



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

2004 DEC 15 P 2:02

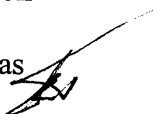
December 15, 2004

**AGENDA ITEM**  
For Meeting of: 12-16-04

**SUBMITTED LATE**

MEMORANDUM

TO: The Commission

FROM: Scott E. Thomas  
Commissioner 

SUBJECT: Alternative re Treasurer Policy

I have concerns about the approach that has emerged in the document produced by the Office of General Counsel. In my view, the Commission should be pursuing treasurers in their personal capacity where the violation relates to a specific responsibility of the treasurer under the law. The statute, as well as Commission regulations and court precedent, place particular duties on treasurers and, in my view, this has led to the high degree of voluntary compliance we have seen to date. To announce that treasurers generally will not have personal responsibility may undermine this success.

I attach a marked-up version of the Office of General Counsel document that would go in the direction I prefer.

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 current treasurer will typically be subject to Commission action in  
17 his or her official capacity. However, when the alleged violation  
18 stems from a duty specifically imposed on the treasurer, like  
19 recordkeeping or reporting functions, the Commission will consider  
20 the responsible treasurer to have acted in a personal capacity and make  
21 findings (and pursue conciliation) accordingly. This Policy Statement  
22 also addresses situations in which treasurers are subject to

Deleted: only

Deleted: 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,

1 Commission action in both their official and personal capacities, and  
2 situations where successor treasurers are named.

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

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

12 **FOR FURTHER**  
13 **INFORMATION**

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

16 **SUPPLEMENTARY**  
17 **INFORMATION:**

18  
19  
20  
21 I. Introduction.

22 The Commission is modifying its current practices to specify more clearly when a  
23 treasurer is subject to a Commission enforcement proceeding in his or her “official” and/or  
24 “personal” capacity.<sup>1</sup> Specifically, when a complaint asserts sufficient allegations to warrant  
25 naming a political committee as a respondent, the committee’s current treasurer will also be

---

<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 (1<sup>st</sup> Cir. 1994).

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

**Deleted:** may, in the circumstances described below,

**Deleted:** may

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

---

<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 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  
12 statutory role, especially the authority to receive and disburse funds (*e.g.*, pay a civil penalty,  
13 refund improper contributions, disgorge ill-gotten funds) on behalf of the committee,  
14 designating the treasurer as the representative of the committee for purposes of compliance  
15 with the Act makes sense.

16 ~~The Commission will consider treasurers parties to enforcement proceedings in their~~  
17 ~~personal capacities where information indicates that the treasurer violated an obligation that~~  
18 ~~the Act or regulations specifically impose on treasurers. In these circumstances, the~~  
19 ~~Commission ordinarily will decide to find reason to believe the treasurer has violated the Act~~  
20 ~~in his or her personal capacity, as well as finding reason to believe the committee violated the~~  
21 ~~Act.~~

**Deleted:** 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, t

**Deleted:** knowingly and willfully

**Deleted:** 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

**Deleted:** may

22 This statement of policy is intended to provide clearer notice to respondents and the  
23 public as to the nature of the Commission's enforcement actions, improve the perception of

1 fairness throughout the regulated community, and merge the Commission's treasurer  
2 designation into conceptually familiar legal principles for the federal judiciary.<sup>3</sup> The  
3 statement first surveys the law on the official/personal capacity distinction; next, addresses  
4 when the Commission will proceed as to treasurers in their official or personal capacity or  
5 both; and finally, resolves the reoccurring issues of successor treasurers and substitution.

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

18

19 II. The Official/Personal Capacity Distinction

---

<sup>3</sup> 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           In the seminal case of Kentucky v. Graham, 473 U.S. 159 (1985), the United States  
2 Supreme Court discussed the distinction between official capacity and personal capacity  
3 suits. The Court determined that a suit against an officer in her official capacity “generally  
4 represent[s] only another way of pleading an action against an entity of which an officer is an  
5 agent.” Id. at 165. In other words, an official capacity proceeding “is not a suit against the  
6 official but rather is a suit against the official’s office.” Will v. Mich. Dept. of State Police,  
7 491 U.S. 58, 71 (1989). Accordingly, “an official-capacity suit is, in all respects other than  
8 name, to be treated as a suit against the entity.” Graham, 473 U.S. at 166. Therefore, in an  
9 official capacity suit, the plaintiff seeks a remedy from the entity, not the particular officer  
10 personally.

