MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan
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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
FEDERAL ELECTION COMMISSION

11 CFR Part 111

[Notice 2007-XX]

Best Efforts in Administrative Fines Challenges

AGENCY: Federal Election Commission.

ACTION: Final Rules and Transmittal of Rules to Congress.

SUMMARY: The Federal Election Commission is revising its regulations to amend four aspects of its Administrative Fines Program ("AFP"), a streamlined process through which the Commission assesses civil money penalties for late filers and non-filers under the Federal Election Campaign Act of 1971, as amended ("FECA"). First, the Commission is revising its rules regarding the permissible grounds for challenging a proposed civil money penalty by clarifying the scope of the defense based on factual errors. Second, the Commission is incorporating a defense for political committees that demonstrate that they used their best efforts to file reports timely. Third, the Commission is revising its rules regarding its final determinations to clarify when the Commission finds that no violation has occurred. Lastly, the rules are being amended to explain that the Commission's statement of reasons for its final decision in an AFP matter usually consists of the reasons set forth by the Commission's reviewing officer as adopted by the Commission. The supplementary information that follows provides further information.
EFFECTIVE DATE: [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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:

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

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

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

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

In Lovely v. FEC, 307 F. Supp. 2d 294 (D. Mass. 2004), a political committee challenged a civil money penalty assessed by the Commission through the AFP. The political committee argued that it had used its best efforts to file the report in question and that this constituted a valid and complete defense under FECA’s “best efforts” provision in 2 U.S.C. 432(i). See Lovely, 307 F. Supp. 2d at 299. Section 432(i) provides that “[w]hen 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 [FECA].” 2 U.S.C. 432(i). The Lovely court concluded that the plain language of FECA requires the Commission to consider the “best efforts” defense in the AFP, and that the record in the Lovely case did not establish whether the Commission had considered that defense. See Lovely, 307 F. Supp. 2d at 300-01. The court remanded the case to the Commission for further proceedings. See id. at 301. On remand, the Commission 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.
confirmed the earlier imposition of the civil money penalty. See Statement of Reasons in
Administrative Fines Case 549 (Oct. 4, 2005), available at
http://www.fec.gov/law/law_rulemakings.shtml under the heading “Best Efforts in
Administrative Fines Challenges.”

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

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

4 The Internal Revenue Service did not comment on the NPRM.
greater clarity regarding permissible grounds for challenging an RTB finding. The revisions are
substantially similar to those proposed in the NPRM.

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

EXPLANATION AND JUSTIFICATION

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

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

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

The NPRM sought comment on proposed clarifications to the “factual errors” defense
and asked whether the regulation should include examples of the types of factual errors that
would suffice as grounds for challenging an RTB finding. See NPRM, 71 FR at 71094. The
comment did not address this issue. The Commission has decided to revise the rule regarding
the “factual errors” defense as proposed in the NPRM, except for stylistic changes. The revised
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.
its RTB finding. See revised 11 CFR 111.35(b)(1). Thus, a respondent may not challenge an RTB finding based on factual errors that are irrelevant to the Commission’s actual RTB finding, such as errors in the RTB finding regarding individual names or titles of committee staff.

The revised rule provides two examples of the type of factual errors that would properly support a challenge: the respondent was not required to file the report in question, and the respondent did in fact timely file as described in 11 CFR 100.19. See revised 11 CFR 111.35(b)(1). For example, a political committee that is not subject to electronic filing requirements could challenge an RTB finding and proposed civil money penalty under section 111.35(b)(1) by showing that the paper copy was filed on time and the Commission relied on the factual error that the committee was required instead to file electronically. See 11 CFR 104.18(a). As referenced in the rule’s second example, Commission rules currently state that certain reports are “timely filed” if they are deposited as registered or certified mail with the U.S. Post Office, as Priority Mail or Express Mail through the U.S. Post Office, or with an overnight delivery service to be delivered the next business day with a postmark no later than 11:59 p.m. EST on the filing date. See 11 CFR 100.19(b). Thus, a respondent who is not required to file electronically could challenge an RTB finding based on evidence that it deposited the report in the proper manner pursuant to section 100.19(b) on the filing date, even if the Commission did not receive the report because of a delivery failure by the U.S. Post Office or other delivery service. The Commission emphasizes that the revisions to section 111.35(b)(1) do not create any new “factual errors” defenses, but simply recognize the types of errors that the Commission has accepted previously as a defense in the AFP.
B. Revised 11 CFR 111.35(b)(3) – "Best Efforts" Defense

