No. 13-5358

**ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED**

IN THE

# United States Court of Appeals for the District of Columbia Circuit

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COMBAT VETERANS FOR CONGRESS POLITICAL ACTION COMMITTEE AND DAVID H. WIGGS, TREASURER

Appellants,

v.

FEDERAL ELECTION COMMISSION

Appellee.

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**On Appeal From the United States District Court for the District of Columbia in Case No. 11-2168 (CKK)**

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## BRIEF FOR APPELLANTS COMBAT VETERANS FOR CONGRESS POLITICAL ACTION COMMMITEE AND DAVID H. WIGGS, TREASURER

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PAUL D. KAMENAR
(D.C. Bar No. 914200)
COOLIDGE-REAGAN FOUNDATION
1629 K Street NW, Suite 300
Washington, DC 20006
(202) 603-5397
Paul.Kamenar@Gmail.com

DAN BACKER
(D.C. Bar No. 996641)
DB CAPITOL STRATEGIES, PLLC
203 South Union Street, Suite 300
Alexandria, VA 22314
(202) 210-5431
DBacker@DBCapitolStrategies.com

August 18, 2014

*Counsel for Appellants*

# CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

## A. Parties and Amici

The following parties appeared before the district court as plaintiffs and now appear before this Court as appellants: Combat Veterans For Congress Political Action Committee and David H. Wiggs, Treasurer. The following party appeared before the district court as the defendant and now appears before this Court as appellee: Federal Election Commission.

## B. Rulings Under Review

The ruling under review is contained in the Memorandum Opinion issued on September 30, 2012 by United States District Court Judge Colleen Kollar-Kotelly.

## C. Related Cases

This case was originally before the United States District Court for the District of Columbia as Case No. 1:11-cv-02168-CKK. There are no related cases.

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# GLOSSARY OF ABBREVIATIONS

| ABBREVIATION | DEFINITION |
|---|---|
| AF | Administrative Fine |
| CVFC | Combat Veterans For Congress PAC |
| FECA | Federal Election Campaign Act |
| OAR | Office of Administrative Review |
| OGC | Office of General Counsel |
| RAD | Reports Analysis Division |
| RTB | Reason to Believe |

## STATEMENT OF JURISDICTION

The district court had jurisdiction under 2 U.S.C. 437g(a)(4)(C)(iii) and 28 U.S.C. 1331.

This Court's jurisdiction over the appeal from the district court's order granting Summary Judgment for the FEC and denying Summary Judgment for CVFC rests on 28 U.S.C. 1291. JA7.

The district court order was entered on September 30, 2013 and the Appellants filed a timely notice of appeal on November 26, 2013. JA4

## STATUTORY PROVISIONS

The pertinent statutes, regulations, and other authorities are reproduced in the Addendum to this brief.

## STATEMENT OF ISSUES

1. Whether the district court erred by failing to even consider Appellants' claim that the Federal Election Commission's "Reason to Believe" findings and Final Determinations that Appellants violated the reporting provisions of the Federal Election Campaign Act (FECA) and fining them a total of $8,690 was "(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; *** (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [and/or] without observance of procedure required by law" where FECA, 2 U.S.C. 437g (a)(2) and 11 C.F.R. 111.32 and 11 C.F.R. 111.37 require an

"affirmative vote" of at least four Commissioners to make such findings and determinations but where the number of actual ballots cast by the Commissioners in this case show that the requisite number of affirmative votes cast was less than four.

a. Whether the Federal Election Commission's "Reason to Believe" findings and Final Determinations were "(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; *** (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [and/or] without observance of procedure required by law" where FECA, 2 U.S.C. 437g (a)(2) and 11 C.F.R. 111.32 and 11 C.F.R. 111.37 require an "affirmative vote" of at least four Commissioners to make such findings and determinations but where the number of actual ballots cast by the Commissioners in this case show that the requisite number of affirmative votes cast was less than four.

2. Whether the district court erred by ruling that the Commission's failure to hold the Committee's then-treasurer, who failed to file disclosure reports on time, liable in his personal capacity either solely or jointly where the statute, FEC regulations, and published guidance from the FEC clearly provides for such imposition of liability was "(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" under 5 U.S.C. 706(2) where the record shows, as here, that the treasurer's failure to do so was knowing, willful, or reckless.

3. Whether the district court erred by ruling that it did not have jurisdiction to consider the Commission's failure to even consider holding the then-treasurer, who acted knowingly, wilfully, or recklessly, liable for failing to file timely disclosure reports where the Commission's own regulations require that it "will consider the treasurer to have acted in a personal capacity and make findings accordingly." 70 Fed. Reg. 3.

4. Whether the district court erred by ruling that the Commission's failure to mitigate or reduce the fine imposed was not arbitrary or capricious, especially where the administrative record does not show that the Commissioners even considered the mitigation arguments raised by Appellants at the administrative level and therefore failed to even exercise their discretion.

5. Whether the district court erred in ruling that the Commission's refusal to consider the Appellants' "best efforts" in "obtain[ing], maintain[ing] and submit[ting] the information" required for the disclosure reports which would otherwise "shall be considered in compliance with the Act" under 11C.F.R. 111.35 was not arbitrary or capricious.

6. Whether the district court erred in ruling that 11 C.F.R. 111.35 is neither arbitrary nor capricious on its face or as applied.

## STANDARD OF REVIEW

This Court's review of the district court's ruling is *de novo*. *See Coburn v. McHugh*, 679 F.3d 924, 928 (D.C. Cir. 2012).

## STATEMENT OF THE CASE

### A. Proceedings Before the Federal Election Commission

Appellant Combat Veterans For Congress Political Action Committee (CVFC) is a non-partisan, non-connected political action committee registered with the Federal Election Commission. CVFC raises and disburses funds for the purpose of influencing Federal elections. It endorses, contributes to, and otherwise supports the election of carefully vetted candidates who are combat veterans of any active or reserve component of the United States Military, and who meet other ideological and/or policy related standards determined by the organization. Michael Curry was registered then as both the treasurer and custodian of records.