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

19           The “distinction between claims aimed at a defendant in his individual as opposed to  
20 representative capacity can be found across the law.” McCarthy, 22 F.3d at 360 (citing  
21 numerous Supreme Court, lower court, and state cases referencing differences between

1 individual and official capacity claims in multiple fields of law).<sup>4</sup> The official  
2 capacity/individual capacity distinction also carries societal significance. As the McCarthy  
3 court explained:

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

12 Id.

13

14 III. Treasurers in Their Official Capacity

15 Clearly indicating that the current treasurer is a party to an enforcement proceeding in  
16 his or her official capacity will improve the Commission’s enforcement of the law in a  
17 number of ways. Most importantly, it clarifies that findings by the Commission (whether  
18 “Reason To Believe” or “Probable Cause To Believe”) or the signing of a conciliation  
19 agreement only concerns the treasurer in his or her capacity as representative of the

---

<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); 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 committee, not personally. The practice also ensures that a named individual who signs the  
2 conciliation agreement on behalf of the committee (or obtains legal representation on behalf  
3 of the committee) is the one empowered by law to disburse committee funds to pay a civil  
4 penalty, disgorge funds, make refunds, and carry out other monetary remedies that the  
5 committee agrees to through the conciliation agreement.<sup>5</sup> Also, naming a treasurer (in his or  
6 her official capacity), as opposed to naming simply the office of treasurer or just the  
7 committee, not only provides the Commission with an individual in every instance to serve  
8 with notices throughout the proceeding, but also results in more accountability on behalf of  
9 the committee – that is, a particular person who will ensure that a committee is responsive to  
10 Commission findings.<sup>6</sup> Finally, specifying whether a treasurer is a party to an enforcement  
11 proceeding in his or her official or personal capacity is consistent with use of these terms as  
12 pleading conventions in court actions. A probable cause finding against a treasurer in his or  
13 her official capacity makes clear to a district court in enforcement litigation that the  
14 Commission is seeking relief against the committee, and would only entitle the Commission  
15 to obtain a civil penalty from the committee. See Graham, 473 U.S. at 165.

16

17 IV. Treasurers in Their Personal Capacities

---

<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 (9<sup>th</sup> 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.

1           The Act places certain legal obligations on committee treasurers, the violation of  
2   which makes them personally liable.<sup>7</sup> See, e.g., 2 U.S.C. 432(c) (keep an account of various  
3   committee records), 432(d) (preserve records for three years), 434(a)(1) (file and sign reports  
4   of receipts and disbursements). The Commission’s regulations further require treasurers to  
5   examine and investigate contributions for evidence of illegality. See 11 CFR 103.3. Due to  
6   their “pivotal role,” treasurers may be held personally liable for failing to fulfill their  
7   responsibilities under the Act and the Commission’s regulations. See Toledano, 317 F.3d at  
8   947 (“The Act requires every political committee to have a treasurer, 2 U.S.C. 432(a), and  
9   holds him personally responsible for the committee’s recordkeeping and reporting duties,  
10   id. 432(c)–(d), 434(a) . . . . Federal law makes the treasurer responsible for detecting [facial  
11   contribution] illegalities, 11 CFR 103.3(b), and holds him personally liable if he fails to  
12   fulfill his responsibilities, see 2 U.S.C. 437g(d) . . . .”) (emphasis added); see also FEC v.  
13   John A. Dramesi for Cong. Comm., 640 F. Supp. 985 (D.N.J. 1986) (holding treasurer  
14   responsible for failing to “make . . . best efforts to determine the legality of” an excessive  
15   contribution); FEC v. Gus Savage for Cong. ’82 Comm., 606 F. Supp. 541, 547 (N.D. Ill.  
16   1985) (“It is the treasurer, and not the candidate, who becomes the named defendant in  
17   federal court, and subjected to the imposition of penalties ranging from substantial fines to  
18   imprisonment.”); 104.14(d) (“Each treasurer of a political committee, and any other person  
19   required to file any report or statement under these regulations and under the Act shall be

---

<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).

