

Title—7 Agriculture

PART 24—[Removed and reserved]

- 1. Remove and reserve part 24, consisting of §§ 24.1 through 24.21.

PART 400—GENERAL ADMINISTRATIVE REGULATIONS

- 2. Revise the authority citation for part 400 to read as follows:

Authority: 40 U.S.C. 121, 41 U.S.C. 421.

- 3. Amend § 400.169 by revising the last sentence of paragraph (c) and paragraph (d) to read as follows:

§ 400.169 Disputes.

* * * * *

(c) * * * Such determinations will not be appealable to the Civilian Board of Contract Appeals.

(d) Appealable final administrative determinations of the Corporation under paragraph (a) or (b) of this section may be appealed to the Civilian Board of Contract Appeals in accordance with 48 CFR part 6102.

Title 36—Parks, Forests, and Public Property

PART 223—SALE AND DISPOSAL OF NATIONAL FOREST SYSTEM TIMBER

- 4. The authority citation for part 223 continues to read as follows:

Authority: 90 Stat. 2958, 16 U.S.C. 472a; 89 Stat. 2213, 16 U.S.C. 618, 104 Stat. 714–726, 16 U.S.C. 620–620j; unless otherwise noted.

- 5. Amend § 223.138 by removing paragraph (b)(8) and revising paragraphs (b)(7)(i)(C) and (D) and by removing paragraph (b)(7)(i)(E) to read as follows:

§ 223.138 Procedures for Debarment.

* * * * *

(b) * * *

(7) * * *

(i) * * *

(C) State the period of debarment, including effective dates (see § 223.139); and

(D) Specify any limitations on the terms of the debarment.

* * * * *

Title 48—Federal Acquisition Regulations System, chapter 4, Department of Agriculture.

PART 409—CONTRACTOR QUALIFICATIONS

- 6. Revise the authority citation for part 409 to read as follows:

Authority: 40 U.S.C. 121, 41 U.S.C. 421.

- 7. Remove § 409.470.

PART 432—CONTRACT FINANCING

- 8. Revise the authority citation for part 432 to read as follows:

Authority: 40 U.S.C. 121, 41 U.S.C. 421.

- 9. Revise § 432.616 to read as follows:

§ 432.616 Compromise Actions.

Compromise of a debt within the proceedings under appeal to the Civilian Board of Contract Appeals is the responsibility of the contracting officer.

PART 433—PROTESTS, DISPUTES AND APPEALS

- 10. Revise the authority citation for part 433 to read as follows:

Authority: 40 U.S.C. 121, 41 U.S.C. 421.

- 11. Revise § 433.203–70 to read as follows:

§ 433.203–70 Civilian Board of Contract Appeals.

The organization, jurisdiction, and functions of the Civilian Board of Contract Appeals, together with its Rules of Procedure, are set out in 48 CFR part 6101.

Done in Washington, DC, this 25th day of May 2007.

Mike Johanns,

Secretary of Agriculture.

[FR Doc. 07–2702 Filed 6–6–07; 8:45 am]

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FEDERAL ELECTION COMMISSION

11 CFR Part 104

[Notice 2007–13]

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

AGENCY: Federal Election Commission.

ACTION: Statement of Policy.

SUMMARY: The Federal Election Commission (the "Commission") is issuing a Policy Statement to clarify its enforcement policy with respect to the circumstances under which it intends to consider a political committee and its treasurer to be in compliance with the recordkeeping and reporting requirements of the Federal Election Campaign Act, as amended ("FECA"). Section 432(i) of FECA provides that when the treasurer of a political committee demonstrates that best efforts were used to obtain, maintain, and submit the information required by

FECA, any report or records of such committee shall be considered in compliance with FECA or the statutes governing the public financing of Presidential candidates. In the past, the Commission has interpreted this section to apply only to a treasurer's efforts to obtain required information from contributors to a political committee, and not to maintaining information or to submitting reports. However, the district court in *Lovely v. FEC*, 307 F. Supp. 2d 294 (D. Mass. 2004), held that the Commission should consider whether a treasurer used best efforts under FECA with regard to efforts made to submit a report in a timely manner. This Policy Statement makes clear that the Commission intends to apply FECA's best efforts provision to treasurers' and committees' efforts to obtain, maintain, and submit information and records to the Commission consistent with the holding of the Federal court in *Lovely*. Further information is provided in the supplementary information that follows.

DATES: Effective Date: June 7, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. Ron B. Katwan, Assistant General Counsel, or Ms. Margaret G. Perl, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory and Regulatory Provisions

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

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

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

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

Paragraph (b) of 11 CFR 104.7 specifies the actions that treasurers of a political committee must take to demonstrate that they have exercised best efforts to obtain and report the "identification" of each person whose contribution(s) to the political committee and its affiliated political committees aggregate in excess of \$200 in a calendar year (or in an election

cycle in the case of an authorized committee).¹ “Identification” includes the person’s full name, mailing address, occupation, and name of employer. See 11 CFR 100.12.

Both the language of FECA and the Commission’s regulation at 11 CFR 104.7(a) apply the best efforts defense broadly to efforts by treasurers to “obtain, maintain and submit” the information required to be disclosed by FECA. In past enforcement actions, however, the Commission has interpreted this statutory and regulatory language to apply only to efforts to “obtain” contributor information.² This interpretation draws from an example contained in the provision’s legislative history. See H.R. Rep. No. 96–422, at 14 (1979) (“One illustration of the application of this [best efforts] test is the current requirement for a committee to report the occupation and principal place of business of individual contributors who give in excess of \$100”).