On October 15 2010, the 2010 October Quarterly Report became due, and Mr. Curry did not timely file. On October 21, 2010, less than a week later, the 12-Day Pre-General Election Report became due, and Mr. Curry did not timely file that report either. On November 4, 2010, the FEC sent Mr. Curry a Notice of Failure to File regarding the October 2010 Quarterly Report. JA132. On November 21, 2010, Mr. Curry electronically filed the 2010 October Quarterly Report, thirty

seven (37) days after it became due. On December 2, 2010, the 30-Day Post-General Election Report became due, and Mr. Curry did not timely file that report.

On December 13, 2010, Captain Joseph R. John, Chairman of CVFC, contacted the FEC called Mr. McAllister seeking guidance on changing the treasurer because Mr. Curry, was on his way out as the committee's Treasurer and he wanted to know what he needed to do to change the Treasurer. He was advised that once a new treasurer was selected, the committee needed to submit that person's name. As for the status of the overdue reports, he was advised that while the reports would be late due the absence of the treasurer, but that he should submitted as "soon as possible *in order to mitigate any fines or penalties*." On December 15, 2010, the Commission purportedly found Reason to Believe ("RTB") by an affirmative vote of 6-0 that CVFC and its then-Treasurer Curry violated 2 U.S.C. 434(a) by failing to timely file the October Quarterly Report by October 15, 2010, and transmitted that information to Mr. Curry. JA105.[1]

[1] In fact, as further described the Declaration of the Plaintiffs' counsel, Dan Backer, JA64, CVFC learned only two days prior to filing its Motion for Summary Judgment below that this Certification claiming that six Commissioners affirmatively voted to find RTB appears to be inaccurate. In reality, only three of the six Commissioners affirmatively voted (four being necessary under FECA to find reason to believe), and even those three did not actually "find reason to believe"; rather, they merely "did not object" to the staff report recommending that the Commissioners should find reason to believe. JA80-82. See 2 U.S.C. § 437g(a)(2).

On January 11, 2011, the delinquent Pre-Election Report and Post- Election Reports**,** which were due on October 21, 2010 and December 2, 2010, respectively, were filed due to the best efforts of CFVC due to assistance of the new treasurer David H. Wiggs and other resources used by CFVC to get the reports filed as quickly as possible. See JA272-75..

On March 11, 2011, the FEC purportedly found reason to believe by an affirmative vote of 6-0 that CVFC's Pre-General Election Report was filed after the deadline of October 21, 2010. JA238. However, as with the first reason to believe on December 15, 2010, this Certification also appears to be false. Instead of six affirmative votes, there were only two affirmative votes (four being necessary under FECA) and those two votes were also merely a "do not object" vote to the staff report.

With respect to the late reports, Capt. John sent letters to the FEC asserting that the conduct of the former Treasurer, Mr. Curry, made it impossible for CVFC to timely file and that the CVFC exercised its best efforts to obtain the bank records and other information, retain a bookkeeper to conduct an audit, and take other steps necessary to file the three reports as soon as practicable under the circumstances. JA248. Capt. John specifically identified former Treasurer, Mr. Curry as the only person with access to "ten months of records, bank deposit slips, the bank statements, personal information on Web site donors, the personal records

on each of the estimated 210 donors, the password to make electronic reports, and the knowledge of how to electronically submit FEC Reports." *Id.* Additionally, Capt. John articulated that best efforts were employed to "obtain substantial missing information as quickly as humanely [sic] possible, assembled and audited that information in a timely manner, expending approximately 600 man hours of work, reconstructed the donor information in the proper electronic format, and fully complied with FEC Reporting requirements." JA249.

On March 25, 2011, the FEC purportedly found reason to believe by an affirmative vote of 6-0 that CVFC's 30 Day Post-General Election Report was filed after the deadline of December 2, 2010. JA327. However, as with the reason to believe findings on December 15, 2010 and March 11, 2011, this Certification also appears to be false. Instead of six affirmative votes, there were only three affirmative votes (four being necessary under FECA) and those three votes were also simply a "do not object" vote to the staff report.

On March 31, 2011, Capt. John responded as he did before explaining that the late filing was due to the wilful and reckless conduct of its former treasurer JA338.

On June 15, 2011, Dayna C. Brown, Reviewing Officer for the Office of Administrative Review (OAR), while not disputing Capt. John's statement of reasons for the late filings, sent CVFC the Recommendation of the Reviewing

Officer regarding the RTB for the October 2010 Quarterly Report affording the respondents only 10 days to file a written response to the Recommendation. JA140-42. On June 17, 2011, Ms. Brown sent CVFC the Recommendation of the Reviewing Officer regarding the RTB for both the Pre- and Post-General Election Reports. JA268-71.

On June 24, 2011, counsel for CVFC filed a written response to the Reviewing Officer Recommendation regarding the October 2010 report, the Pre-General Election Report and the Post-General Election Report that clearly established the factual and legal basis why Mr. Curry was solely liable, in his personal capacity, for the knowing, willful, and reckless conduct that precipitated these fines. JA311-13.

On August 18, 2011, the Office of General Counsel ("OGC") submitted a Memorandum to Dayna Brown providing legal guidance on the disposition of these actions. JA314-18. Notably, the OGC in Part III heading of its memorandum concluded that CVFC allegations with respect to the reckless conduct of their former treasurer "**MIGHT JUSTIFY PURSUING [THE FORMER] TREASURER PERSONALLY.**" *Id.* at 3 (emphasis added). The memorandum also noted that the "Commission could conclude that [Mr. Curry's] actions constituted a reckless failure to fulfill his duties as treasurer." *Id.* at 4. More significantly, the OGC noted that the Commission "could consider Mr.

Curry's actions as possible mitigating factors in determining the civil penalty for the Committee's violations." *Id*. at 5.

On October 12, 2011, the FEC's Chief Compliance Officer, Patricia Carmona and Reviewing Officer Dayna Brown, made a Final Determination Recommendation to the Commission for all three late filings AF#s 2199, 2312, and 2355 that CVFC and its *new* Treasurer David Wiggs violated 2 U.S.C. § 434(a) and to assess respective penalties of $4,400, $3,300, and $990 against them for an aggregate of $8,690. JA319-21. Notably, Ms. Brown requested that "the Commission consider the issue of the [former] Treasurer's personal responsibility in these matters." *Id*. at 3.

