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## FEDERAL ELECTION COMMISSION

### 11 CFR Part 111

[Notice 2004—20]

#### Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings

**AGENCY:** Federal Election Commission.

**ACTION:** Statement of policy.

**SUMMARY:** The Commission is issuing a Policy Statement to clarify when, in the course of an enforcement proceeding (known as a Matter Under Review or “MUR”), a treasurer is subject to Commission action in his or her official or personal capacity, or both. Under this policy, when the Commission investigates alleged violations of the Federal Election Campaign Act, as amended, the Presidential Election Campaign Fund Act, and the Presidential Primary Matching Payment Account Act (collectively “the Act” or “FECA”) involving a political committee, the treasurer will typically be subject to Commission action only in his or her official capacity. However, when information indicates that a treasurer has knowingly and willfully violated a provision of the Act or regulations, or has recklessly failed to fulfill duties specifically imposed on treasurers by the Act, or has intentionally deprived himself or herself of the operative facts giving rise to the violation, the Commission will consider the treasurer to have acted in a personal capacity and make findings (and pursue conciliation) accordingly. This Policy Statement also addresses situations in which treasurers are subject to Commission action in both their official and personal capacities, and situations where successor treasurers are named.

The goal in adopting this policy is to clarify when a treasurer is subject to Commission action in a personal or official capacity, while at the same time

preserving the Commission’s ability to obtain an appropriate remedy that will satisfactorily resolve enforcement matters, or to seek relief in court, if necessary, against a live person. Importantly, the policy is grounded in the statutory obligations specifically imposed on treasurers and well-established legal distinctions between official and personal capacity proceedings.

**DATES:** December 16, 2004.

**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 is modifying its current practices to specify more clearly when a treasurer is subject to a Commission enforcement proceeding in his or her “official” and/or “personal” capacity.<sup>1</sup> Specifically, when a complaint asserts sufficient allegations to warrant naming a political committee as a respondent, the committee’s current treasurer will 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 will also be accompanied by findings against 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, then that treasurer may, in the circumstances described below, be named in his or her personal capacity, and findings may be made against the treasurer in that capacity. Thus, in some matters the current treasurer could be named in both official and personal capacities. Maintaining the Commission’s ability to pursue a treasurer as a respondent in either official or personal capacity allows the Commission discretion to fashion an appropriate remedy for violations of the Act.<sup>2</sup>

<sup>1</sup> 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).

<sup>2</sup> In any scenario, the Commission will, of course, remain free to exercise its prosecutorial discretion not to pursue a respondent. For example, the Commission, in some cases, may decide not to

Notably, political committees are artificial entities that can act only through their agents, such as their treasurers, and often can be, by their very nature, ephemeral entities that may exist for all practical purposes for a limited period, such as during a single election cycle. Due to these characteristics, identifying a live person who is responsible for representing the committee in an enforcement action is particularly important. Without a live person to provide notice to and/or to attach liability to, the Commission may find itself at a significant disadvantage in protecting the public interest and in ensuring compliance with the laws it is responsible for enforcing. By virtue of their authority to disburse funds and file disclosure reports and to amend those reports, treasurers of committees are in the best position to carry out the requirements of a conciliation agreement such as paying a civil penalty, refunding or disgorging contributions, and amending reports.

The Act designates treasurers to play a unique role in a political committee; indeed, a treasurer is the only office a political committee is required to fill. 2 U.S.C. 432(a). Without a treasurer, committees cannot undertake the host of activities necessary to carry out their mission, including receiving and disbursing funds and publicly disclosing their finances in periodic reports filed with the Commission. *Id.*; 2 U.S.C. 434(a)(1). Given this statutory role, especially the authority to receive and disburse funds (e.g., pay a civil penalty, refund improper contributions, disgorge ill-gotten funds) on behalf of the committee, designating the treasurer as the representative of the committee for purposes of compliance with the Act makes sense.

Although the Commission may be entitled to take action as to a treasurer in both an official and individual capacity, in the typical enforcement matter the Commission expects that it will proceed against treasurers only in their official capacities. However, the Commission will consider treasurers parties to enforcement proceedings in their personal capacities where information indicates that the treasurer

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.

knowingly and willfully violated an obligation that the Act or regulations specifically impose on treasurers or where the treasurer recklessly failed to fulfill the duties imposed by law, or where the treasurer has intentionally deprived himself or herself of the operative facts giving rise to the violation. In these circumstances, the Commission may decide to find reason to believe the treasurer has violated the Act in his or her personal capacity, as well as finding reason to believe the committee violated the Act.

