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January 8, 2007

Duane Pugh, Jr., Esq.  
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Federal Election Commission  
999 E Street NW  
Washington, D.C. 20463

RE: **Notice 2006-21: Proposed Statement on Policy Regarding Treasurer's Best Efforts to Obtain, Maintain, and Submit Information as Required by the Federal Election Campaign Act**

**Notice 2006-22: Best Efforts in Administrative Fines Challenges**

Dear Mr. Pugh:

The above matters touch upon areas that are fundamental to our political system and I appreciate the opportunity to present my ideas to the Commission. As a consultant in the area of campaign finance, the renewed interest in Best Efforts offers a continued hope that efficiency and fairness will remain the overriding objective of the Commission.

The attached is therefore submitted for the Commission's consideration as it relates to the expanded policy on Best Efforts and the application of Best Efforts in the Administrative Fines Program.

Best Wishes,

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## Summary:

With the announced policies and rules of 2006-21 and 2006-22, the Federal Elections Commission advances its stated Mission to ensure compliance with Federal Election Campaign Act (FECA).<sup>1</sup> But with more direction on the use and application of “Best Efforts” of treasurers to “obtain, maintain and submit” information required under FECA (the “Act”) the FEC can maximize its efforts to promote voluntary compliance and to efficiently use of resources for “salient and significant compliance concerns.”

While some might claim that there is a greater degree of freedom under laws and regulations that are ambiguous, treasurers or committees looking for guidance or facing a factual determination under the Administrative Fines Program are better served by greater clarity of the FEC’s proposed policy on Best Efforts as an affirmative defense and its application under § 432(i). With more direction, committees are afforded procedural protections when defending their constitutional rights in enforcement proceedings.

Specifically, a clarification as to what Best Efforts are, rather than what they are not is necessary. Clarified application of Best Efforts under §§ 432(i), 434 and 488 of Title 2 and the Code of Federal Regulations (CFR) will provide committees and treasurers with prospective guidance on voluntary compliance and a basis for factual analysis during the compliance process.

## Guidance and Voluntary Compliance:

A stated objective of the FEC is to increase voluntary compliance with the Act.<sup>2</sup> In advancing that effort, the FEC has been ambitious in providing information and guidance to the public for effective navigation of the Act and the underlying policies and rules of the CFR. The FEC has issued publications to inform those seeking instruction on best practices; the Commission endeavors annually to ensure sufficient funding to provide public education on its Mission by sponsoring roundtable discussions, making public appearances, and through its participation at conferences on campaign finance.

But it is the CFR itself that speaks the message of the FEC the loudest. Equally important are the companion policies maintained by the FEC. In the FEC’s tradition of public education, developing the application of Best Efforts from within the policies and rules will greatly advance the FEC’s Mission of voluntary compliance.

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<sup>1</sup> Performance and Accountability Report, Federal Election Commission, Fiscal Year 2006. Sec. 1.B (pg. 6).

<sup>2</sup> *Id.*

For decades, Best Efforts has been understood, if nothing else, as a procedural “safe harbor” for committees and treasurers from a finding that the entity or individual violated the FECA.<sup>3</sup> From a guidance standpoint, what is important about the discussion of a safe harbor is that the any publications by the FEC on the matter are received as instruction on how to avoid an enforcement proceeding altogether.

Part of the FEC’s effort to provide guidance has been, in fact, to provide information about practices and procedures likely to minimize errors that would lead to compliance violations. The FEC published “Financial Controls and Compliance Manual for Presidential Primary Candidates Receiving Public Financing”<sup>4</sup> (Manual). In the Manual, the FEC “suggests” (emphasis in original) a management plan based on best practices that includes internal controls and management procedures for committees.<sup>5</sup> In the publication, the FEC explored a variety of areas that posed factual dilemmas and provided policy suggestions for the campaign committees of presidential candidates; the ultimate suggestion of the publication is that with an eye toward duties of disclosure, sound financial and operational practices (best practices) often elevates the risk of compliance violations.