On October 27, 2011, the Commission without meeting and without providing the CVFC or its counsel with an opportunity to be heard, summarily "approved" by a vote of 6-0 the Reviewing Officer's recommendation that the Commissioners should make a Final Determination. However, the Commissioners did not themselves act on that recommendation and did not explicitly make a finding or Final Determination that CVFC in fact violated 2 U.S.C. § 434(a) for filing late the three reports in question: October Quarterly Report, the 12-Day Pre-Election, and the 30-Day Post-Election Report. JA86-91. The Commissioners further purported to asses a civil fines against the committee and it current treasurer instead of the former treasurer in his personal capacity for each such late

filing in the amount of $4,400, $3,300, and $990, respectively, for an aggregate amount of $8,690. JA322-23. The Commission failed to exercise its discretion and address the request by its Reviewing Officer that the Commission consider the issue of the former Treasurer's personal liability or whether his actions would be a mitigating factor in determining the civil penalties against CVFC. The Commission also did not give CVFC an opportunity to be heard in person before the full Commission before making its Final Determination.

On November 4, 2011, notice of the alleged Final Determination was sent to CVFC by certified mail and received by certified mail on November 10. On November 23, 2011, CVFC counsel sent a letter by courier to the Chair of the Commission requesting expedited action that the Commission vacate its Final Determination as being premature inasmuch as it did not give the respondents a hearing before the full Commission under 2 U.S.C. § 437g(a)(4)(C)(ii). JA327-329. Alternatively, the Commission was asked to reconsider the matter since it neglected to consider the personal liability of the former Treasurer as being solely liable for the fine or at a minimum to mitigate the penalty on CVFC and its current Treasurer, and preserving its procedural and substantive rights, including its claim that its Due Process and First Amendment rights were violated. *Id.*

On December 9, 2011, the FEC denied CVFC's request for reconsideration, a hearing, and mitigation of the fine. JA330.

### B. Proceedings Before The District Court

On December 7, 2011, CVFC and its current treasurer filed a timely Petition for Review of the FEC's Determination and Complaint for Declaratory and Injunctive Relief challenging the FEC's enforcement action as authorized by 2 U.S.C. 437g(a)(4)(C)(iii) and 28 U.S.C. 1331 seeking to modify or set aside the agency determination. Per the scheduling order, on June 7, 2012 CVFC filed their motion for summary judgment. On June 25, 2012, CVFC filed an Amended Petition and Complaint raising the additional claim that the FEC's voting procedures were invalid.

Cross motions were filed by the FEC and the case was submitted to the court. On September 30, 2013, the district court granted the FEC's motion and denied the plaintiffs and entered an order to that effect. The plaintiffs filed a timely notice of appeal to this Court on November 26, 2013.

### C. Proceedings In The Court of Appeals

On January 27, 2014, the FEC filed a Motion for Summary Affirmance. On March 3, 2014, Appellants filed their Opposition to the motion. On March 25, 2014, the FEC filed its reply. On May 13, 2014, this Court denied the FEC's motion and set the case for plenary briefing and argument.

## SUMMARY OF ARGUMENT

In this case, the fundamental locus of accountability embedded by statute, regulation, and rule within the entire campaign finance regime – the personal liability of Committee Treasurers for knowing, wilful, or reckless malfeasance – has been ignored wholesale by the Federal Election Commission, the very agency charged with enforcing the law as it is clearly written. More disturbing, the agency itself engaged in a series of unlawful practices to remove accountability of the Commissioners from their own decision making processes. If the decision below were to stand, the result would be an agency whose exercise of its powers conferred by Congress would be openly violative of its organic statute and promulgated regulations, the Administrative Procedure Act, and the Sunshine Act, and would erode the only measure of integrity from campaign finance law.

1. The district court erred by refusing to consider CVFC's claim that the FEC's "reason to believe" finding and "Final Determination" against CVFC and its current treasurer were invalid and void ab initio because the Commission never cast at least four "affirmative votes" as required by FEC's organic statute for either action. 2 U.S.C. 437g(a)(2); 11 C.F.R. 111.32. The court, reasoning the claim should have first been presented to the Commission for consideration at the agency level, was in error because CVFC was not and could not have been aware of the defective procedures at the agency level. Moreover, CVFC does not raise this

issue to attack the merits of the underlying enforcement action, but rather to challenge the adequacy of the agency's voting procedure; thus, the rules of exhaustion of remedies do not apply in such circumstances.

The court's second reason for not adjudicating CVFC's voting claim was equally flawed. The court concluded that because the documentary evidence supporting that claim, namely, the actual ballots used by the Commissioners, were not provided by the FEC in the Administrative Record, they would be not be considered. However, CVFC was not aware of the existence of the questionable ballots until after litigation commenced, requested them from the FEC, and promptly submitted them to the court for its consideration since the FEC had only submitted a blank sample ballot with the Administrative Record. Because the ballots themselves were generated and maintained exclusively by the FEC, and since they relate to the validity of the voting procedure, there was no prejudice to the agency if the court were to consider them.

As to the merits of CVFC's voting procedure claim, the ballots show that the Commissioners did not cast "four affirmative" votes in any of the three administrative fine proceedings in this case, as required by 2 U.S.C. 437g(a)(2). Rather, the Commission has devised a novel procedure whereby if a Commissioner does not return his or her ballot on the matter within 24 hours after being provided a copy, that silence and non-action would be deemed to constitute an "affirmative

vote" authorizing enforcement action to be taken against CVFC and similar respondents. In this case, at the "reason to believe" stage, there never were the requisite four votes submitted in any of the three administrative fines proceedings in this case. Therefore, the enforcement action was void ab initio. The subsequent Final Determination of liability and the imposition of penalties were tainted since the predicate "reason to believe" finding was not lawfully made, and additional apparent errors, such as the Commissioner's ballots being signed by persons other than the Commissioners who may not have been properly authorized to do so. Finally, FEC Directive No. 52, which purports to give the FEC the authority to utilize this novel "no show- no vote" procedure is itself defective since it was secretly promulgated in violation of the Sunshine Act.

