the respondent; and

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(ii) The respondent filed within 24 hours thereafter.

(c) Circumstances that will be considered unforeseen and beyond the control of respondent include, but are not limited to, a failure of Commission computers, Commission-provided software, or the internet, and severe weather or other disaster-related incident.

(d) Circumstances that will not be considered unforeseen and beyond the control of respondent include, but are not limited to, negligence; delays caused by committee vendors or contractors; illness, inexperience, or unavailability of the treasurer or other staff; committee computer or software failures; a committee's failure to know filing dates; or a committee's failure to use filing software properly.

(e) Respondent's written response must detail the factual basis supporting the grounds and include any supporting documentation.

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

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

~~—— (ii) The improper calculation of the civil money penalty; and/or~~

~~—— (iii) The 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;~~

~~—— (2) The factual basis supporting the reason(s); and~~

~~—— (3) Supporting documentation.~~

~~—— (4) Examples of circumstances that will not be considered extraordinary include, but are not limited to, the following:~~

~~—— (i) Negligence;~~

~~—— (ii) Problems with vendors or contractors;~~

~~—— (iii) Illness, inexperience, or unavailability of staff, including the treasurer;~~

~~—— (iv) Computer failures (except failures of the Commission's computers); and~~

~~—— (v) Other similar circumstances.~~

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

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

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

(d) When the Commission makes a final determination under this section, the statement of reasons for the Commission action consists of the reasons provided in the reviewing officer's recommendation, if adopted by the Commission, subject to any Commission amendments, additions, substitutions, or statements of reasons. ~~The Commission may determine, by an affirmative vote of at least four of its members, that a violation of 2 U.S.C. 434(a) has occurred but waive the penalty because the respondent has convincingly demonstrated the existence of extraordinary circumstances that were beyond the respondent's control and that were for a duration of at least 48 hours. The Commission shall authorize the reviewing officer to notify the respondent by letter of its final determination.~~

Michael E. Toner
Chairman
Federal Election Commission

DATED _____
BILLING CODE: 6715-01-U