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

The Lovely court recognized 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. In exercising its authority to interpret how to incorporate a "best efforts" defense into the AFP rules, the Commission is mindful of the statutory terms chosen by Congress. As also explained by the Commission in its statement of reasons in the Lovely case after remand, section 432(i) creates a safe harbor for treasurers who demonstrate that best efforts have been used to submit reports required by FECA. "Best" is an adjective of the superlative degree. Therefore, best efforts requires more than "some" or "good" efforts. Section 432(i)'s use of the phrase "best efforts," instead of a "good faith" standard, means that an AFP respondent cannot rely upon the
state of mind of the committee’s treasurer or staff to claim this defense. Instead, the Commission’s revised rule at 11 CFR 111.35(b)(3), which sets forth the “best efforts” defense, focuses on actions taken by the respondent committee or treasurer to comply with reporting deadlines.

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

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

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

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

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

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

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

Revised section 111.35(c) provides three examples of circumstances that the Commission will consider “reasonably unforeseen and beyond the control” of the respondent under a “best efforts” defense. The first example is that a failure of Commission computers or Commission-provided software, despite the respondent seeking technical assistance, caused the respondent’s untimely electronic filing. See revised 11 CFR 111.35(c)(1). This example is similar to the example in the prior rules, in which a failure of Commission computers satisfied the “extraordinary circumstances” defense. See former 11 CFR 111.35(b)(4)(iv); Admin Fines E&J. 65 FR at 31790 (“Any failure of the Commission’s system that prevents committees from filing their reports when due would be recognized as an extraordinary circumstance beyond the respondents’ control.”). The revised rule differs from the proposed rule by including the respondent’s seeking technical assistance as part of the example. Consistent with the prior defense based on Commission computer failures, the revised example clarifies that political committees must use all Commission resources available to aid with electronic filing, such as technical support manuals and personnel, before a respondent will be considered “prevented” from timely filing by Commission computer or software failures. Thus, any failure of Commission computers, servers, filing system or Commission-provided software of sufficient severity that it results in a respondent being unable to file, despite the respondent seeking assistance from the Commission’s technical support personnel, is a reasonably unforeseen 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)(i)(ii). 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).
The second example in revised section 111.35(c)(2) is a “widespread disruption of
information transmissions over the Internet not caused by any failure of the Commission’s or
respondent’s computer systems or Internet service provider.” This example covers
circumstances in which technological problems at a third-party hub or information transfer
location, rather than the Commission’s or respondent’s computer systems, caused widespread
communication failures on the Internet that left the respondent unable to send, or the
Commission unable to receive, an electronically filed report. This failure to transmit information
must occur irrespective of any failures of the Commission’s or respondent’s computer systems or
Internet service providers. If a respondent demonstrates such a widespread disruption of
information transmissions occurred, the Commission will consider it “reasonably unforeseen
circumstances that were beyond the control” of the respondent. As with all the examples in
revised section 111.35(c)(2), the respondent bears the burden of showing that these reasonably
unforeseen circumstances in fact prevented the respondent from filing timely, despite attempts to
file by any available alternative methods permitted under Commission regulations. This
example has been refined from the proposed rule to clarify the types of transmission failures
contemplated.

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

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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., “FECFile
(last visited Mar. 16, 2007).
committee cannot timely file a report because of lack of electricity or flooding or destruction of
committee records” would satisfy the defense. See previous 11 CFR 111.35(b)(1)(iii); Admin
Fines E&J, 65 FR at 31790. The revised rule permits such severe weather-related events
occurring at the respondent’s or Commission’s location to form the basis for a “best efforts”
defense. The Commission is not defining with specificity the level of severity for weather or
other disaster-related incidents in revised section 111.35(c)(3) because a respondent’s challenge
must show that the weather or disaster-related incident in fact prevented the respondent from
filing timely. Given that the effects upon the respondent of each weather or disaster-related
incident will vary, the Commission will evaluate the particular facts contained in individual
challenges, instead of mandating such details in a rule of general application.

