Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL ELECTION COMMISSION

11 CFR Part 111

[Notice 2004–3]

Proposed Statement of Policy Regarding Naming of Treasurers in Enforcement Matters

AGENCY: Federal Election Commission.

ACTION: Draft statement of policy with request for comments.

SUMMARY: The Commission is considering exercising its discretion in enforcement matters to clarify when it intends to name a treasurer of a political committee in his or her official capacity as treasurer, and when it intends to name the treasurer in his or her personal capacity. For most enforcement matters involving a political committee, the Commission may decide, as a matter of policy, to name the treasurer in his or her official capacity. However, where a treasurer has apparently breached a personal obligation owing by virtue of his or her responsibilities under the Act and regulations, or a prohibition that applies to individuals, the Commission may decide to name that treasurer as a respondent in his or her personal capacity. The Commission seeks comments on the policy under consideration, and on how it should exercise its prosecutorial discretion on this subject in matters arising in its Administrative Fines Program.

DATES: Comments must be submitted on or before February 27, 2004.

ADDRESSES: All comments should be addressed to Peter G. Blumberg, Attorney, and must be submitted in either electronic or written form. Electronic mail comments should be sent to *treas2004@fec.gov* and must include the full name, electronic mail address and postal service address of the commenter. Electronic mail comments that do not contain the full name, electronic mail address and postal service address of the commenter will not be considered. If the electronic mail comments include an attachment, the attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219–3923, with printed copy follow-up to ensure legibility. Written comments and printed copies of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. The Commission will make every effort to post public comments on its Web site within ten business days of the close of the comment period.

FOR FURTHER INFORMATION CONTACT: Peter G. Blumberg, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Commission proposes modifying its current practice to name more clearly treasurers in their ''official'' and/or ''personal'' capacities.[1] Specifically, when a complaint asserts sufficient allegations to warrant naming a committee as a respondent, the committee's current treasurer would also be named as a respondent in his or her official capacity. In these circumstances, reason-to-believe and probable cause findings against the committee would also be made as to the current treasurer in his or her official capacity. When the complaint asserts allegations that involve a past or present treasurer's violation of obligations that the Act or regulations impose specifically on treasurers, or prohibitions that apply to individual persons, then that treasurer would be named in his or her personal capacity, and findings would be made against the treasurer in that capacity. Thus, in some matters the current treasurer could be named in both official and personal capacities.

The proposed policy modification would provide clearer notice to respondents and the public as to the nature of the Commission's enforcement actions, improve the perception of fairness among the regulated community, and merge the Commission's treasurer designation into conceptually familiar legal principles for the federal judiciary.[2] In explaining the proposed policy change, this section first surveys the law on the official/personal capacity distinction; next, addresses when treasurers are properly named in their official or personal capacity or both; and finally, confronts the reoccurring issues of successor treasurers and substitution.

II. The Official/Personal Capacity Distinction

In the seminal case of *Kentucky* v. *Graham,* 473 U.S. 159 (1985), the United States Supreme Court discussed the distinction between official capacity and personal capacity suits. The Court determined that a suit against an officer in her official capacity ''generally represent[s] only another way of pleading an action against an entity of which an officer is an agent.'' *Id.* at 165. In other words, an official capacity proceeding ''is not a suit against the official but rather is a suit against the official's office.'' *Will* v. *Mich. Dept. of State Police,* 491 U.S. 58, 71 (1989). Accordingly, ''an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.'' *Graham,* 473 U.S. at 166. Therefore, in an official capacity suit, the plaintiff seeks a remedy from the entity, not the particular officer personally.

A ''personal-capacity action is * * * against the individual defendant, rather than * * * the entity that employs him.'' *Id.* at 167–68. Since a ''[p]ersonal-capacity suit[] seek[s] to impose personal liability upon'' a particular individual, the individual is the true party in interest. *Id.* Liability lies with the particular officer personally, not with the officer's position. *See id.* at 166 n.11 (''Should the official die pending final resolution of a personal-capacity action, the plaintiff would have to pursue his action against the decedent's estate.''); *see also Hafer* v. *Melo,* 502 U.S. 21, 27 (1991) (''officers sued in their personal capacity come to court as individuals'').