1 personally responsible for the timely and complete filing of the report or statement and for  
2 the accuracy of any information or statement contained in it.") (emphasis added).

3 Thus, the statutory language, Commission regulations, and court precedent indicate a  
4 treasurer should be named as a respondent in a Matter Under Review in his or her personal  
5 capacity, and findings should be made against a treasurer in the same capacity, when the  
6 MUR involves the treasurer's violation of a legal obligation that the statute or regulations  
7 impose specifically on committee treasurers.<sup>8</sup> In practice, however, the Commission intends  
8 to consider a treasurer the subject of an enforcement proceeding in his or her personal  
9 capacity only when available information (or inferences fairly derived therefrom) indicates  
10 that the treasurer knew or should have known about the conduct that constituted a violation.  
11 If, at any time in the proceeding, the Commission is persuaded that the treasurer did not act  
12 with the requisite state of mind, subsequent findings against the treasurer will only be made  
13 in his or her official capacity.<sup>9</sup>

Deleted: may

Deleted: may

Deleted: or when a reasonable inference from the alleged violation is that the treasurer knew, or should have known, about the facts constituting a violation.

Deleted: 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.

14 Should the Commission file suit in district court following a finding of probable  
15 cause against a treasurer in his or her personal capacity, judicial relief, including an  
16 injunction and payment of a civil penalty, could be obtained against the treasurer personally.  
17 Graham, 473 U.S. at 166-168. Likewise, when the Commission obtains relief from a  
18 treasurer personally, the obligation will follow the individual. Thus, when a treasurer in his

<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 C.F.R. 104.7(b) (best efforts).

Deleted: <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.

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

12

13 V. Treasurers in Both Capacities

14 There will likely be cases in which the treasurer is subject to Commission action in  
15 both his or her official and personal capacity, as explained in supra sections III. and IV. In  
16 such cases, the Commission will clearly designate that the findings are being made against  
17 the treasurer in both capacities. See, e.g., United States v. Johnson, 541 F.2d 710, 711 (8<sup>th</sup>  
18 Cir. 1976) (applying a similar standard in an action involving the Federal Trade Commission  
19 when finding that “[t]he propriety of including a person both as an individual and as a  
20 corporate officer in a cease and desist order has consistently been upheld in instances where  
21 the person included was instrumental in formulating, directing and controlling the acts and  
22 practices of the corporation”) (citing Fed. Trade Comm’n v. Standard Ed. Soc’y, 302 U.S.

1 112 (1937); Standard Distrib. v. Fed. Trade Comm'n, 211 F.2d 7 (2d Cir. 1954); Benrus  
2 Watch Co. v. Fed. Trade Comm'n, 352 F.2d 313 (8<sup>th</sup> Cir. 1965)).

3 For example, if a complaint alleges a violation such as receipt of a coordinated  
4 communication or receipt of contributions in the name of another during the tenure of the  
5 current treasurer, the Commission normally will name the treasurer as a respondent only in  
6 his or her official capacity. Even though in these cases a reporting violation would stem  
7 from the same operative facts as the principal violation, knowing acceptance of these types of  
8 contributions by the treasurer is not to be assumed. Only if the Commission learns later that  
9 the treasurer had knowledge of the operative facts -- for example, the treasurer knew that an  
10 in-kind contribution stemming from coordination went unreported – or acted recklessly, or  
11 intentionally deprived himself or herself of the relevant facts, might the Commission make  
12 findings against the treasurer in his or her personal capacity.

Deleted: ion  
Deleted: intends initially to  
Deleted: Notably  
Deleted: ,  
Deleted: the  
Deleted: s

13 In cases where the treasurer is subject to Commission action in both official and  
14 personal capacities, the respondents could be named as “John Doe for Congress and Joe  
15 Smith, in his official capacity as treasurer and in his personal capacity.” Alternatively, the  
16 respondents could be named as “John Doe for Congress and Joe Smith, in his official  
17 capacity as treasurer” and “Joe Smith, in his personal capacity.” Regardless of the form of  
18 the notification, where a treasurer has been named in both his or her official and personal  
19 capacities, any resulting conciliation agreement would be signed by the treasurer on behalf of  
20 both the committee and the treasurer in his or her personal capacity.