2. The district court further erred in upholding the FEC's failure to impose – or even consider – personal liability on CVFC's former treasurer and the Commissions creation from whole cloth of a new species of prosecutorial discretion to substitute parties into enforcement actions in direct contravention of Congress's express mandate. Notwithstanding the mountain of clear statutory and regulatory provisions that provide that the "treasurer," rather the committee, is personally responsible for filing the reports and will be personally liable when they are knowing, wilful, or reckless in failing to fulfill his or her duties, the court erroneously held that the statute "clearly imposes reporting responsibility on

committees." JA22. Alternatively, the court's Chevron deference to the agency was misplaced, since there was no ambiguity as to who is responsible for filing the reports nor as to the scope of the former Treasurers knowing, willful or reckless conduct. CVFC also argues that it was arbitrary, capricious, contrary to law, and an abuse of discretion for the FEC not to impose any liability, even jointly, on the Treasurer due to his wilful and reckless conduct in failing to file the required reports.

3. Finally, the court erred by rejecting CVFC's claim that the FEC arbitrarily failed to exercise its discretion or abused it by not mitigating the fine imposed on CVFC due to the malfeasance of the treasurer, especially where the Office of General Counsel and Reports Analysis Division made the recommendation that it consider such mitigation. Despite CVFC using its best efforts to compile and submit the disclosure reports as promptly as possible, with full knowledge by the FEC of the exact nature of the delay, the court below also erred in ruling that the FEC did not abuse its discretion in precluding CVFC from invoking FEC's "best efforts" defense found in 11 C.F.R. 111.35. By its own terms, the "best efforts" regulation does not and cannot preclude raising "reckless or wilful" conduct of the treasurer to mitigate the fine imposed on the committee; consequently, the FEC's failure to even exercise its discretion was arbitrary and capricious, and the regulation is arbitrary and capricious as applied. Secondly, to

the extent that the defenses are limited to those only listed in the regulation, the regulation is over- and under inclusive as to the circumstances that can be used as a defense, and is otherwise arbitrary and capricious on its face.

## ARGUMENT

### I. THE DISTRICT COURT ERRED BY NOT CONSIDERING CVFC'S CLAIM THAT THE PURPORTED FINDING OF LIABILITY AND IMPOSITION OF FINES ARE NULL AND VOID BECAUSE THE COMMISSIONERS FAILED TO CAST THE REQUISITE NUMBER OF "AFFIRMATIVE VOTES"

In their Amended Petition for Review and Complaint, CVFC challenged the validity of the FEC's enforcement action alleging that the FEC failed to comply with the statutory requirements that the Commissioners' findings at both the "reason to believe" stage and the final determination stage that a violation occurred must be made "by an affirmative vote of 4 of its members" as required by statute and the FEC's own regulations. 2 U.S.C. 437g(a)(2); 11 C.F.R. 111.32; 111.37(a). See Amend. Pet. For Review, JA51-52. Consequently, the FEC's enforcement action was "in excess of statutory jurisdiction" and "without observance of procedure required by law" and thus null and void. 5 U.S.C. 706(d). Accordingly, this Court need not reach any of the other issues in this appeal and should remand this case to the district court to adjudicate this preliminary issue. Alternatively, this Court may decide that based on the uncontroverted evidence that the requisite

four affirmative votes were not cast, the case should be remanded with instructions to vacate the FEC's purported finding of liability and imposition of the $8,690 fine.

### A. The District Court Erred In Not Reaching The Merits Of CVFCs Challenge To FEC's Voting Procedures

The district court improperly declined to consider the merits of CVFC's challenge that the requisite "affirmative votes" of four Commissioners was lacking, and the agency action was thus a nullity because (1) CVFC did not first raise the issue with the FEC at the administrative level, and (2) the actual ballots which evidence the improper voting procedure were not part of the administrative record filed by the agency, and thus, should not be considered by the court. JA35-36. The FEC reiterated those two reasons in its unsuccessful Motion for Summary Affirmance. The district court and FEC are wrong on both counts.

#### 1. CVFC Was Not Required To First Present The FEC's Defective Voting Procedure To The Commission

The district court declined to adjudicate the voting procedure claim citing the general rule that the court should not "usurp[] an agency's function if it sets aside an administrative determination upon a ground not theretofore presented and deprives the agency of an opportunity to consider the matter, make its ruling, and state the reasons for its actions.'" JA35 (quoting *Coburn v. McHugh*, 679 F.3d 924, 931 (D.C. Cir. 2012) (quoting *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946)).

**First**, CVFC had no reason to raise the unlawful voting issue before the FEC. The December 21, 2010 letter sent by the FEC to the treasurer notifying him about the reason to believe finding simply stated that "the FEC found that there is reason to believe ("RTB")" that a violation of 2 U.S.C. 434(a) occurred. JA106. There was no indication of the actual vote tally. Once this suit was filed and the FEC submitted the Administrative Record to the district court below, the formal Certifications by the FEC's Secretary and Clerk were also submitted attesting to the votes cast by the Commissioners at the RTB stage and the final determination stage. The Certification by the Commission Secretary certified that the FEC on December 15, 2010, "[d]ecided by a vote of 6-0 to: (1) find reason to believe that COMBAT VETERANS FOR CONGRESS PAC, and CURRY, MICHAEL MR. as treasurer violated 2 U.S.C. § 434(a) and make a preliminary determination that the civil money penalty would be the amount indicated on the report . . . . Commissioners Bauerly, Hunter, McGahn II, Peterson, Walther, and Weintraub *voted affirmatively* for the decision." JA105 (emphasis added). Similar Certifications were executed for the final determination stage. JA208. From all appearances and representations, it would seem that the FEC complied with the statutory requirement that any enforcement action at both the "reason to believe" stage and the "final determination" stage must be approved by at least "four affirmative votes." These "certifications" were false and misleading.

It was only after examining the Administrative Record that included only the "blank" voting sheets used by the Commissioners as part of the record did CVFC suspect that the Certifications of the votes did not accurately reflect the actual "affirmative votes" cast by the Commissioners. Accordingly, counsel for CVFC pressed the FEC attorneys to disclose the actual ballots. JA66. Despite some reluctance on the part of the FEC, those ballots were provided two days before the filing of CVFC's Motion for Summary Judgment. As demonstrated *supra*, there were at best only three votes cast to find reason to believe.

Shortly thereafter, CVFC filed an Amended Petition for Review and Complaint on June 19, 2012, notably with the consent of the Commission, raising an additional and dispositive claim that the entire agency enforcement action was null and void since the Commissioners did not comply with the statute's voting procedures of casting at least four "affirmative votes" to initiate this enforcement action and make a final determination of liability and assessing a fine. JA51-52. Under these circumstances, CVFC can hardly be faulted for not raising the voting issue at the agency level since they had no reason to believe the voting was questionable at the time. Nor should the FEC be heard to complain that CVFC is raising the issue in this litigation inasmuch as the FEC consented to the filing of the Amended Complaint for the purpose of challenging the validity of the voting procedure.