[1] The terms ''official capacity'' and ''representative capacity'' are generally interchangeable, as are the terms ''personal capacity'' and ''individual capacity.'' *See McCarthy* v. *Azure,* 22 F.3d 351, 359 n.12 (1st Cir. 1994).

[2] As discussed *infra* Part II.A., the phrases ''official capacity'' and ''personal capacity'' are legal terms of art that permeate such fields as sovereign immunity, bankruptcy, corporations, and federal procedure. Their usage instantaneously identifies for the judiciary when the Commission is pursuing treasurers by virtue of their position, rather than by product of their actions.

The ''distinction between claims aimed at a defendant in his individual as opposed to representative capacity can be found across the law.'' *McCarthy,* 22 F.3d at 360 (citing numerous Supreme Court, lower court, and state cases referencing differences between individual and official capacity claims in multiple fields of law).[3] The official capacity/individual capacity distinction also carries societal significance. As the McCarthy court explained:

> The ubiquity of the [official capacity/individual capacity] distinction is a reflection of the reality that individuals in our complex society frequently act on behalf of other parties—a reality that often makes it unfair to credit or blame the actor, individually, for such acts. At the same time, the law strikes a wise balance by refusing automatically to saddle a principal with total responsibility for a representative's conduct, come what may, and by declining mechanically to limit an injured party's recourse to the principal alone, regardless of the circumstances.

Id.

III. Naming Treasurers in Their Official Capacity

Naming the current treasurer in his or her official capacity would improve the Commission's enforcement practice in a number of ways. Most importantly, it would clarify that findings by the Commission (whether ''Reason To Believe'' or ''Probable Cause To Believe'') or the signing of a conciliation agreement only concerns the treasurer in his or her capacity as representative of the committee, not personally. The practice would also ensure that a named individual who signs the conciliation agreement on behalf of the committee (or obtains legal representation on behalf of the committee) is the one empowered by law to disburse committee funds to pay a civil penalty, disgorge funds, make refunds, and carry out other monetary remedies that the committee agrees to through the conciliation agreement.[4] Also, naming a treasurer (in his or her official capacity), as opposed to naming simply the office of treasurer or just the committee, not only provides the Commission with an individual in every instance to serve with notices throughout the proceeding, but also results in more accountability on behalf of the committee—that is, a particular person who will ensure that a committee is responsive to Commission findings.[5] Finally, specifying whether a treasurer is named in his or her official or personal capacity would be consistent with use of these terms as pleading conventions in court actions. A probable cause finding against a treasurer in his or her official capacity would make clear to a district court in enforcement litigation that the Commission is seeking relief against the committee, and would only entitle the Commission to obtain a civil penalty from the committee. *See Graham*, 473 U.S. at 165.

IV. Naming Treasurers in Their Personal Capacity

The Act places certain legal obligations on committee treasurers, the violation of which makes them personally liable. *See, e.g.*, 2 U.S.C. 432(c) (keep an account of various committee records), 432(d) (preserve records for three years), 434(a)(1) (file and sign reports of receipts and disbursements). The Commission's regulations further require a treasurer to examine and investigate contributions for evidence of illegality. *See* 11 CFR 103.3. Due to their ''pivotal role,'' treasurers may be held personally liable for failing to fulfill their responsibilities under the Act and the Commission's regulations. *See Toledano*, 317 F.3d at 947 (''The Act requires every political committee to have a treasurer, 2 U.S.C. 432(a), and holds him personally responsible for the committee's recordkeeping and reporting duties, id. 432(c)–(d), 434(a). * * * Federal law makes the treasurer responsible for detecting [facial contribution] illegalities, 11 CFR 103.3(b), and holds him personally liable if he fails to fulfill his responsibilities, *see* 2 U.S.C. 437g(d). * * *'') (emphasis added); *see also FEC* v. *John A. Dramesi for Cong. Comm.*, 640 F. Supp. 985 (D.N.J. 1986) (holding treasurer responsible for failing to ''make * * * best efforts to determine the legality of'' an excessive contribution); *FEC* v. *Gus Savage for Cong. '82 Comm.*, 606 F. Supp. 541, 547 (N.D. Ill. 1985) (''It is the treasurer, and not the candidate, who becomes the named defendant in federal court, and subjected to the imposition of penalties ranging from substantial fines to imprisonment.''); 104.14(d) (''Each treasurer of a political committee, and any other person required to file any report or statement under these regulations and under the Act shall be personally responsible for the timely and complete filing of the report or statement and for the accuracy of any information or statement contained in it.'') (emphasis added). Thus, a treasurer would be named as a respondent in a MUR in his or her personal capacity, and findings would be made against a treasurer in the same capacity, when the MUR involves the treasurer's personal violation of a legal obligation that the statute or regulations impose specifically on committee treasurers and when a reasonable inference from the alleged violation is that the treasurer knew, or should have known, about the facts constituting a violation.[6]

