



FEDERAL ELECTION COMMISSION
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2003 DEC 12 P 1:04

December 12, 2003

MEMORANDUM

AGENDA ITEM
For Meeting of: 12-18-03

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
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SUBMITTED LATE

SUBJECT: Enforcement Treasurer Policy – Official and Personal Capacities

I. INTRODUCTION

For some time, the Commission's practice of systematically naming treasurers "as treasurer" when a committee is named as a respondent has been a source of controversy and confusion. Last year, this Office began examining the issues underlying the treasurer policy; however, more pressing matters, such as the BCRA rulemakings and litigation, commanded this Office's resources and took attention away from these issues. More recently, during the Enforcement Policy Hearing in June 2003, attorneys who regularly represent clients in Commission enforcement proceedings raised concerns about hardship and ambiguity created by the Commission's treasurer policy. At least one commenter suggested that the Commission examine the feasibility of more clearly stating in what capacity treasurers are named as respondents in matters under review ("MUR"), explicitly naming treasurers in their "official" and/or "personal" capacities.¹

This Office proposes that the Commission modify its policy to name more clearly treasurers in their "official" and/or "personal" capacities. Specifically, when a complaint asserts sufficient allegations to warrant naming a committee as a respondent, the committee's current

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).

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. Below, we review the Commission's present treasurer naming policy and the problems that have arisen from its application; then discuss more thoroughly our proposal to change the policy; and finally, set out recommendations for instituting such a policy change.²

II. OVERVIEW OF THE PRESENT POLICY

In 1983, the Commission formally adopted a policy whereby, as a matter of course, the treasurer of a political committee would be named as a respondent, along with the committee, when proceeding against a committee for any potential violations of the Act. *See* Agenda Doc. #83-119. Under that policy, the Commission directed that treasurers be named as respondents in their official capacity and named individually only if the Commission had a sufficient basis for believing that there was individual liability. *See id.* In 1984, the Commission directed that successor treasurers be named as respondents in their official capacity in enforcement matters alleging violations of the Act that occurred during the tenure of prior treasurers. *See* Agenda Doc. #84-79. Applying this policy, the Commission currently names committee treasurers with the designation of "as treasurer," which is understood within the agency to mean that the treasurer is named in his or her representative capacity.

The current convention, however, does not make clear when the Commission finds that treasurers have personally violated an obligation or prohibition of the Act or regulations and when they are simply named as the individual equivalent of the committee itself. This lack of clarity is unfair to treasurers and is also a disservice to the public who may be confused about the nature of Commission findings or the reason for the treasurer's presence as a respondent in a conciliation agreement. Attorneys who represent clients in enforcement proceedings testified at the June hearing that this ambiguity can confuse treasurers during the enforcement process, cause unnecessary anxiety, and delay or frustrate conciliation. *See* Tr. of Public Hearing on Enforcement Procedures (June 11, 2003), pp. 88–93, 102–04. These witnesses also asserted that this ambiguity can impact treasurers for years, by prolonging or precluding opportunities for employment or political appointments; obstructing personal, home, or educational loan applications; or triggering professional disciplinary proceedings. *See id.* The failure to be clear in a probable cause finding also leads to problems if the Commission proceeds to litigation on a case – if it is unclear whether the Commission has made probable cause findings against the

² Recognizing the concerns that have been raised about applying this proposed policy to the Administrative Fines Program, i.e., to subjecting treasurers to personal liability for routine late filing violations through the Administrative Fines Program, this Office is deferring any recommendation on applying the proposed policy to Administrative Fines cases until the legal and policy ramifications of doing so can be more comprehensively analyzed.

treasurer personally, then it is equally unclear when the Commission files suit whether the statutory predicate for seeking a civil penalty from the treasurer himself or herself has been established.

III. PROPOSED POLICY

Due to the problems arising from the present policy, this Office recommends that the Commission adopt a policy to state more clearly whether a treasurer is being pursued in his or her official or personal capacity. The proposed policy change will further the underlying rationale of the 1983 and 1984 directives, while curing the problems arising from their present application. The proposed modification will also 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.³ 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.

A. *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").

³ As discussed *infra* Part III.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).⁴ 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.

B. 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 RTB or PCTB) 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.⁵ 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.⁶ Finally, specifying whether a treasurer is named in his or her official or personal capacity is consistent with use of these terms as pleading conventions in court actions. A probable cause

⁴ 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).

⁵ 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 C.F.R. § 102.7(a) (designation of assistant treasurer).

⁶ 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.

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.

C. 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 C.F.R. § 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 C.F.R. § 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 ought to be named as a respondent in a MUR in his or her personal capacity, and findings should 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.⁷

Similarly, if a past or present treasurer violates a prohibition that applies to individuals, the treasurer should be named as a respondent in his or her personal capacity, and findings should 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.⁸ Should the

⁷ 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."

⁸ 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

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.⁹

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 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.)).¹⁰

D. Naming Treasurers in Both Capacities

Treasurers will 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 FTC 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 we are persuaded through the respondent's response to the complaint, or the response to the Factual and Legal, or the Respondent's Brief at the Probable Cause stage, or our own investigation, that the treasurer was unaware, and had no

(receipt of contributions from foreign nationals), and 441f (making and knowingly accepting contributions in the name of another).

⁹ 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.

¹⁰ 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).

reason to know, of the operative facts giving rise to a violation, we 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 should not be drawn as a routine matter. We propose with respect to complaints of this nature that we initially generate 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 we learn 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 -- would we propose that findings be made against the treasurer in his or her personal capacity.

In cases where the treasurer has both official and personal liability, the respondents should be named as "John Doe for Congress and Joe Smith, in his official capacity as treasurer and in his personal capacity." Alternatively, the respondents may 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 should be signed by the current treasurer on behalf of both the committee and the treasurer in his or her personal capacity.

E. 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 policy, when this Office discovers that a committee has changed treasurers since the point of the underlying violation, we typically note the change of treasurer, the date of the change, the former treasurer's name, and indicate whether an amendment was made to the Statement of Organization in our next report to the Commission. If a treasurer change is made after a finding of reason to believe, then we typically include the new treasurer and note the change in our next report on the matter. If a treasurer change is made after a finding of probable cause to believe, we send 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, we typically return 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 must 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.¹¹

When a predecessor treasurer is personally liable, the Commission should 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 pursues a treasurer *both* officially and individually and this treasurer is later replaced, the Commission should 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 Commission should not pursue intermediate treasurers.¹² *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 . . .”).¹³

IV. RECOMMENDATIONS

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.”

¹¹ 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 may choose to inform a new treasurer of the pending action and make copies of the briefs available to the successor treasurer.

¹² 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.

¹³ 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., ¶¶ 8, 58–59, Prayer ¶¶ 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.

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.”