This statement of policy is intended to provide clearer notice to respondents and the public as to the nature of the Commission's enforcement actions, improve the perception of fairness throughout the regulated community, and merge the Commission's treasurer designation into conceptually familiar legal principles for the federal judiciary.<sup>3</sup> The statement first surveys the law on the official/personal capacity distinction; next, addresses when the Commission will proceed as to treasurers in their official or personal capacity or both; and finally, resolves the reoccurring issues of successor treasurers and substitution.

The Commission's Proposed Statement of Policy Regarding Naming of Treasurers in Enforcement Matters was published in the January 28, 2004, **Federal Register**. 69 FR 4092 (January 28, 2004). One comment was received. The commenter stated that the Commission's effort to clarify its treasurer naming policy is welcome, but he made several recommendations for how the Commission could assist treasurers to better understand their potential personal liability, such as requiring separate notices in instances where a treasurer was named in his or her individual and official capacities, and by enacting the policy's proposals through a rulemaking, rather than a policy statement. The commenter's suggestions were considered, but in order to allow the Commission to retain flexibility in processing its cases, and because the policy statement combined with existing laws and Commission regulations provide sufficient notice to treasurers of their responsibilities, the suggested changes were not implemented.

<sup>3</sup> As discussed *infra* Part II., the phrases "official capacity" and "personal capacity" are legal terms of art that permeate such field 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.

## 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").

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).<sup>4</sup> 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

<sup>4</sup> *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); *Pelkoff 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).

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. Treasurers in Their Official Capacity

Clearly indicating that the current treasurer is a party to an enforcement proceeding in his or her official capacity will improve the Commission's enforcement of the law in a number of ways. Most importantly, it clarifies 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 also ensures 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.<sup>5</sup> 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.<sup>6</sup> Finally, specifying whether a treasurer is a party to an enforcement proceeding in his or her official or personal capacity is 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 makes clear to a district court in enforcement litigation that the Commission is seeking relief against the committee, and would only entitle the

<sup>5</sup> 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).

<sup>6</sup> 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.

Commission to obtain a civil penalty from the committee. See *Graham*, 473 U.S. at 165.

#### IV. Treasurers in Their Personal Capacities

The Act places certain legal obligations on committee treasurers, the violation of which makes them personally liable.<sup>7</sup> 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 treasurers 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). \* \* \*"); 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.").

Thus, a treasurer may be named as a respondent in a Matter Under Review in his or her personal capacity, and findings may be made against a treasurer in the same capacity, when the MUR involves the treasurer's violation of a legal obligation that the statute or regulations impose specifically on committee treasurers or when a reasonable inference from the alleged violation is that the treasurer knew, or should have known, about the facts constituting a violation.<sup>8</sup> In practice, however, the Commission intends to consider a treasurer the subject of an enforcement proceeding in his or her personal capacity only when available information (or inferences fairly derived therefrom) indicates that the treasurer had knowledge that his or her conduct violated a duty imposed by law, or where the treasurer recklessly failed to fulfill his or her duties under the act and regulations, or intentionally deprived himself or herself of facts giving rise to the violations. If, at any time in the proceeding, the Commission is persuaded that the treasurer did not act with the requisite state of mind, subsequent findings against the treasurer will only be made in his or her official capacity.<sup>9</sup>

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

#### V. Treasurers in Both Capacities

There will likely be cases in which the treasurer is subject to Commission action in both his or her official and personal capacity, as explained in *supra* sections III. and IV. In such cases, the Commission will clearly designate that the findings are being made against the treasurer in both capacities. 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)).

For example, if a complaint alleges a violation such as coordination or receipt of contributions in the name of another, the Commission intends initially to name the treasurer 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 the Commission 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—or acted recklessly, or intentionally deprived himself or herself of the relevant facts, might the Commission make findings

<sup>7</sup> If a past or present treasurer violates a prohibition that applies generally to individuals, the treasurer may be named as a respondent in his or her personal capacity, and findings may 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. The Act and the Commission's regulations apply to any "person," which includes individuals. 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).

<sup>8</sup> 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." In fact, in some instances, the Act and the Commission's regulations specifically impose obligations on committees and committee officers and candidates. See, e.g., 2 U.S.C. 441a(f) (receipt of excessive contributions), 11 CFR 104.7(b) (best efforts).

<sup>9</sup> Conversely, when a reason-to-believe finding is made against a treasurer in his or her official capacity only, but the potential violations at issue involve obligations specifically imposed by the Act or regulations on treasurers, the notice of the finding will be accompanied by a letter advising that the Commission could later decide to pursue the treasurer in a personal capacity if information shows that the treasurer knowingly and willfully violated the Act, or recklessly failed to fulfill the duties imposed by law, or intentionally deprived himself or herself of the operative facts giving rise to the violation.

against the treasurer in his or her personal capacity.