Fundamentally, best practices are a standard of discipline. As the FEC noted in its proposed policy [2006-21], best practices are fairly characterized as “a standard that has diligence as its essence.”<sup>6</sup> Best practices are typically operating principles with a flexible approach, founded on a notion of progress and commitment to learning. Applied by a treasurer, best practices of a committee serve the principle of Best Efforts as a method to provide accurate, complete and timely disclosure of campaign finance information; furthermore, as best practices serve to promote accurate disclosure, they are a tool to raise the public confidence in the integrity of the political system by elevating the transparency of the process.

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<sup>3</sup> 71 CFR 71087 (Dec. 8, 2007) (referring to the FEC’s statement of Reasons at 2).

<sup>4</sup> Financial Control and Compliance Manual for Presidential Primary Candidate Receiving Public Financing, Federal Elections Commission (April 2000).

<sup>5</sup> *Id.* at iii.

<sup>6</sup> Proposed Statement of Policy Regarding Treasurer’s Best Efforts To Obtain, main, and Submit Information as Required by the Federal Election Campaign Act, 71 Fed. Reg. 71084, 71087 (Dec. 8, 2006).

In the Manual, the FEC observed: “[O]ne of the early duties of a committee is to develop procedures for a financial control system that will contribute to the achievement of campaign goals and insure compliance with the Act.”<sup>7</sup> For treasurers and committees seeking instruction on best practices, a clarification in the CFR—one of the most widely disseminated publications—an inclusion indicia of Best Efforts as direction on best practices would significantly advance the Commission’s mission of voluntary compliance.

The following is offered for consideration by the Commission when contemplating potential clarifications on the indicia of Best Efforts under the proposed policy and for use within 11 CFR 111.35 and, as applicable, within 11 CFR 104.7:

Factual consideration of best efforts include the evaluation of the best practices used, if any, for the actions taken, or systems implemented, by the committee to ensure that required information is obtained, maintained and submitted. When using best practices under the principle of best efforts, the following would be considered factually relevant when examining best efforts with regard to plans, policies, procedures or guidelines calculated to insure compliance with the Act:

Generally: Fundamentally, best practices promote: 1) effective operations; 2) increased transparency; 3) reliable and accurate recordkeeping; 4) a culture that fosters integrity, ethical values and duties of compliance; 5) provide reasonable assurance operational objectives are met; 6) a system architecture that is proportional in scope to committee size; 7) factually established plan, policy, procedure and/or guidelines of best practices with documentation.

Financial Controls: Operations demonstrate: 1) management directives for transaction processing procedures; 2) management directives for transaction approval and error-checking; 3) enforcement of management directives on transaction controls; 4) consistent accounting methodology; 5) recordkeeping practices that promote contemporaneous and accurate documentation of transactions.

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<sup>7</sup> Financial Control and Compliance Manual for Presidential Primary Candidate Receiving Public Financing, Federal Elections Commission (April 2000), p. 1.

Risk Prevention: Interim and long-term practices consider: 1) the reliability of the method of report preparation and submission; 2) security of assets from theft or misappropriation; 3) efforts for internal education on regulatory schemes, impacts and consequences of decision-making; 4) IT and MIS security; 5) the segregation of duties; 6) a system of checks and balances for error detection; 7) a system of preparing, approving and disseminating communications on behalf of the committee.

Risk Assessment: Self-Audits provide the most valuable method of risk assessment and should be considered for a consistent policy addressing: 1) requirements; 2) frequency; 3) a method of response and resolution to a completed audit; 4) scope relevant to the committee size; 5) standards of acceptable risk.

As proposed, there is little guidance on what specifically amounts to Best Efforts and, instead, speaks to what Best Efforts are not.<sup>8</sup> For committees seeking guidance to proactively conform to Best Efforts, the policy and rule as proposed is lacking a "Best Efforts Test." Such committees must have a "qualitative common" to define the Best Efforts standard; as such, a clarification as to the indicia of Best Efforts through the elaboration of best efforts should be conveyed in the regulatory plan.

According to the policy announced and the published rule, "when a treasurer of a political committee demonstrates that the failure to properly obtain, maintain or submit required information and reports was beyond the control of the committee, [t]he Commission intends to generally consider the following: (1) the actions taken or systems implemented by the committee to ensure the required information is obtained, maintained and submitted..." Therefore, an evaluation of the implementation system is implied as part of the Best Efforts Test.