**Second**, even if CVFC had access to the voting ballots or suspected that the voting procedures did not comply with the statutory requirement at the administrative level, bringing that issue before the agency would have been a futile exercise. As evidenced by the FEC's submissions on the merits in the district court, the FEC maintains that its "no show- no vote" procedures fully satisfy the "affirmative vote" requirements of the statute and regulations because the FEC adopted Directive 52, which purports to authorize such voting procedure., a position which was vigorously disputed and briefed by CFVC in the district court,

In that regard, the district court's reliance on *Coburn v. McHugh*, 679 F.3d 924, 930 (D.C. Cir. 2012) for the proposition that the court cannot consider the merits of this issue is misplaced. JA35 (Op. at 29). In *Coburn*, this Court upheld that portion of the district court's decision not to consider certain of the plaintiff's arguments regarding his involuntary separation from the United States Army, on the ground that these claims had not been raised during plaintiff's initial challenge of the separation decision. *Id*. at 930-31. In the instant case, however, the claim at issue does not relate to merits of the underlying facts that were the basis for the FEC's staff investigation, but instead goes to the validity of whether a decision itself was lawful. Moreover, the plaintiff in *Coburn* could have raised the issue but chose not to; CVFC had no such opportunity.

The general rule of exhaustion of administrative remedies does not apply in situation such as this where the agency has already predetermined the issue, and hence, it would have been futile to challenge the FEC's voting procedures before the agency. *See McCarthy v. Madigan*, 503 U.S. 140, 148 (1992). Exhaustion is also not required where, as here, "the challenge is to the adequacy of the agency procedure itself. . . ." *Id*. Moreover, as noted *supra*, CVFC simply could not have exhausted any administrative remedy here because it had no reason to believe then that less than four "affirmative votes" were cast in this case.

**2. The District Court Erred In Concluding That It Could Not Review The Actual Ballots Used By The FEC Because The FEC Failed To Submit Them As Part of the Administrative Record**

The district court's related holding that it could not reach the merits of CVFC's voting procedure claim because the voting ballots themselves were not part of the administrative record is clearly erroneous. The general rule that a reviewing court should focus on the administrative record made at the agency is only applicable where the material sought to be presented for the first time to the reviewing court by an aggrieved party relates to the *merits* of the underlying facts or dispute that was before the agency. That is why, for example, the district court in *Cunningham v. FEC*, 2002 U.S. Dist. LEXIS 20935 (S.D. Ind. Oct. 28, 2002) -- relied upon by the FEC below and which also involves the assessment of a fine for filing a campaign finance report late -- correctly refused to consider an Affidavit

by the candidate swearing the disclosure report was timely filed. That Affidavit was signed more than a year *after* the FEC's decision and the filing of his lawsuit. Id. at *15 n.3.

Here, the voting ballots and documents submitted by CVFC were documents generated by the agency itself *during* the enforcement proceedings. Those voting ballots do not relate to the circumstances of or factual defenses to the late filing of the campaign finance reports; rather, they go to the validity of the Commissioners' votes. In short, the FEC is in no position to complain that they are prejudiced by the submission and consideration of the actual ballots they used in this enforcement action. They "certified" that six affirmative votes were cast yet only supplied a *blank* ballot sheet in the Administrative Record. If in fact the ballots reflecting the Commissioners' votes were required to be part of the Administrative Record and not just a blank ballot, it was the FEC's fault for not submitting the actual ballots to the district court along with the Administrative Record.

Normally, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). "The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (internal citations omitted). "But of

course, it is black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.'" *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792, 242 U.S. App. D.C. 110 (D.C. Cir. 1984). This Court has recognized a small class of cases where district courts may consult extra-record evidence when "*the procedural validity* of the [agency]'s action . . . remains in serious question." *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (emphasis added).

In this case, the FEC's jurisdictional infirmity could not have been known until (1) the administrative record was filed with the court, (2) plaintiffs inquired about the omission from the administrative record, and (3) the FEC produced from its own records the actual ballots that illuminated the infirmity. The FEC's own documents that formed the basis for its Secretary's certification that the district court declined to consider illustrate just such a serious question. This is a case in which the district court should have considered the FEC's documents because "'it may sometimes be appropriate to resort to extra-record information' to determine whether an administrative record is deficient." *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) (quoting *Esch v. Yeutter*, 876 F.2d at 991)).

The infirmity in the completeness of the administrative record is manifest. This court has held that an agency enjoys a presumption that it properly designated the administrative record absent clear evidence to the contrary, but the agency does *not* unilaterally determine what constitutes the administrative record. *Bar MK Ranches* v. *Yuetter*, 994 F.2d 735, 739-40 (10th Cir. 1993). In this instance, the FEC's own documents that CVFC wished the district court to consider show that the agency deliberately or at best negligently excluded documents that may have been adverse to it by demonstrating that the agency failed to comply with statutory requirements and its own regulations, and thus frustrated judicial review of that agency action. See *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010); *American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008); *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996). The district court's refusal to consider such clear concrete evidence that the FEC failed to include documents that cast serious doubt on the authority of the FEC's action was in error and warrants reversal of the district court's judgment.

Moreover, the issue here does not go to the substance of the agency's decision, but to its validity *ab initio* because the question is whether the agency followed required procedures in voting to take enforcement action against CVFC. The restrictions on completing or supplementing an administrative record are not implicated and other evidence may be considered when a challenge is brought to

"the procedural validity of [an agency's] action." *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989); see also *Franks v. Salazar*, 751 F. Supp. 2d 62, 68 (D.D.C. 2010); *The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 115 (D.D.C. 2009).[2]

Finally, it should be noted that CVFC filed a combined Petition for Review of the FEC's enforcement action as provided for by 2 U.S.C. 437g(a)(4)(C)(iii) *and* Complaint for Declaratory and Injunctive Relief under 28 U.S.C. 1331, 2201, and 5 U.S.C. 701-706. Thus, the claim challenging the validity and sufficiency of the votes, and the voting ballots submitted as evidence in support of that claim, can also be considered as a separate challenge to agency action under 28 U.S.C. 1331 under typical APA review provisions that an agency's action was "in excess of statutory jurisdiction, authority, or limitations" or "without observance of procedure required by law." 5 U.S.C. 706(2)(C)-(D)7. This jurisdictional basis stands apart from the specific judicial review provisions of FEC enforcement actions provided by statute, 2 U.S.C. 437g(a)(4)(C)(iii).