In cases where the treasurer is subject to Commission action in both official and personal capacities, the respondents could be named as "John Doe for Congress and Joe Smith, in his official capacity as treasurer and in his personal capacity." Alternatively, the respondents could be named as "John Doe for Congress and Joe Smith, in his official capacity as treasurer" and "Joe Smith, in his personal capacity." Regardless of the form of the notification, where a treasurer has been named in both his or her official and personal capacities, any resulting conciliation agreement would be signed by the 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 in a matter under review. Often the specific individual who was the treasurer at the time of a violation is no longer the treasurer during 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.

Currently, when OGC discovers that a committee has changed treasurers after the date of the activity on which the finding was based, 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 OGC's 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 as to the new treasurer.

When the Commission pursues a current treasurer in his or her official

capacity, successor treasurers will 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.<sup>10</sup>

When a predecessor treasurer may be personally liable, the Commission could 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 personally and this treasurer is later replaced, the Commission could 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 Commission does not intend to pursue intermediate treasurers.<sup>11</sup> *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

<sup>10</sup> Pursuant to the final policy, the Commission is not legally obligated to undertake the requirements of 2 U.S.C. 437g(a)(3) when a successor treasurer begins 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.

<sup>11</sup> For example, while Treasurer A is the treasurer for Joe Smith for Congress, a violation occurs that subjects A to official liability and potentially to individual liability. Treasurer A would be named in his official capacity and notified in a reason-to-believe notification of the potential for personal liability. After the enforcement action has begun, Treasurer A resigns and Treasurer B takes over. The Commission would pursue Treasurer B in her official capacity, and if the circumstances warranted, Treasurer A in his individual capacity. If Treasurer B resigns and is succeeded by Treasurer C prior to the conclusion of the enforcement matter, the Commission would then continue to pursue Treasurer A in his individual capacity and pursue Treasurer C in her official capacity. Treasurer B would no longer be named in her official capacity.

whom an official capacity suit can be maintained. \* \* \*").<sup>12</sup>

#### VII. Conclusion

Effective as of the date this Policy Statement is published in the **Federal Register**, and as more fully explained above, the Commission will consider treasurers of political committees subject to enforcement proceedings as follows:

1. In enforcement proceedings where a political committee is a respondent, the committee's current treasurer will be subject to Commission action "in (his or her) official capacity as treasurer."

2. In enforcement proceedings where information indicates that a treasurer (past or present) of a political committee (a) knowingly and willfully violated the Act or regulations, (b) recklessly failed to fulfill the duties imposed by a provision of the Act or regulations that applies specifically to treasurers, or (c) intentionally deprived himself or herself of the operative facts giving rise to a violation, the treasurer may be subject to Commission action "in (his or her) personal capacity."

3. In enforcement proceedings where information indicates that a treasurer of a political committee is subject to findings in both an official and personal capacity (*i.e.*, information indicates that the committee's current treasurer violated the Act or regulations with the requisite state of mind described in #2 above), the current treasurer may be subject to Commission action in both an official and personal capacity.

4. When the Commission makes findings as to a treasurer in his or her official capacity, successor treasurers will be substituted as if the findings had been made as to the successor.

5. In enforcement proceedings involving provisions of the Act or regulations that apply generally to individuals (*e.g.*, prohibitions against the making of an excessive contribution), the treasurer will be subject to Commission action in his or her personal capacity the same as any other individuals.

<sup>12</sup> 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 court's statement in *California Democratic Party* underscores the need for the Commission to delineate more clearly the capacity in which it pursues treasurers.

Dated: December 23, 2004.

**Bradley A. Smith,**

*Chairman, Federal Election Commission.*

[FR Doc. 04-28668 Filed 12-30-04; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2004-19969; Directorate Identifier 2004-SW-43-AD; Amendment 39-13923; AD 2004-26-11]

RIN 2120-AA64

#### Airworthiness Directives; Bell Helicopter Textron Canada Model 222, 222B, 222U, 230, and 430 Helicopters

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD) for the specified Bell Helicopter Textron (BHTC) model helicopters. This action requires certain checks and inspections of the tail rotor blades. If a crack is found, before further flight, this AD requires replacing the tail rotor blade (blade) with an airworthy blade. This amendment is prompted by three reports of cracked blades found during scheduled inspections. The actions specified in this AD are intended to detect a crack in the blade and prevent loss of a blade and subsequent loss of control of the helicopter.