As exemplified above, implementation systems are defined by the operating methods chosen to affect the goals of the system. Best practices are chosen by reasonably balancing the practice or internal control method with the cost of implementing the solution. The choice of solution must always be weighed against the risk posed by the failure of the implementation system. As such, if the procedures used

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<sup>8</sup> 71 Fed. Reg. 71085-86 (an affirmative defense excludes "negligence, problems with vendors or contractors, illness, inexperience, or unavailability of staff, computer failures... and other similar circumstances).

by a committee risks late filings and/or inaccurate reports with the FEC despite the availability of other cost-effective methods, then the burden of demonstrating the indicia of Best Efforts is not met.<sup>9</sup>

While the suggestion here could be criticized as being equally amorphous as a singularly stated standard of Best Effort, it is to the contrary. Treating best practices as indicia of Best Efforts provide a conceptual test that is much needed. The including of best practices in the policy and the rule permits a reasoned analysis of diligence used to comply with the Act. The analysis then becomes one of efforts within the committee's control and as objective provides a Best Efforts (factors) Test.

Clarifying Best Efforts promotes the understanding of accountability and provides a reasonable standard for committees to use in day-to-day operations.<sup>10</sup>

Ultimately, the administrative fines are designed to assign accountability and to provide negative reinforcement for complying with the Act. The presence of best practices offer the Commission a codex for analysis as to the: 1) the factual development of the behavior in question and 2) the accountability to the entity or individuals who fostered the behavior in question. Consequently, the inclusion of regulation the provides a Best Efforts Test permit swifter determination of the factual basis for any fines in stark contrast to a debate as to when "earnestness" matures into Best Efforts.<sup>11</sup>

And while, theoretically, committees innately prone to compliance may not benefit from language in the rule of indicia of Best Efforts, committees that might not otherwise accurately calculate Best Efforts could do so. Thus, treasurers who are currently misinformed regarding the utility of "earnest efforts" would have opportunity to reconsider the implementation systems in place to ensure compliance under the CFR and the Act. Ultimately, then, the Commission supports its objective of a high level of voluntary compliance while demonstrating an "efficient use of FEC enforcement" by illuminating the path to proactive conformity of Best Efforts.

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<sup>9</sup> *Id.* at 71087 ("the burden rests on with the political committee and its treasurer to present facts that demonstrate that 'best efforts' were made.")

<sup>10</sup> Under such analysis, the statutory concepts of "good faith," and "substantial compliance" as well as regulatory concepts of "reasonable assurances" could now take their seat at the table during enforcement procedures.

<sup>11</sup> 71 Fed. Reg. 71087 (Dec. 8, 2006).

To be sure, under the suggested clarifications, the committee and/or treasurer who seeks to establish the affirmative defense would bear the burden of demonstrating Best Efforts through evidence of best practices and, under legal reasoning, arguing that a “reasonable man” would have acted similarly under similar circumstances. Alternately understood under economic reasoning, the respondent would endeavor to demonstrate the “rational choice” of system by evidencing a cost-benefit analysis based on strategy of the unilateral interest to avoid violating the Act.<sup>12</sup> Thus, if reasonably or rationally, it can be demonstrated that among the various available systems, the given choice of system of implementation provided the best possible effort to minimize the risk of failing to “obtain, maintain and submit” information under the FECA. The respondents’ theories and evidence of the affirmative defense would have to be persuasive in light of the circumstances and the realistic risks of fines, the stigma of a violation, attorneys’ fees and the private consequences to his/her personal life. And should the respondent successfully defend the behavior in question, despite a *prima facie* violation of the FECA, the respondent would be entitled to the safe harbor of Best Efforts.

#### Enforcement and Compliance:

As has been advocated for some time now by esteemed colleagues and the ABA,<sup>13</sup> the Constitutional rights of the committees’ activities must be protected by procedural protections used to enforce the Act. A Best Efforts Test through the elaboration of best practices would provide for reasoned and factual analysis of the record of an enforcement proceeding.

