



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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AGENDA ITEM
For Meeting of: 12-16-04

SUBMITTED LATE

TO: The Commission

THROUGH: James A. Pehrkonig
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rhonda J. Vosdinger
Associate General Counsel for Enforcement

Peter G. Blumberg
Attorney

SUBJECT: Treasurer Policy – Official and Individual Capacities

I. Introduction

The Office of General Counsel recommends that the Commission adopt the attached Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings. The proposed Statement clarifies when treasurers as respondents are subject to Commission action in their official capacity as treasurer and when the Commission will name individual treasurers as respondents in their personal capacity.

A version of the proposed Statement was published in the January 28, 2004 *Federal Register*. 69 *Federal Register* 4092 (January 28, 2004). The published document sought comments on all aspects of the draft policy, including whether there are circumstances warranting flexibility in the policy's application, whether the Commission should consider a treasurer's "best efforts" to comply with the law, and whether the Commission should apply this proposed policy in matters arising out of the Administrative Fines program. One comment, from Paul E. Sullivan of Foley & Lardner, was received. This memorandum briefly reviews Mr. Sullivan's comment and recommends that the Commission adopt the attached Treasurer Naming Policy. See Attachment.

II. Discussion of Comment

Mr. Sullivan welcomes the Commission's effort to clarify its treasurer naming policy and generally supports the proposal. At the same time, he suggests several changes, both on the execution of the policy as well as the process for enacting it, that he believes will assist treasurers to better understand their potential personal liability. While constructive, these suggestions ultimately are unnecessary.

Specifically, Mr. Sullivan suggests that when a treasurer is a respondent in his or her official capacity, a reference only to the position of treasurer without including the treasurer's name is sufficient. This issue was addressed in the proposed policy statement, where the benefits of including a specific name were enumerated. For example, the practice ensures that an individual is empowered by law to disburse civil penalty payments, make disgorgements or refunds, and carry out other remedies required in conciliation agreements. Also, it is useful to identify the specific individual who, on behalf of the committee, will be served with notices. Ensuring that there is a specific person to respond to inquiries and notices on behalf of the committee also promotes accountability. Finally, it is useful to specify individuals by name in court pleadings to clarify for the district court the relief being sought. Mr. Sullivan also proposes that treasurers named in both a personal and an official capacity receive separate notifications outlining the basis for each finding. The proposed policy statement indicates that the Commission intends to retain flexibility to process matters on a case-by-case basis, and send either separate notifications or, in some instances, joint notifications addressing official-capacity and personal-capacity violations.

Mr. Sullivan also suggests that the policy should affirmatively state that a treasurer found to have violated the law in his or her official capacity is not personally liable for the payment of any civil penalties in the event his or her political committee lacks funds to make such a payment. Mr. Sullivan's point is already acknowledged in the Policy Statement, where it is noted that in the post-probable cause to believe stage the Commission would be entitled to civil penalties only from the political committees when the treasurer has been named a respondent in an official capacity.

Finally, Mr. Sullivan suggests that a rulemaking on treasurer liability may provide additional notice to the regulated community and suggests that it would be useful for the Commission to identify the "unique provisions" for which a treasurer might be pursued in his or her personal capacity. The proposals regarding when to name a treasurer in his or her personal capacity are based on the plain letter of the statutes and regulations describing treasurer responsibilities and obligations; thus, additional rulemaking would be superfluous. As was pointed out in the draft policy statement, the statute's use of "treasurers" indicates that Congress intended treasurer responsibility for certain functions, and the statute constitutes notice to treasurers. If Congress had intended that only political committees would be held liable for violations of the Act, it could have easily accomplished this outcome by imposing reporting, recordkeeping, and other duties on "committees" rather than "treasurers." The Act and its implementing regulations are published and readily accessible to treasurers. Further, the policy

statement describes a number of specific statutes and regulations that place responsibilities on treasurers, and to that extent, the Commission has further identified unique provisions covered by the policy. Moreover, the attached Policy Statement itself will be published in the *Federal Register*, could be placed on the Commission's website, could be summarized in the *FEC Record*, and could be referenced in FEC brochures. Through this Policy Statement, the Commission would announce its intentions in certain areas rather than attempting an exhaustive list of factors it can consider in deciding who to name as a respondent, thereby achieving the goal of notice while retaining flexibility for the Commission, especially given the expectation that the naming of treasurers in a personal capacity will occur relatively infrequently.