Similarly, if a past or present treasurer violates a prohibition that applies to individuals, the treasurer would be named as a respondent in his or her personal capacity, and findings would be made against the treasurer in that capacity. In this way, a treasurer would be treated no differently than any other individual who violates a provision of the Act.[7] Should the Commission file suit in district court following a finding of probable cause against a treasurer in his or her personal capacity, judicial relief, including an injunction and payment of a civil penalty, could be obtained against the treasurer personally. *Graham,* 473 U.S. at 166–168. In any scenario, the Commission would, of course, remain free to exercise its prosecutorial discretion not to pursue a respondent.[8]

When the Commission obtains relief from a treasurer personally, the obligation will follow the individual. Thus, when a treasurer in his or her

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[3] *See Graham,* 473 U.S. at 165 (42 U.S.C. 1983); *Stafford* v. *Briggs,* 444 U.S. 527, 544 (1980) (venue determination); *Ex Parte Young,* 209 U.S. 123, 159 (1908) (Eleventh Amendment); *Northeast Fed. Credit Union* v. *Neves,* 837 F.2d 531, 534 (1st Cir. 1988) (jurisdictional purposes); *Pelkoffer* v. *Deer,* 144 B.R. 282, 285–86 (W.D. Pa. 1992) (bankruptcy); *Estabrook* v. *Wetmore,* 529 A.2d 956, 958 (N.H. 1987) (applying doctrine that acts of a corporate employee performed in his corporate capacity generally do not form the basis for personal jurisdiction over him in his individual capacity).

[4] In the absence of a treasurer, ''the financial machinery of the campaign grinds to a halt. * * *'' *FEC* v. *Toledano*, 317 F.3d 939, 947 (9th Cir. 2003), *reh'g denied; see* 2 U.S.C. 432(a) (''No expenditure shall be made * * * without the authorization of the treasurer or *his or her* designated agent.''); 11 CFR 102.7(a) (designation of assistant treasurer).

[5] Such accountability may be especially helpful in matters involving committees that tend to be ephemeral—existing for only a short time before permanently disbanding operations.

[6] Indeed, if FECA were construed to impose liability on treasurers only in their official capacities, it would effectively mean that only committees are liable for violations under the statute—which would have been easy enough for Congress to accomplish by writing the Act to impose reporting, recordkeeping, and other duties on ''committees'' rather than ''treasurers.''

[7] The Act and the Commission's regulations prohibit any ''person'' which includes individuals, from engaging in certain kinds of conduct. *See, e.g.*, 2 U.S.C. 432(b) (forward contributions to the committee's treasurer), 441e (receipt of contributions from foreign nationals), and 441f (making and knowingly accepting contributions in the name of another).