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[2] Cf. *D.C. Circuit Handbook on Internal Practices and Procedures* at 22 ("The record on review [in cases from administrative agencies] consists of the order sought to be reviewed or enforced; the findings or report on which it is based; and the pleadings, evidence, and proceedings before the agency. The record may later be corrected or *supplemented* by stipulation *or by order of this Court*, as in the case of an appeal from the district court". (emphasis added). The record on review does not appear to comprise the votes cast by a multi-member agencies, but if it must, the record could be easily supplemented by the court as CVFC suggested to the court below.

In short, the district court's conclusion that CVFC's challenge to the sufficiency and validity of the votes "are not properly before th[e] Court and will not be addressed" because the issue was not first raised by CVFC at the administrative level and that the ballots used by the Commissioners were not part of the Administrative Record compiled by the FEC is clearly erroneous and should be reversed.

### B. The Commissioners Did Not Cast At Least Four Affirmative Votes In This Case And Thus The Enforcement Action Is Null And Void And Should Be Vacated.

Because the record is clear that the Commission failed to cast the required four "affirmative votes" in this enforcement action, this Court, instead of vacating the judgment and remanding to the district court to consider this issue, may conclude that the FEC's action was "in excess of statutory jurisdiction, authority, or limitation" or "without observance of procedure required by law" under 5 U.S.C. 706(2)(C)-(D). In that case, this Court could remand with instructions to vacate the FEC's determinations. At a minimum, a discussion of the merits of CVFC's claim will inform this Court of the fatal defects in the voting procedures used in this case.

As noted in the Statement of Facts, the three enforcement actions for the three reports in question were each purportedly initiated by an affirmative vote of at least four Commissioners as required by law. Indeed, the Commission's

Secretary and Clerk certified in each of the three enforcement matters on three separate occasions that the Commission "Decided by a vote of 6-0 to (1) find reason to believe that COMBAT VETERANS FOR CONGRESS PAC, and WIGGS, DAVID H. MR. as treasurer violated 2 U.S.C. § 434(a) and make a preliminary determination that the civil money penalty would be the amount indicated on the report. . . ." "Commissioners Bauerly, Hunter, McGahn II, Peterson, Walther, and Weintraub *voted affirmatively* for the decision." See JA105, JA238, JA344. On its face, these Certifications indicate that the Commission's six "affirmative votes" satisfied the statutory requirement of a minimum of four affirmative votes necessary for Commission action.

**1. *Voting at the "Reason to Believe" Stage***

As the evidence before the district court demonstrated, the FEC considers a Commissioner as casting an "affirmative vote" at the reason to believe stage when that Commissioner simply does not "cast" any vote at all. According to the unlawful voting procedures described in the questionably promulgated FEC Directive 52 which the FEC relied upon below, a Commissioner need do nothing at all for 24 hours after being sent a staff memo to have this *failure to act* count as casting an "affirmative vote" to initiate enforcement action. "Matters circulated on a 24-hour no-objection basis *shall be deemed approved* unless an objection is received in the Commission Secretary's Office by the voting deadline." Directive

No, 52 at 3 (Add. 61). Under this voting system, a Commissioner could be on vacation, out of the country, sick, or his or her email may be malfunctioning or simply ignored or not opened. Silence will be counted as casting an "affirmative vote."

The actual breakdown of all the votes at the "reason to believe" stage in these three proceedings provided by the Commission is as follows:

**Signed 24-Hour No-Objection Ballot Votes for Reason to Believe on AF# 2199: Dated December 15, 2010**:

Commissioner Bauerly: Do Not Object

Commissioner Walther: Do Not Object (signed by another)

Commissioner Weintraub: Do Not Object

**Summary: 3-0** Missing are three "no shows- no votes" and one questionable vote signed by another. Four "affirmative votes" lacking.

**Signed 24-Hour No-Objection Ballot Votes for Reason to Believe on AF# 2312: Dated March 11, 2011**

Commissioner Walther: Do Not Object (signed by another)

Commissioner Weintraub: Do Not Object (signed by another)

Four "no show-no votes." Two questionable ballots signed by another.

**Summary**: **2-0**: Missing are four "no show-no votes". Two questionable ballots signed by another. Four "affirmative votes" lacking.

**Signed 24-Hour No-Objection Ballot Votes for Reason to Believe on AF# 2355 Dated March 25, 2011**

Commissioner Bauerly: Do Not Object

Commissioner Walther: Do Not Object (signed by another)

Commissioner Weintraub: Do Not Object

**Summary**: **3-0**: Missing are three "no show-no votes". One questionable ballot signed by another. Four "affirmative votes" lacking.

Clearly, in all three proceedings, there were never the requisite four "affirmative votes" to find reason to believe, and several that were cast and signed by someone other than the Commissioner may be invalid even under the terms of the FEC's Directive No. 52, the validity of which will be discussed, *infra*. Indeed, even by the very terms of Directive No. 52, the FEC itself does not consider silence by a Commissioner to constitute an "affirmative vote." Section II C of that Directive states with Commission's authorization and approval of the publication of the names of non-filers, that publication "will occur immediately after the vote deadline *or as soon as there are four affirmative votes.*" Id. at 3; Add. 61 (emphasis added). This statement is a clear admission by the FEC that even they do not regard mere silence as constituting an "affirmative vote."