21  
22 VI. Successor Treasurers/Substitution

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

7 Currently, when OGC discovers that a committee has changed treasurers after the  
8 date of the activity on which the finding was based, OGC typically notes the change of  
9 treasurer, the date of the change, the former treasurer's name, and indicates whether an  
10 amendment was made to the Statement of Organization in OGC's next report to the  
11 Commission. If a treasurer change is made after a finding of reason to believe, then OGC  
12 typically includes the new treasurer and notes the change in its next report on the matter. If  
13 a treasurer change is made after a finding of probable cause to believe, OGC sends the new  
14 treasurer a supplemental probable cause brief (incorporating the prior probable cause brief),  
15 which states that the Commission found probable cause to believe against the committee and  
16 the treasurer's predecessor and will recommend probable cause against the new treasurer.  
17 After receiving a response or waiting until the expiration of the response period, OGC  
18 typically returns to the Commission with a recommendation as to the new treasurer.

19 When the Commission pursues a current treasurer in his or her official capacity,  
20 successor treasurers will be substituted for the predecessor treasurer. In such cases, the  
21 Commission is pursuing the official position (and, therefore, the entity), not the individual  
22 holding the position. See Will, 491 U.S. at 71. Because an official capacity action is an  
23 action against the treasurer's position, the Commission may summarily substitute a new

1 treasurer in his or her official capacity at any stage prior to a finding of probable cause to  
2 believe.<sup>10</sup>

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

8 If the Commission were to pursue a treasurer both officially and personally and this  
9 treasurer is later replaced, the Commission could pursue the predecessor treasurer for any  
10 violations for which he or she is personally liable, and substitute the successor treasurer for  
11 official capacity violations. Absent some independent basis of liability, the Commission  
12 does not intend to pursue intermediate treasurers.<sup>11</sup> See Cal. Democratic Party v. FEC, 13  
13 F. Supp. 2d 1031, 1037 (E.D. Cal. 1998) (dismissing individual capacity claims against a  
14 former treasurer because “there is no allegation that [the treasurer] violated any personal  
15 obligation” and dismissing official capacity claims against him “since [he] is no longer

---

<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.

1 treasurer . . . and thus, is not the appropriate person against whom an official capacity suit  
2 can be maintained . . . ”).<sup>12</sup>

3

4 VII. Final Statement of Policy

5 In light of the considerations explained above and after carefully reviewing the  
6 comment submitted on this matter, the Commission hereby announces that, from the date of  
7 publication of this notice, it intends to exercise its discretion in enforcement matters by  
8 naming treasurers as follows:

9 1. In enforcement actions where a political committee is a respondent, the  
10 Commission will name as respondents the committee and its current treasurer  
11 ~~in his or her official capacity as treasurer,~~

Deleted: "  
Deleted: (  
Deleted: )  
Deleted: "

12 2. In enforcement actions where information indicates that treasurer may have  
13 violated a provision of the Act or regulations that applies specifically to  
14 treasurers and knew or should have known of the conduct constituting the  
15 violation, the Commission will consider the treasurer a subject to the action in  
16 his or her personal capacity,

Deleted: or a provision that applies generally to individuals,  
Deleted: may  
Deleted: "  
Deleted: (  
Deleted: )  
Deleted: "  
Formatted: Bullets and Numbering

17 3. In enforcement proceedings where information indicates that a treasurer of a political  
18 committee is subject to findings in both an official and personal capacity, the current

<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.



1 treasurer may be subject to Commission action in both an official and personal  
2 capacity.

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

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

10  
11  
12  
13  
14 \_\_\_\_\_  
15 Bradley A. Smith  
16 Chairman  
17 Federal Election Commission

18 DATED: \_\_\_\_\_  
19 BILLING CODE: 6715-01-U