[8] For example, the Commission, in some cases, may decide not to pursue a predecessor treasurer who technically has personal liability where the committee, through its current treasurer, has agreed to pay a sufficient civil penalty and to cease and desist from further violations of the Act.

personal capacity agrees to pay a civil penalty through a conciliation agreement, or is ordered to pay a civil penalty by a district court, a personal obligation exists to pay the civil penalty. (A separate civil penalty would likely be assessed against the committee itself.) Likewise, a cease and desist provision (negotiated through conciliation) or an injunction (imposed by a district court) against a treasurer in his or her personal capacity will still apply to that treasurer in the event he or she moves on to become treasurer with another committee. *Cf. Sec'y Exch. Comm'n* v. *Coffey*, 493 F.2d 1304, 1311 n.11 (6th Cir. 1974) (''The significance of naming an officer * * * personally is that 'otherwise he is bound only as long as he remains an officer * * *, whereas if he is named [personally] he is personally enjoined without limit of time.' '') (quoting 6 L. Loss, Securities Regulation 4113 (1969, supp. to 2d ed.)).[9]

V. Naming Treasurers in Both Capacities

Treasurers would be initially generated as respondents in both their official and personal capacities only with respect to allegations that directly relate to reporting, recordkeeping, and other duties specifically imposed by the Act on treasurers. *See, e.g., United States* v. *Johnson*, 541 F.2d 710, 711 (8th Cir. 1976) (applying a similar standard in an action involving the Federal Trade Commission when finding that ''[t]he propriety of including a person both as an individual and as a corporate officer in a cease and desist order has consistently been upheld in instances where the person included was instrumental in formulating, directing and controlling the acts and practices of the corporation'') (citing *Fed. Trade Comm'n* v. *Standard Ed. Soc'y*, 302 U.S. 112 (1937); *Standard Distrib.* v. *Fed. Trade Comm'n*, 211 F.2d 7 (2d Cir. 1954); *Benrus Watch Co.* v. *Fed. Trade Comm'n*, 352 F.2d 313 (8th Cir. 1965)). However, if the Office of General Counsel (''OGC'') is persuaded through the respondent's response to the complaint, or the response to the Factual and Legal Analysis, or the Respondent's Brief at the Probable Cause stage, or an investigation, that the treasurer was unaware, and had no reason to know, of the operative facts giving rise to a violation, OGC would recommend that findings against the treasurer only be made in his or her official capacity.

On the other hand, if a complaint alleges a violation such as coordination or receipt of contributions in the name of another, the same reasonable inference as to the treasurer's knowledge of the operative facts would not be drawn as a routine matter. The Commission proposes with respect to complaints of this nature that the treasurer would initially be named as a respondent only in his or her official capacity. Notably, in these cases the reporting violation stems from the same operative facts as the principal violation. Only if OGC learns later that the treasurer had knowledge of the operative facts—for example, the treasurer knew that an in-kind contribution stemming from coordination went unreported—might the Commission make findings against the treasurer in his or her personal capacity.

In cases where the treasurer has both official and personal liability, the respondents would be named as ''John Doe for Congress and Joe Smith, in his official capacity as treasurer and in his personal capacity.'' Alternatively, the respondents might be named as ''John Doe for Congress and Joe Smith, in his official capacity as treasurer'' and ''John Doe, in his personal capacity.'' Where a treasurer has been named in both his or her official and personal capacities, any resulting conciliation agreement would be signed by the current treasurer on behalf of both the committee and the treasurer in his or her personal capacity.

VI. Successor Treasurers/Substitution

An issue closely related to the official/personal capacity distinction is whether a successor treasurer may be substituted for a predecessor treasurer. Often the specific individual who was the treasurer at the time of a violation is no longer the treasurer when the Commission undertakes the enforcement process. Whether the successor treasurer or the predecessor treasurer should be named as the respondent depends on whether the Commission is pursuing the treasurer in his or her official capacity, personal capacity, or both.

Under the present practice, when OGC discovers that a committee has changed treasurers since the point of the underlying violation, OGC typically notes the change of treasurer, the date of the change, the former treasurer's name, and indicates whether an amendment was made to the Statement of Organization in its next report to the Commission. If a treasurer change is made after a finding of reason to believe, then OGC typically includes the new treasurer and notes the change in its next report on the matter. If a treasurer change is made after a finding of probable cause to believe, OGC sends the new treasurer a supplemental probable cause brief (incorporating the prior probable cause brief), which states that the Commission found probable cause to believe against the committee and the treasurer's predecessor and will recommend probable cause against the new treasurer. After receiving a response or waiting until the expiration of the response period, OGC typically returns to the Commission with a recommendation to find probable cause to believe against the new treasurer.