**2. *Voting at the Final Determination Stage***

Moreover, with respect to the votes that were actually cast at the final determination stage, challenges were raised by CVFC below to the validity of four of the six votes that were submitted by some Commissioners *after* the FEC self-imposed deadline for voting and/or were signed by someone other than the Commissioner. This latter issue also raises a factual question regarding the existence and validity of staff authorization,[3] and is material evidence which the FEC refused to provide to CVFC below and thus precluding summary judgment for the FEC. See JA68-91. The breakdown of the votes at the Final Determination stage were as follows:

> **Signed Ballot Votes for Final Determination Recommendation on AF#'s 2199, 2312, and 2355 Dated October 26, 2011**
>
> Commissioner Bauerly: I approve the recommendation(s) (signed by another)
>
> Commissioner McGahn: I approve the recommendation(s)
>
> Commissioner Petersen: I approve the recommendation(s) (signed by another) (submitted after stated ballot deadline)

[3] Directive No. 52 purports to allow Commissioners have their staff sign their names but with certain restrictions which may not have been followed in this case, thereby possibly voiding even those questionable "Do Not Object" ballots cast both at the reason to believe stage and the "I approve the recommendations" ballots cast at the final determination stage. See *Id.* at 4. Add. 62.

Commissioner Hunter: I approve the recommendation(s) (submitted after stated ballot deadline)

Commissioner Walther: I approve the recommendation(s) (signed by another)

Commissioner Weintraub: I approve the recommendation(s)

**Summary:** Six signed ballots but four are disputed: three questionable ballots signed by another with one of those submitted after the deadline and one questionable ballot submitted after the deadline.

Assuming there were at least four valid "affirmative votes," CVFC further challenged the legal sufficiency of the action resulting from any such vote, since the Commissioners did not actually make any final determination as such, issue any order, or impose any fine; at best, they merely did not object to a staff recommendation that they *should* make a final determination. Thus, this claim raises both factual and legal issues that are unresolved as to the validity and impact of these final determination votes, already tainted by the clear failure of the Commission to cast four "affirmative votes" at the reason to believe stage.

This is not the first instance in which a multi-member agency has acted without statutory authority as shown by its own voting records. The National Labor Relations Board, required by statute to conduct actions by a quorum of three of its five members, adopted an electronic voting mechanism under which

members may "participate" in agency action. In that case, the third member needed to constitute a quorum had expressed his dissenting views on earlier iterations of the proposal under consideration but did not vote on the final version. The NLRB asserted that he was a member of the Board when the final rule was circulated and was sent a notification that it had been called for a vote, even though not voting would constitute an abstention but still constitute being present for purposes of a quorum.

In a well-reasoned opinion, the district court found that a quorum was not present, although had the member "affirmatively expressed his intent to abstain or even acknowledged receipt of the notification [of the meeting], he may well have been legally 'present'" to constitute a quorum." *Chamber of Commerce of the United States v. NLRB*, 879 F. Supp. 2d 18, 25 (D.D.C. 2012) (summary judgment granted to plaintiffs), *appeal dismissed*, 2013 U.S. App. LEXIS 25897 (D.C. Cir. Dec. 9, 2013). The court said that the "NLRB is a 'creature of statute' and possesses only that power that has been allocated to it by Congress." *Id*. at 30 (citing *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

After considering a supplemental affidavit submitted by the NLRB on a motion to reconsider that the member's deputy chief counsel had opened the electronic agenda item when the meeting began, and argued that the Member was therefore virtually "present" for the meeting, the court denied the motion for being

too little and too late, and further noted that there was "no indication that [the Member's employees] were authorized to vote or abstain on his behalf . . . ." *Id.* at 32. In the same fashion, there was no "affirmative vote" or even acknowledgement that the Commissioner received the "no-objection" ballot. The FEC acted in violation of its organic statute by failing to act with a minimum of "four affirmative votes," notwithstanding Directive No. 52's purported authorization for them to do so.[4] In both cases, the agencies acted in violation of their organic statutes; the results should not be different based on the party submitting the agency's evidence of that failure.

Unlike the FEC's novel argument that a "no show-no vote" constitutes an "affirmative vote" to take agency enforcement action, the typical practice for multi-member agencies for is for agency commissioners to cast their vote at a public meeting or submit their written vote for those matters that may be disposed of without a meeting. *See, e.g.*, 16 C.F.R. 4.14(c) ("Any [Federal Trade]

[4] As noted, several of the 24-Hour ballots in this case show that they were signed by someone other than the Commissioner to whom it was sent, and purportedly on their behalf. JA78-85. Even Directive No. 52 were lawfully promulgated and valid, it specifies that the ballot can be signed by staff "provided the Commissioner has given instructions to the staff member *regarding the matter being acted on* and the staff member is acting in accordance with those instructions." Directive No. 52 at 4 (App. 62) (emphasis added). While those instructions are to be kept with the record, the FEC has refused to provide those alleged authorizations to CVFC. Just as in the *NLRB* case, those staff authorizations may be found wanting should this Court remand this case to the district court for further proceedings.

Commission action, either at a meeting or by written circulation, may be taken only with the affirmative concurrence of a majority of the participating Commissioners, except where a greater majority is required by statute or rule. . . .") (emphasis added). Moreover, such votes are made a matter of public record. *See, e.g.*, 16 C.F.R. 4.9(b)(ii) ("final votes of each member of the Commission in all matters of public record, including matters of public record decided by notational voting").

More importantly, unlike the district court below, other courts carefully examine the facts in cases where there are challenges to the validity of a Commissioner's vote in agency enforcement and other administrative actions. See *Braniff Airways, Inc. v. Civil Aeronautics Board*, 379 F.2d 453, 462 (D.C. Cir. 1967) (concluding the notational vote cast was valid and that the evidence supports the conclusion that the "signature of the Chairman was affixed to the opinion while he was still competent to vote."); *Federal Trade Comm'n v. Flotill Products, Inc.*, 389 U.S. 179 (1967) (Court determines that sufficient quorum of FTC Commissioners validly acted on matter despite resignation of two Commissioners); *Corus Group PLC v. Bush*, 217 Supp. 2d 1347 (C.I.T. 2002) (Commissioner made valid "affirmative. . . findings" and express "determinations" and was properly appointed to his position).

### C. FEC Directive No. 52 Is Invalid Because It Was Promulgated In Secret In Violation of the Sunshine Act

The FEC defended the validity of Directive No. 52 that purportedly authorized "No-Objection" voting by arguing that it has the authority to promulgate their own "rules for the conduct of its activities," citing 2 U.S.C. § 437c (e) and *Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 542-43 (1978) (agency can devise "their own rules of procedure"). While an agency can certainly promulgate its own rules of procedure, it is axiomatic that those rules cannot deviate from the requirements of the agency's organic statute or the agency's own regulations published in the Code of Federal Regulations. See *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1098 (D. C. Cir. 1985).