III. Final Statement of Policy

After reviewing the comment received on the Draft Statement, the Office of General Counsel has prepared a final Statement of Policy regarding the naming of treasurers as respondents in enforcement matters. The Office of General Counsel recommends that the Commission issue this Statement of Policy and implement it immediately.

This Office further recommends that the Statement of Policy be transmitted for publication in the *Federal Register* as required by the Freedom of Information Act and submitted to Congress in accordance with the Congressional Review Act ("CRA"). 5 U.S.C. §§ 552(a)(1)(D) and 801(a).

This document represents a general statement of policy announcing the general course of action that the Commission intends to follow. This policy statement does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay in effective date under 5 U.S.C. § 553 of the Administrative Procedure Act ("APA"). As such, it does not bind the Commission or any member of the general public. The provisions of the Regulatory Flexibility Act, which apply only when notice and comment are required by the APA or another statute, are not applicable. Because this non-binding policy statement is not a "major rule" within the meaning of the CRA and there is no applicable delay requirement in the Act,¹ the Statement of Policy may be put into effect immediately upon its publication in the *Federal Register*.

IV. Recommendation

The Office of the General Counsel recommends that the Commission take the following actions:

1. Approve the attached Statement of Policy for publication in the Federal Register.

¹ We note that the congressional submission requirements and accompanying delay in effective date specified in 2 U.S.C. § 438(d)(1) and 26 U.S.C. § 9039(c) apply only to a "separable rule of law" and, in any event, were removed by the Federal Reports Elimination and Sunset Act of 1995, Pub. L. 104-66 (1995).

2. Direct the Office of General Counsel to transmit the Statement of Policy to Congress in accordance with the Congressional Review Act, 5 U.S.C. § 801 *et seq.*

Attachment
Draft Final Statement of Policy

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 111**

3 **[NOTICE 2004 -]**

4 **STATEMENT OF POLICY REGARDING**

5 **TREASURERS SUBJECT TO ENFORCEMENT PROCEEDINGS**

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Statement of Policy.

8 **SUMMARY:** The Commission is issuing a Policy Statement to clarify when, in the
9 course of an enforcement proceeding (known as a Matter Under
10 Review or "MUR"), a treasurer is subject to Commission action in his
11 or her official or personal capacity, or both. Under this policy, when
12 the Commission investigates alleged violations of the Federal Election
13 Campaign Act, as amended, the Presidential Election Campaign Fund
14 Act, and the Presidential Primary Matching Payment Account Act
15 (collectively "the Act" or "FECA") involving a political committee,
16 the treasurer will typically be subject to Commission action only in his
17 or her official capacity. However, when information indicates that a
18 treasurer has knowingly and willfully violated a provision of the Act or
19 regulations, or has recklessly failed to fulfill duties specifically
20 imposed on treasurers by the Act, or has intentionally deprived himself
21 or herself of the operative facts giving rise to the violation, the
22 Commission will consider the treasurer to have acted in a personal
23 capacity and make findings (and pursue conciliation) accordingly.

1 This Policy Statement also addresses situations in which treasurers are
2 subject to Commission action in both their official and personal
3 capacities, and situations where successor treasurers are named.

4 The goal in adopting this policy is to clarify when a treasurer
5 is subject to Commission action in a personal or official capacity,
6 while at the same time preserving the Commission's ability to obtain
7 an appropriate remedy that will satisfactorily resolve enforcement
8 matters, or to seek relief in court, if necessary, against a live person.
9 Importantly, the policy is grounded in the statutory obligations
10 specifically imposed on treasurers and well-established legal
11 distinctions between official and personal capacity proceedings.

12 **DATE:** December 16, 2004.

13 **FOR FURTHER**
14 **INFORMATION**
15 **CONTACT:** Peter G. Blumberg, Attorney, 999 E Street, NW, Washington, D.C.
16 20463, (202) 694-1650 or (800) 424-9530.

17 **SUPPLEMENTARY**
18 **INFORMATION:**

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22 **I. Introduction.**

23 The Commission is modifying its current practices to specify more clearly when a
24 treasurer is subject to a Commission enforcement proceeding in his or her "official" and/or