B. The Lovely Decision

In *Lovely*, a political committee challenged an administrative fine the

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

² In 1980, the Commission explained that “[i]n determining whether or not a committee has exercised ‘best efforts,’ the Commission’s primary focus will be on the system established by the committee for obtaining disclosure information.” *Amendments to Federal Election Campaign Act of 1971: Regulations Transmitted to Congress*, 45 FR 15080, 15086 (Mar. 7, 1980) (emphasis added). In 1993, the Commission referred to “the requirement of [FECA] that treasurers of political committees exercise best efforts to obtain, maintain and report the complete identification of each contributor whose contributions aggregate more than \$200 per calendar year.” *Final Rule on Recordkeeping and Reporting by Political Committees: Best Efforts*, 58 FR 57725, 57725 (Oct. 27, 1993). And in 1997, the Commission stated that “[t]reasurers of political committees must be able to show they have exercised their best efforts to obtain, maintain and report [contributor identification information].” *Final Rule on Recordkeeping and Reporting by Political Committees: Best Efforts*, 62 FR 23335, 23335 (Apr. 30, 1997). In 2003, the Commission asserted in the *Lovely* litigation: “the Commission has long interpreted the best efforts provision as creating a limited safe harbor regarding committees’ obligations to report substantive information that may be beyond their ability to obtain.” FEC Supplemental Brief at 1, *Lovely* (Civil Action No. 02–12496–PBS). Furthermore, “when Congress originally enacted the ‘best efforts’ provision, it could not have been more clear that it was creating a limited defense regarding the inability to obtain specific information that was supposed to be disclosed, not the failure to file reports on time.” *Id.* at 12–13. The *Lovely* court summarized the Commission’s argument: “The FEC in its briefing claims that it limits the reach of the best efforts statute to best efforts to ‘obtain’ contributor information.” *Lovely*, 307 F. Supp. 2d at 300.

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

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

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

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

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

C. Proposed Policy Statement

The Commission sought public comment on a Proposed Statement of Policy that would clarify the Commission’s current enforcement practice to consider whether the treasurer and committee made best efforts to obtain, maintain or submit the

required information under 11 CFR 104.7(a). 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 received two comments, which are available at <http://www.fec.gov/law/policy.shtml> under the heading “Best Efforts.” 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. The comment also suggested that the Policy Statement provide guidance to political committees and treasurers regarding what conduct would qualify under the best efforts defense, and not rely solely on examples of conduct that would not qualify under the defense. The other comment was not relevant to this Policy Statement.

II. Policy Regarding the Best Efforts Defense

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

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

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

efforts made to obtain other information, to maintain all information required by the statute, and to submit required information on disclosure reports.

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

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

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

With respect to 11 CFR 104.7(a), the Commission intends to consider a committee's affirmative steps to keep adequate records and make accurate reports, as well as the reasons for its failure to obtain, maintain, or submit information properly. The Commission generally intends to consider the following: (1) The actions taken, or systems implemented, by the committee to ensure that required information is obtained, maintained, and submitted; (2) the cause of the failure to obtain, maintain, or submit the information or reports at issue; and (3) the specific efforts of the committee to obtain, maintain, and submit the information or reports at issue. This general policy does not modify other guidance and policy standards issued by the Commission addressing specific circumstances, such as the *Internal Controls for Political Committees*, and *Policy Statement Regarding Safe Harbor*

for Misreporting Due to Embezzlement, 72 FR 16695 (Apr. 5, 2007), both available at <http://www.fec.gov/law/policy.shtml>.

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

- At the time of its failure, the committee took relevant precautions such as double checking recordkeeping entries, regular reconciliation of committee records with bank statements, and regular backup of all electronic files;
- The committee had trained staff responsible for obtaining, maintaining, and submitting campaign finance information in the requirements of the Act as well as the committee's procedures, recordkeeping systems, and filing systems;
- The failure was a result of reasonably unforeseen circumstances beyond the control of the committee, such as a failure of Commission computers or Commission-provided software; severe weather or other disaster-related incidents; a widespread disruption of information transmission over the Internet not caused by any failure of the committee's computer systems or Internet service provider; or delivery failures caused by mail/courier services such as U.S. Postal Service or Federal Express; and
- Upon discovering the failure, the committee promptly took all reasonable additional steps to expeditiously file any unfiled reports and correct any inaccurate reports.

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

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

Under this policy, the Commission intends to consider the best efforts of a committee under section 432(i) when reviewing all violations of the recordkeeping and reporting requirements of FECA, whether arising in its traditional enforcement docket

(Matters Under Review), audits, or the ADR Program. The best efforts standard is an affirmative defense and the burden rests with the political committee and its treasurer to present evidence sufficient to demonstrate that best efforts were made. The Commission does not intend to consider the best efforts defense in any enforcement or ADR matter, or in an audit unless a respondent or audited committee asserts the facts that form the basis of that defense.

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

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

Dated: June 1, 2007.

Robert D. Lenhard,
Chairman, Federal Election Commission.
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