When the Commission pursues a current treasurer in his or her official capacity, any successor treasurer would be substituted for the predecessor treasurer. In such cases, the Commission is pursuing the official position (and, therefore, the entity), not the individual holding the position. *See Will*, 491 U.S. at 71. Because an official capacity action is an action against the treasurer's position, the Commission may summarily substitute a new treasurer in his or her official capacity at any stage prior to a finding of probable cause to believe.[10]

When a predecessor treasurer is personally liable, the Commission would pursue the predecessor treasurer individually, and not substitute the successor treasurer for the predecessor treasurer individually. *See* fn. 7; *Graham*, 473 U.S. at 167–68. There would be no legal basis for imputing personal liability from a predecessor treasurer's misconduct to a successor treasurer who did not personally engage in the misconduct.

If the Commission were to pursue a treasurer both officially and individually and this treasurer is later replaced, the Commission would continue to pursue the predecessor treasurer for any violations for which he or she is personally liable, and substitute the successor treasurer for official capacity violations. Absent some independent basis of liability, the

[9] In some cases, initially, the Commission does not have information that would indicate that the Commission should pursue a treasurer in his or her personal capacity for a violation. However, at a later stage of the enforcement process, evidence may arise that indicates that a treasurer is personally liable for a violation. In these instances, the Commission would exhaust the Act's administrative prerequisites to suit before filing suit against the treasurer in his or her personal capacity. *See* 2 U.S.C. 437g(a)(3); *FEC* v. *Nat'l Rifle Ass'n*, 553 F. Supp. 1331, 1337–38 (D.D.C. 1983).

[10] Pursuant to the proposed policy, the Commission would not be legally obligated to undertake the requirements of 2 U.S.C. 437g(a)(3) when a successor treasurer undertakes his or her position; although not legally required to do so, the Commission would intend to inform a new treasurer of the pending action and make copies of the briefs available to the successor treasurer.

Commission would not pursue intermediate treasurers.[11] *See Cal. Democratic Party* v. *FEC,* 13 F. Supp. 2d 1031, 1037 (E.D. Cal. 1998) (dismissing individual capacity claims against a former treasurer because ''there is no allegation that [the treasurer] violated any personal obligation'' and dismissing official capacity claims against him ''since [he] is no longer treasurer * * * and thus, is not the appropriate person against whom an official capacity suit can be maintained. * * *'').[12]

VII. Proposed Policy

In light of the considerations explained above, the Commission is considering exercising its discretion in enforcement matters by naming treasurers as follows:

1. In all enforcement actions where a political committee is a respondent, name as respondents the committee and its current treasurer ''in (his or her) official capacity as treasurer.''

2. In enforcement actions where a treasurer has apparently breached a personal obligation owing by virtue of his or her responsibilities under the Act and regulations, or a prohibition that applies to individuals, name that treasurer as a respondent ''in (his or her) personal capacity.''

The Commission invites comments on this policy that is under consideration. Comments may be submitted on any aspect of the policy being considered, including:

(A) If the Commission adopts the policy, are there certain circumstances that warrant flexibility in applying the policy?

(B) Whether, and to what extent, the Commission should consider a treasurer's ''best efforts'' to comply with the law.

(C) Whether and how to apply the prospective policy in its Administrative Fines program.

Dated: January 23, 2004.

Bradley A. Smith,

Chairman, Federal Election Commission.

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BILLING CODE 6715–01–P

[11] For example, while Treasurer A is the treasurer for Joe Smith for Congress, a violation occurs that subjects A to official and individual liability. Treasurer A would be named in both his official and personal capacities. After the enforcement action has begun, Treasurer A resigns and Treasurer B takes over. The Commission should pursue Treasurer A in his individual capacity, and Treasurer B in her official capacity. If Treasurer B resigns and is succeeded by Treasurer C prior to the conclusion of the enforcement matter, the Commission should then continue to pursue Treasurer A in his individual capacity and pursue Treasurer C in her official capacity. Treasurer B is no longer named in her official capacity.