1 “personal” capacity.¹ Specifically, when a complaint asserts sufficient allegations to warrant
2 naming a political committee as a respondent, the committee’s current treasurer will also be
3 named as a respondent in his or her official capacity. In these circumstances, reason-to-
4 believe and probable cause findings against the committee will also be accompanied by
5 findings against the current treasurer in his or her official capacity. When the complaint
6 asserts allegations that involve a past or present treasurer’s violation of obligations that the
7 Act or regulations impose specifically on treasurers, then that treasurer may, in the
8 circumstances described below, be named in his or her personal capacity, and findings may
9 be made against the treasurer in that capacity. Thus, in some matters the current treasurer
10 could be named in both official and personal capacities. Maintaining the Commission’s
11 ability to pursue a treasurer as a respondent in either official or personal capacity allows the
12 Commission discretion to fashion an appropriate remedy for violations of the Act.²

13 Notably, political committees are artificial entities that can act only through their
14 agents, such as their treasurers, and often can be, by their very nature, ephemeral entities that
15 may exist for all practical purposes for a limited period, such as during a single election
16 cycle. Due to these characteristics, identifying a live person who is responsible for
17 representing the committee in an enforcement action is particularly important. Without a live
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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 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 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.

1 person to provide notice to and/or to attach liability to, the Commission may find itself at a
2 significant disadvantage in protecting the public interest and in ensuring compliance with the
3 laws it is responsible for enforcing. By virtue of their authority to disburse funds and file
4 disclosure reports and to amend those reports, treasurers of committees are in the best
5 position to carry out the requirements of a conciliation agreement such as paying a civil
6 penalty, refunding or disgorging contributions, and amending reports.

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

16 Although the Commission may be entitled to take action as to a treasurer in both an
17 official and individual capacity, in the typical enforcement matter the Commission expects
18 that it will proceed against treasurers only in their official capacities. However, the
19 Commission will consider treasurers parties to enforcement proceedings in their personal
20 capacities where information indicates that the treasurer knowingly and willfully violated an
21 obligation that the Act or regulations specifically impose on treasurers or where the treasurer
22 recklessly failed to fulfill the duties imposed by law, or where the treasurer has intentionally
23 deprived himself or herself of the operative facts giving rise to the violation. In these

1 circumstances, the Commission may decide to find reason to believe the treasurer has
2 violated the Act in his or her personal capacity, as well as finding reason to believe the
3 committee violated the Act.

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

11 The Commission's Proposed Statement of Policy Regarding Naming of Treasurers in
12 Enforcement Matters was published in the January 28, 2004 *Federal Register*. 69 *Federal*
13 *Register* 4092 (January 28, 2004). One comment was received. The commenter stated that
14 the Commission's effort to clarify its treasurer naming policy is welcome, but he made
15 several recommendations for how the Commission could assist treasurers to better
16 understand their potential personal liability, such as requiring separate notices in instances
17 where a treasurer was named in his or her individual and official capacities, and by enacting
18 the policy's proposals through a rulemaking, rather than a policy statement. The
19 commenter's suggestions were considered, but in order to allow the Commission to retain

³ As discussed *infra* Part II., 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.

1 flexibility in processing its cases, and because the policy statement combined with existing
2 laws and Commission regulations provide sufficient notice to treasurers of their
3 responsibilities, the suggested changes were not implemented.

4
5 II. The Official/Personal Capacity Distinction

6 In the seminal case of Kentucky v. Graham, 473 U.S. 159 (1985), the United States
7 Supreme Court discussed the distinction between official capacity and personal capacity
8 suits. The Court determined that a suit against an officer in her official capacity “generally
9 represent[s] only another way of pleading an action against an entity of which an officer is an
10 agent.” Id. at 165. In other words, an official capacity proceeding “is not a suit against the
11 official but rather is a suit against the official’s office.” Will v. Mich. Dept. of State Police,
12 491 U.S. 58, 71 (1989). Accordingly, “an official-capacity suit is, in all respects other than
13 name, to be treated as a suit against the entity.” Graham, 473 U.S. at 166. Therefore, in an
14 official capacity suit, the plaintiff seeks a remedy from the entity, not the particular officer
15 personally.

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

1 The “distinction between claims aimed at a defendant in his individual as opposed to
2 representative capacity can be found across the law.” McCarthy, 22 F.3d at 360 (citing
3 numerous Supreme Court, lower court, and state cases referencing differences between
4 individual and official capacity claims in multiple fields of law).⁴ The official
5 capacity/individual capacity distinction also carries societal significance. As the McCarthy
6 court explained:

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

15 Id.

16

17 III. Treasurers in Their Official Capacity

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).