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

Revised section 111.35(d) includes a non-exhaustive list of circumstances that are not
considered “reasonably unforeseen and beyond the control” of the respondent, and will not
support a “best efforts” finding. See revised 11 CFR 111.35(d)(1) through (6). All but two of
these examples are drawn from the list of events that did not constitute “extraordinary
circumstances” under the Commission’s prior rule: negligence; delays caused by committee
vendors or contractors; illness, inexperience or unavailability (including death) of the treasurer or
other staff; and committee computer, software or Internet service provider failures. Compare
revised 11 CFR 111.35(d)(1) through (4) with former 11 CFR 111.35(b)(4). One example
cconcerns Internet service provider failures. See revised 11 CFR 111.35(d)(4). The proposed rule
described this example as failures of committee computers or software. The final rule also
includes Internet service provider failures. Because many Internet service providers are
available, a failure limited to one provider is not a defense for late filing or not filing. The
revised rule adds two examples to this list based upon the Commission’s experience with
respondent challenges in the AFP: a failure to know filing dates and a failure to use Commission
software properly. See revised 11 CFR 111.35(d)(5) and (6).

Under the revised rule, a respondent’s challenge will not succeed if its “best efforts”
defense is based on any of these circumstances as the cause of the failure to file timely. The
Commission notes that the examples in revised section 111.35(d) are not exhaustive, but are
illustrative of the types of situations that are not reasonably unforeseen and beyond the
respondent’s control. The Commission strongly encourages all political committees to name
assistant treasurers and have additional staff available so that their ability to file reports on time
will not be compromised due to the unavailability or inexperience of the treasurer or other staff.

See Final Rules on Administrative Fines, 68 FR 12572, 12573 (Mar. 17, 2003) (adding staff
“inexperience” and “unavailability” as examples of circumstances that will not be considered
“extraordinary” under former 11 CFR 111.35(b)(4)(iii)).

The Commission’s implementation of the “best efforts” defense set forth in this revised
rule serves as a proxy for the factual investigation of a respondent’s internal practices regarding
filing of reports that would ordinarily be necessary to determine whether such practices were
sufficient to constitute best efforts. The comment argued that the Commission should conduct a
full examination of the business models and management procedures of each committee to
determine whether the committee implemented proper back-up systems and other measures
reflecting management “best practices” in the relevant industry to reduce the risk of a late filing.
However, such an investigation would be resource-intensive for the Commission, burdensome
for the respondent, and inappropriate in the AFP, which is a streamlined procedure created by
Congress to alleviate the Commission’s enforcement burden for routine and minor filing violations. Absent reasonably unforeseen circumstances that were beyond the control of the respondent, the Commission sees no reason why political committees cannot file reports on time.\textsuperscript{10} Thus, the Commission’s implementation of the “best efforts” defense appropriately incorporates a statutory “best efforts” standard, while taking into account the unique streamlined nature of the AFP.

\textbf{D. Revised 11 CFR 111.35(e) – Factual Basis for Challenge}

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

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

\textbf{II. Revised 11 CFR 111.37 – Commission Review of Respondent’s Challenge and Reviewing Officer’s Recommendation}

\textbf{A. Revised 11 CFR 111.37(b) – Commission Finding That No Violation Has Occurred}

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

\textsuperscript{10} See \textit{Admin Fines E&I}, 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).