[12] A deeper examination of the court file indicates that—despite the *California Democratic Party* court's assertion to the contrary''the Commission never actually pled that the treasurer in this case was personally liable. Rather, the complaint references the treasurer ''as treasurer'' and the Commission's response to the treasurer's motion to dismiss indicates that the Commission was pursuing the treasurer ''in his official capacity.'' Compl., paragraphs 8, 58–59, Prayer paragraphs 1–5; Resp. to Def. Mot. to Dismiss, p. 21. However, the *California Democratic Party* court's result underscores the need for the Commission to delineate more clearly the capacity in which it pursues treasurers.

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Chapter II

Pilot Program for Systematic Review of Commission Regulations; Request for Comments and Information

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of systematic review of current regulations.

SUMMARY: The Consumer Product Safety Commission (CPSC or Commission) is undertaking a pilot program to systematically review its current substantive regulations to ensure, to the maximum practical extent, consistency among them and with respect to accomplishing program goals. The pilot is currently expected to be completed by the end of calendar year 2004. Depending on the results of the pilot, the availability of personnel and fiscal resources, and other priorities for action, the Commission would then develop and implement an expanded systematic review process to address the remainder of its substantive regulations.

The primary purpose of the review is to assess the degree to which the regulations under review remain consistent with the Commission's program policies. In addition, each regulation will be examined with respect to the extent that it is current and relevant to CPSC program goals. Attention will also be given to whether the regulations can be streamlined, if possible, to minimize regulatory burdens, especially on small entities. To the degree consistent with other Commission priorities and subject to the availability of personnel and fiscal resources, specific regulatory or other projects may be undertaken in response to the results of this review.

In the initial, pilot phase of this program the following four regulations will be evaluated: safety standard for walk-behind power mowers, 16 CFR part 1205; requirements for electrically operated toys and other electrically operated articles intended for use by children, 16 CFR part 1505; standard for the flammability of vinyl plastic film, 16 CFR part 1611; and child-resistant packaging requirements for aspirin and methyl salicylate, 16 CFR 1700.14(a)(1) and 1700.14(a)(3), respectively.

The Commission solicits written comments from interested persons concerning the designated regulations' currentness and consistency with Commission policies and goals, and suggestions for streamlining where appropriate. In so doing, commenters are requested to specifically address how their suggestions for change could be accomplished within the various statutory frameworks for Commission action under the Consumer Product Safety Act (CPSA), 15 U.S.C. 2051–2084, Federal Hazardous Substances Act (FHSA), 15 U.S.C. 1261–1278, Flammable Fabrics Act (FFA), 15 U.S.C. 1191–1204; and Poison Prevention Packaging Act (PPPA), 15 U.S.C. 1471–1476.

DATES: Written comments and submissions in response to this notice must be received by March 29, 2004.

ADDRESSES: Comments and other submissions should be captioned ''Pilot Regulatory Review Project'' and mailed to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207, or delivered to that office, room 502, 4330 East-West Highway, Bethesda, Maryland 20814. Comments and other submissions may also be filed by facsimile to (301) 504–0127 or by e-mail to *cpsc-os@cpsc.gov.*

FOR FURTHER INFORMATION CONTACT: N.J. Scheers, PhD, Director, Office of Planning & Evaluation, U.S. Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504–7670; e-mail *nscheers@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

A. The Pilot Review Program

The President's Office of Management and Budget has designed the Program Assessment Rating Tool (PART) to provide a consistent approach to rating programs across the Federal government. A description of the PART process and associated program evaluation materials is available online at: *http://www.whitehouse.gov/omb/budintegration/part_assessing2004.html.*

Based on an evaluation of the Commission's regulatory programs using the PART, the recommendation was made that CPSC develop a plan to systematically review its current regulations to ensure consistency among them in accomplishing program goals. The pilot review program launched with