1 Clearly indicating that the current treasurer is a party to an enforcement proceeding in
2 his or her official capacity will improve the Commission’s enforcement of the law in a
3 number of ways. Most importantly, it clarifies that findings by the Commission (whether
4 “Reason To Believe” or “Probable Cause To Believe”) or the signing of a conciliation
5 agreement only concerns the treasurer in his or her capacity as representative of the
6 committee, not personally. The practice also ensures that a named individual who signs the
7 conciliation agreement on behalf of the committee (or obtains legal representation on behalf
8 of the committee) is the one empowered by law to disburse committee funds to pay a civil
9 penalty, disgorge funds, make refunds, and carry out other monetary remedies that the
10 committee agrees to through the conciliation agreement.⁵ Also, naming a treasurer (in his or
11 her official capacity), as opposed to naming simply the office of treasurer or just the
12 committee, not only provides the Commission with an individual in every instance to serve
13 with notices throughout the proceeding, but also results in more accountability on behalf of
14 the committee – that is, a particular person who will ensure that a committee is responsive to
15 Commission findings.⁶ Finally, specifying whether a treasurer is a party to an enforcement
16 proceeding in his or her official or personal capacity is consistent with use of these terms as
17 pleading conventions in court actions. A probable cause finding against a treasurer in his or
18 her official capacity makes clear to a district court in enforcement litigation that the

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 CFR 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.

1 Commission is seeking relief against the committee, and would only entitle the Commission
2 to obtain a civil penalty from the committee. See Graham, 473 U.S. at 165.

3

4 IV. Treasurers in Their Personal Capacities

5 The Act places certain legal obligations on committee treasurers, the violation of
6 which makes them personally liable.⁷ See, e.g., 2 U.S.C. 432(c) (keep an account of various
7 committee records), 432(d) (preserve records for three years), 434(a)(1) (file and sign reports
8 of receipts and disbursements). The Commission’s regulations further require treasurers to
9 examine and investigate contributions for evidence of illegality. See 11 CFR 103.3. Due to
10 their “pivotal role,” treasurers may be held personally liable for failing to fulfill their
11 responsibilities under the Act and the Commission’s regulations. See Toledano, 317 F.3d at
12 947 (“The Act requires every political committee to have a treasurer, 2 U.S.C. 432(a), and
13 holds him personally responsible for the committee’s recordkeeping and reporting duties,
14 id. 432(c)–(d), 434(a) Federal law makes the treasurer responsible for detecting [facial
15 contribution] illegalities, 11 CFR 103.3(b), and holds him personally liable if he fails to
16 fulfill his responsibilities, see 2 U.S.C. 437g(d)”) (emphasis added); see also FEC v.
17 John A. Dramesi for Cong. Comm., 640 F. Supp. 985 (D.N.J. 1986) (holding treasurer
18 responsible for failing to “make . . . best efforts to determine the legality of” an excessive

⁷ 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).

1 contribution); FEC v. Gus Savage for Cong. '82 Comm., 606 F. Supp. 541, 547 (N.D. Ill.
2 1985) ("It is the treasurer, and not the candidate, who becomes the named defendant in
3 federal court, and subjected to the imposition of penalties ranging from substantial fines to
4 imprisonment."); 104.14(d) ("Each treasurer of a political committee, and any other person
5 required to file any report or statement under these regulations and under the Act shall be
6 personally responsible for the timely and complete filing of the report or statement and for
7 the accuracy of any information or statement contained in it.") (emphasis added).

8 Thus, a treasurer may be named as a respondent in a Matter Under Review in his or
9 her personal capacity, and findings may be made against a treasurer in the same capacity,
10 when the MUR involves the treasurer's violation of a legal obligation that the statute or
11 regulations impose specifically on committee treasurers or when a reasonable inference from
12 the alleged violation is that the treasurer knew, or should have known, about the facts
13 constituting a violation.⁸ In practice, however, the Commission intends to consider a
14 treasurer the subject of an enforcement proceeding in his or her personal capacity only when
15 available information (or inferences fairly derived therefrom) indicates that the treasurer had
16 knowledge that his or her conduct violated a duty imposed by law, or where the treasurer
17 recklessly failed to fulfill his or her duties under the act and regulations, or intentionally
18 deprived himself or herself of facts giving rise to the violations. If, at any time in the

⁸ 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 C.F.R. 104.7(b) (best efforts).