For many reasons, highly successful committees, particularly PACs, absorb the FEC’s highest expectations of accuracy and accountability. And while the expansion of the “safe harbor” and the opportunity to make oral arguments are undoubtedly a valued development of the regulatory framework of the FEC, a respondent must know the

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<sup>12</sup> See generally, J. Nash, Non-Cooperative Games, 54(2) *The Annals of Mathematics* 286-295 (1951).

<sup>13</sup> Jan Witold Baran, Esq., Comment to Notice 2003-9, Enforcement Procedures (March 30, 2003) at Tab A, Tab B (providing *Annual Reports of Committees*, vol. 19 (Amer. Bar Ass’n Section of Admin. Law 1982) and Statement of William H. Allen, Chairman, Administrative Law, American Bar Association, Accompanied by Jan Baran, Chairman, Committee on Election Law; and Michael Berman, Committee on Election Law, June 21, 1983, at *Campaign Finance Reform Hearings held before the Task Force on Elections of the Committee on House Administration*, U.S. House of Representatives, 98<sup>th</sup> Cong. (1984)); see also J. Witold Baran, Esq., Prepared Statement before the Federal Election Commission Hearing on Enforcement Procedures (June 11, 2003).

arguments in favor of sanctions and the evidence upon which the arguments are founded. A Best Efforts Test provides a basis to evaluate such evidence and arguments and offers platform upon which an effective defense can be crafted. For meaningful use of Best Efforts under the Act and use application of the Commission's proposed policy and rule, Best Efforts must be articulated in a louder voice.

Under the FEC's administrative fines framework a respondent may challenge a civil penalty based upon: 1) factual error; 2) improper calculation of the civil money penalty; and/or 3) Best Efforts.<sup>14</sup> Defenses are primarily evaluated based on the shifting of burden of evidence, production and persuasion. If the respondent chooses to "disprove" an element of the statutory violations, the respondent has essentially assumed an affirmative defense. Further, affirmative defenses succeeds in one of two ways: 1) by bringing facts establishing the elements of the statutory violation into question, such as a defense of misidentification; or 2) by providing an "excuse" such as Best Efforts. The key, of course, is the availability of the *facts* themselves so that effective defense can be crafted. A factual framework such the evaluation of elements "within the control" of a treasurer as an element of violation is provided with Best Efforts Test.

Additionally, as we are reminded by *Lovely v. FEC*,<sup>15</sup> FEC decisions "shall include findings and conclusion, and the reasons or basis therefore on all materials issues of fact, law or discretion presented." The inclusion of indicia of best practices as indicia to Best Efforts within the rule and the policy also provides the FEC with a factual basis from which to make a determination. Furthermore, the evaluation of best practices and operating procedures is a well-established academic body of knowledge on business and gap analysis of implementation systems.<sup>16</sup> Consequently, the application of the Best Efforts Test is not without an objective marker for understanding.

Furthermore, treasurers, candidates and committees that seek to voluntarily comply by assuming a system under the principles of Best Efforts could refer outside experts and consultants to the "qualitative criteria" proffered in the Commission's advisory opinions and other publications. Understandably, a criticism of this approach would call into question the ability of the Commission to research and write such decisions, agreements and/or opinions under its limited resources for the General

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<sup>14</sup> 11 CFR 111.35(b)(1).

<sup>15</sup> 307 F. Supp. 2d 294 (D. Mass 2004).

<sup>16</sup> See *e.g.*, Internal Control Management and Evaluation Tool, GAO-01-1008G (Aug. 2001); Standards of Internal Control in the Federal Government, GAO/AIMD-00-21.3.1 (Nov. 1999).



Counsel's Office; the question is ultimately whether the burden to issue such opinions, etc. would outweigh the benefit of prospective elimination of administrative proceedings that would otherwise stem from faithful but inaccurate attempts to voluntarily comply with the Act.

A Best Efforts Test must be established to promote the true purpose of the proposed polity and rule in Notices 2006-21 and 2006-22. The inclusion of indicia of Best Efforts by direction and guidance on best practices will provide the factual basis need for the application of a Best Efforts Test.

The foregoing is respectfully submitted for the Commission's consideration.