**DATES:** Effective January 18, 2005.

Comments for inclusion in the Rules Docket must be received on or before March 4, 2005.

**ADDRESSES:** Use one of the following addresses to submit comments on this AD:

- DOT Docket Web site: Go to <http://dms.dot.gov> and follow the instructions for sending your comments electronically;
  - Government-wide rulemaking Web site: Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically;
  - Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590;
  - Fax: (202) 493-2251; or
  - Hand Delivery: Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- You may get the service information identified in this AD from Bell

Helicopter Textron Canada, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J1R4, telephone (450) 437-2862 or (800) 363-8023, fax (450) 433-0272.

#### Examining the Docket

You may examine the docket that contains the AD, any comments, and other information on the Internet at <http://dms.dot.gov>, or in person at the Docket Management System (DMS) Docket Offices between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone (800) 647-5227) is located on the plaza level of the Department of Transportation Nassif Building at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the DMS receives them.

**FOR FURTHER INFORMATION CONTACT:** Sharon Miles, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations and Guidance Group, Fort Worth, Texas 76193-0111, telephone (817) 222-5122, fax (817) 222-5961.

**SUPPLEMENTARY INFORMATION:** This amendment adopts a new AD for the specified BHTC model helicopters. This action requires certain checks and inspections of the blades. If a crack is found, before further flight, this AD requires replacing the blade with an airworthy blade. This amendment is prompted by three reports of cracked blades found during scheduled inspections. This condition, if not detected, could result in loss of a blade and subsequent loss of control of the helicopter.

Transport Canada, the airworthiness authority for Canada, notified the FAA that an unsafe condition may exist on the specified BHTC model helicopters. Transport Canada advises of the discovery of cracked blades during scheduled inspections on three occasions. Two cracks originated from the outboard feathering bearing bore underneath the flanged sleeves. The third crack started from the inboard feathering bearing bore. Investigation found that the cracks originated from either a machining burr or a corrosion site in the bearing bore underneath the flanged sleeves.

BHTC has issued Alert Service Bulletin (ASB) No. 222-04-100 for Model 222 and 222B helicopters, No. 222U-04-71 for Model 222U helicopters, No. 230-04-31 for Model 230 helicopters, and No. 430-04-31 for Model 430 helicopters, all dated August 27, 2004. The ASBs specify a repetitive visual inspection every 3 hours time-in-service (TIS) and a 50-hour inspection of the blade root end around the

feathering bearings for a crack. Transport Canada classified these ASBs as mandatory and issued AD CF-2004-21, dated October 28, 2004, to ensure the continued airworthiness of these helicopters in Canada.

These helicopter models are manufactured in Canada and are type certificated for operation in the United States under the provisions of 14 CFR 21.29 and the applicable bilateral agreement. Pursuant to the applicable bilateral agreement, Transport Canada has kept the FAA informed of the situation described above. The FAA has examined the findings of Transport Canada, reviewed all available information, and determined that AD action is necessary for products of these type designs that are certificated for operation in the United States.

This unsafe condition is likely to exist or develop on other helicopters of the same type designs. Therefore, this AD is being issued to prevent loss of a blade and subsequent loss of control of the helicopter. This AD requires the following:

- Within 3 hours time-in-service (TIS), and at specified intervals, clean and visually check both sides of each blade for a crack in the area around the tail rotor feathering bearing. An owner/operator (pilot) may perform the check for cracked blades. Pilots may perform these checks because they require no tools, can be done by observation, and can be done equally well by a pilot or a mechanic. However, the pilot must enter compliance with these requirements into the helicopter maintenance records by following 14 CFR 43.11 and 91.417(a)(2)(v).
- Within 50 hours TIS and at specified intervals, clean and inspect both sides of each blade for a crack using a 10X or higher magnifying glass.
  - If a crack is found even in the paint during a visual check or during a 50-hour TIS inspection, before further flight, a further inspection of the blade for a crack is required as follows:
    - Remove the blade. Remove the paint to the bare metal in the area of the suspected crack by using Plastic Metal Blasting (PMB) or a nylon web abrasive pad and abrading the blade surface in a span-wise direction only.
    - Using a 10X or higher power magnifying glass, inspect the blade for a crack.
    - If a crack is found, before further flight, replace the blade with an airworthy blade.
    - If no crack is found in the blade surface, refinish the blade by applying one coat of MIL-P-23377 or MIL-P-85582 Epoxy Polyamide Primer so that the primer overlaps the existing coats