1 proceeding, the Commission is persuaded that the treasurer did not act with the requisite state
2 of mind, subsequent findings against the treasurer will only be made in his or her official
3 capacity.⁹

4 Should the Commission file suit in district court following a finding of probable cause
5 against a treasurer in his or her personal capacity, judicial relief, including an injunction and
6 payment of a civil penalty, could be obtained against the treasurer personally. Graham, 473
7 U.S. at 166-168. Likewise, when the Commission obtains relief from a treasurer personally,
8 the obligation will follow the individual. Thus, when a treasurer in his or her personal
9 capacity agrees to pay a civil penalty through a conciliation agreement, or is ordered to pay a
10 civil penalty by a district court, a personal obligation exists to pay the civil penalty. (A
11 separate civil penalty would likely be assessed against the committee itself.) Likewise, a
12 cease and desist provision (negotiated through conciliation) or an injunction (imposed by a
13 district court) against a treasurer in his or her personal capacity will still apply to that
14 treasurer in the event he or she subsequently becomes treasurer with another committee. Cf.
15 Sec’y Exch. Comm’n v. Coffey, 493 F.2d 1304, 1311 n.11 (6th Cir. 1974) (“The significance
16 of naming an officer . . . personally is that ‘otherwise he is bound only as long as he remains
17 an officer . . . , whereas if he is named [personally] he is personally enjoined without limit of
18 time.’”) (quoting 6 L. Loss, Securities Regulation 4113 (1969, supp. to 2d ed.)).

⁹ 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.

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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 against the treasurer in his or her personal capacity.

1 In cases where the treasurer is subject to Commission action in both official and
2 personal capacities, the respondents could be named as “John Doe for Congress and Joe
3 Smith, in his official capacity as treasurer and in his personal capacity.” Alternatively, the
4 respondents could be named as “John Doe for Congress and Joe Smith, in his official
5 capacity as treasurer” and “Joe Smith, in his personal capacity.” Regardless of the form of
6 the notification, where a treasurer has been named in both his or her official and personal
7 capacities, any resulting conciliation agreement would be signed by the treasurer on behalf of
8 both the committee and the treasurer in his or her personal capacity.

9

10 VI. Successor Treasurers/Substitution

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

17 Currently, when OGC discovers that a committee has changed treasurers after the date
18 of the activity on which the finding was based, OGC typically notes the change of treasurer,
19 the date of the change, the former treasurer’s name, and indicates whether an amendment was
20 made to the Statement of Organization in OGC’s next report to the Commission. If a
21 treasurer change is made after a finding of reason to believe, then OGC typically includes the
22 new treasurer and notes the change in its next report on the matter. If a treasurer change is
23 made after a finding of probable cause to believe, OGC sends the new treasurer a

1 supplemental probable cause brief (incorporating the prior probable cause brief), which states
2 that the Commission found probable cause to believe against the committee and the
3 treasurer's predecessor and will recommend probable cause against the new treasurer. After
4 receiving a response or waiting until the expiration of the response period, OGC typically
5 returns to the Commission with a recommendation as to the new treasurer.

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

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

18 If the Commission were to pursue a treasurer both officially and personally and this
19 treasurer is later replaced, the Commission could pursue the predecessor treasurer for any

¹⁰ 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.

1 violations for which he or she is personally liable, and substitute the successor treasurer for
2 official capacity violations. Absent some independent basis of liability, the Commission does
3 not intend to pursue intermediate treasurers.¹¹ See Cal. Democratic Party v. FEC, 13
4 F. Supp. 2d 1031, 1037 (E.D. Cal. 1998) (dismissing individual capacity claims against a
5 former treasurer because “there is no allegation that [the treasurer] violated any personal
6 obligation” and dismissing official capacity claims against him “since [he] is no longer
7 treasurer . . . and thus, is not the appropriate person against whom an official capacity suit can
8 be maintained . . .”).¹²

9
10 VII. Final Statement of Policy

11 In light of the considerations explained above and after carefully reviewing the
12 comment submitted on this matter, the Commission hereby announces that, from the date of

¹¹ 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.

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 court’s statement in California Democratic Party underscores the need for the Commission to delineate more clearly the capacity in which it pursues treasurers.

1 publication of this notice, it intends to exercise its discretion in enforcement matters by
2 naming treasurers as follows:

3 1. In enforcement actions where a political committee is a respondent, the
4 Commission will name as respondents the committee and its current treasurer
5 “in (his or her) official capacity as treasurer.”

6 2. In enforcement actions where information indicates that treasurer may have
7 violated a provision of the Act or regulations that applies specifically to
8 treasurers, or a provision that applies generally to individuals, the Commission
9 may consider the treasurer a subject to the action “in (his or her) personal
10 capacity.”

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Bradley A. Smith
Chairman
Federal Election Commission

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DATED: _____
BILLING CODE: 6715-01-U