\textsuperscript{11} The Commission considers affidavits more persuasive evidence than unsworn statements submitted in support of the respondent’s challenge.
determination for AFP matters upon receipt of the respondent’s challenge and the reviewing officer’s recommendation. See revised 11 CFR 111.37(a) through (d). The NPRM sought comment on proposed revisions to section 111.37(b) regarding Commission determinations that no violation has occurred where the RTB finding is based on a factual error, and where the respondent demonstrated it used best efforts to file timely. See NPRM, 71 FR at 71095. The comment did not address these rules. The Commission is revising section 111.37(b) to clarify that the existence of factual errors or a finding of best efforts are complete defenses. Thus, if one of these defenses is satisfied, the Commission will conclude that no violation of FECA has occurred. Please note that the defense based on an incorrect basis for calculating the civil money penalty (section 111.35(b)(2)) is a defense only as to the amount of the civil money penalty and does not serve as a basis for a finding of no violation under the AFP.

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

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

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

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12 These revisions do not affect any statements of reasons the Commissioners may issue in enforcement matters under review.
AFP matter consists of the reasons provided by the reviewing officer for the recommendation, if approved by the Commission. See *Lovely*, 307 F. Supp. 2d at 301 (stating that the Commission's "adoption of a reviewing officer's recommendation may suffice in some circumstances"). Statements setting forth additional or different reasons may also be issued. The revised rule also recognizes that the Commission may modify or reject the reviewing officer's recommendation in whole or in part. See 11 CFR 111.37(d). In such cases, the Commission will indicate the grounds for its action and it or individual Commissioners may issue one or more statements of reasons.

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

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

The Commission certifies that the attached final rules will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that any individuals and not-for-profit entities affected by these rules are not "small entities" under 5 U.S.C. 601(6). The definition of "small entity" does not include individuals, and classifies a not-for-profit enterprise as a "small organization" if it is independently owned and operated and
not dominant in its field. 5 U.S.C. 601(4). The rules apply to all types of political committees and their treasurers. State political party committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals, and they are affiliated with the larger national political party organizations. In addition, the State political party committees representing the Democratic and Republican parties have a major controlling influence within the political arena of their State and are thus dominant in their field. District and local party committees are generally considered affiliated with the State committees and need not be considered separately. To the extent that any State party committees representing minor political parties or any other political committees might be considered “small organizations,” the number that would be affected by this rule is not substantial.

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

The final rules also do not impose any additional restrictions or increase the costs of compliance for respondents within the AFP. Instead, the final rules provide additional defenses available to political committees and their treasurers, thereby potentially increasing the number
of situations in which the Commission assesses no civil money penalty. Moreover, these rules apply only in the AFP, where penalties are proportionate to the amount of a political committee's financial activity. Any political committee meeting the definition of "small entity" would be subject to lower fines than larger committees with more financial activity. Therefore, the final rules will not have a significant economic impact on a substantial number of small entities.

List of Subjects

11 CFR Part 111

Administrative practice and procedures, Elections, Law enforcement.
For the reasons set out in the preamble, the Federal Election Commission is amending Subchapter A of Chapter I of Title 11 of the Code of Federal Regulations as follows:

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

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

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

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

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

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

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

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

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

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

(i) The respondent was prevented from filing in a timely manner by reasonably unforeseen circumstances that were beyond the control of the respondent; and
(ii) The respondent filed no later than 24 hours after the end of these circumstances.

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

(1) A failure of Commission computers or Commission-provided software despite the respondent seeking technical assistance from Commission personnel and resources;

(2) A widespread disruption of information transmissions over the Internet not caused by any failure of the Commission's or respondent's computer systems or Internet service provider; and

(3) Severe weather or other disaster-related incident.

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

(1) Negligence;

(2) Delays caused by committee vendors or contractors;

(3) Illness, inexperience, or unavailability of the treasurer or other staff;

(4) Committee computer, software or Internet service provider failures;

(5) A committee's failure to know filing dates; and

(6) A committee's failure to use filing software properly.

(e) Respondent's written response must detail the factual basis supporting its challenge and include 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) are 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 used 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 will, unless otherwise indicated by the Commission, consist of the reasons provided by the reviewing officer for the recommendation, if approved by the Commission, although statements setting forth additional or different reasons may also be issued. If the reviewing officer's recommendation is modified or not approved, the Commission will indicate the grounds for its action and one or more statements of reasons may be issued. 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.

Robert D. Lenhard
Chairman
Federal Election Commission

DATED
BILLING CODE: 6715-01-P