While the district court did not reach the voting issue, this Court may wish to decide the issue because the voting procedures in this case were defective as a matter of law, and remand this case to the district court with instructions to vacate the FEC's action. Thus, the question of the validity of Directive No. 52 which purported to authorize such voting is also implicated. In that regard, the FEC has promulgated a number of rules of procedure for conducting their affairs published in the Code of Federal Regulations, including the procedures for conducting its meetings under the Government in the Sunshine Act, 5 U.S.C. 552b. See 11 C.F.R. Part 2; see also 11 C.F.R. Part 111. Add. 20, 28. The provenance of

Directive No.. 52, however, suggests it was unlawfully promulgated under these procedures.

As for the FEC's Sunshine Act regulations, FEC rules state that the Commission need not hold a meeting to decide whether a future meeting should be closed to the public under the exemptions allowed under the Sunshine Act, but that the vote to close all or part of such future meeting may be cast by using the FEC's "notation vote procedures." 11 C.F.R. 2.5(c). That "notation vote" is in the form of a *written* vote rather than a voice vote or a no-objection or silent vote. Presumably, these "notation votes" are equivalent to what the FEC calls "tally votes" in Directive No. 52 where, in contrast to "no objection" matters, in order to be counted, an actual vote must be physically cast. *Id.* at 2. Add. 60

In addition , FEC's Compliance Procedures, 11 C.F.R Part 111, applicable to this case, provide for various procedures that the FEC has chosen to establish, such as how complaints are to be filed, the use of written questions and subpoenas during investigations, conciliation procedures, and the like, but there is nothing in those provisions that mentions "notation vote procedures," "tally votes," or 'no-objection" voting that relieves the Commissioners of their responsibility as expressly mandated by statute to cast at least "four affirmative votes" to initiate enforcement actions. Add. 28.

In addition to these rules of procedure, there are a number of policy statements and directives not published in Code of Federal Regulations that describe the procedures of certain other FEC enforcement activities and the issuance of advisory opinions. However, there is only *one* document that purports to be a rule of procedure pursuant to 2 U.S.C. 437c(e) as the FEC claimed below it has the authority to issue: Directive No. 10, appropriately entitled "**RULES OF PROCEDURES OF THE FEDERAL ELECTION COMMISSION PURSUANT TO 2 U.S.C. 437c(e)**."

Directive No. 10 was adopted on December 20, 2007 and, unlike other directives, *was* published in the Federal Register, 73 Fed. Reg. 5568 (Jan. 30, 2008), Add. 52. Directive No. 10 revised the Commission's 1978 Rules of Procedure for the conduct of its meetings, specifically to address the situation where the Commission has less than four members due to vacancies. On September 10, 2008, however, the FEC held a secret meeting ostensibly authorized under the Sunshine Act to consider several matters, including the proposed Directive No. 52.[5] That Directive purported to allow the Commissioners to

[5] While CVFC obtained from the FEC the final certified vote of that meeting approving Directive No. 52, they were denied a copy of any transcript or recording of the meeting. This portion of the meeting should *not* have been closed to the public under the Government in the Sunshine Act. There was no notice of the September 10, 2008 meeting in the Federal Register that this agenda item was going to be discussed, and even if it were specifically listed, the ostensible boilerplate in the notice for closing that part of the meeting only covers items

discharge their statutory duties of finding "reason to believe" by "affirmative votes" on so-called "No-Objection Matters" by either not casting any vote at all for a 24-hour period or by returning the "no objection" ballot within 24 hours signed by the Commissioner. As previously noted, if none of the Commissioners returned his or her ballot, they are all "deemed" to "approve" the staff recommendation to launch certain enforcement actions, and this non-voting will be certified by the Commission Secretary as a 6-0 affirmative vote of finding of "reason to believe" that a respondent has violated the law.

CVFC learned from the FEC after this litigation commenced that Directive No. 52 was approved by a bare majority of 4-2 during the Commission's September 10, 2008 Executive Session, a closed meeting that was in clear violation of the Government in the Sunshine Act. And unlike Directive No. 10 governing the agency procedures, Directive No. 52, which by its own terms was designed to "supplement other Commission documents" including Directive No. 10 (see *id*. at 1, n.1, Add. 59), was never published in the Federal Register.[6]

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involving "Internal personnel rules and procedures or matters affecting a particular employee." That exemption under the Sunshine Act, however, is inapplicable regarding important agency voting procedures such as this. Lest there be any doubt about the narrow reading of that exemption under the Sunshine Act and its analog in the Freedom of Information Act, the Supreme Court made clear that this exemption is limited to personnel matters. See *Milner v. Dep't of Navy*, 1341 S.Ct. 1259 (2011).

[6] Directive No. 52 is also buried on the Commission's website where it would be difficult for the public to find. The left side of FEC's homepage

Secondly, whatever authority the FEC may have to devise its "rules for the conduct of its activities," that authority does not permit the FEC to contravene the statutory command requiring the Commission to "find" reason to believe a violation occurred and that such finding must garner at least "four affirmative votes" not the "votes" of silent Commissioners who, for all we know, did not even receive a copy of the staff recommendation since not even acknowledgement of receipt is required. As noted, in the instant case, there were no more than three "Do Not Object" votes in each of the three fine cases and even several of those were signed by the Commissioner's assistant, thereby raising questions about the validity of those so-called "votes."

The FEC's deviation from the statutory required voting procedures is not an isolated example of the Commission's blatant disregard of the law. For example,

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(http://www.fec.gov) has links to useful information for political committees and the public, including the link for "Law, Regulations, & Procedures" which in turn has a drop down menu for additional documents under several categories, including "Policy Statements & Other Procedures" and "Procedural Materials." Remarkably, neither Directive No. 52 nor any of the other FEC's Directives are to be found there where one would expect them to be. After searching around, one has to access "About the FEC" at the top of the homepage, which lists general matters about the FEC, its budget, and similar information, and even then, the drop down menu does *not* list the FEC's Directives as one of the items. But if one happens to scroll down to the very bottom of that page, there is a link FEC's Directives. See Add. 64-67. In short, CVFC and others regulated by the FEC could be forgiven for not knowing about the FEC's unusual voting procedures found in the secretly considered and secretly promulgated Directive No. 52 with which the FEC seems to playing "hide the ball."

Congress made it clear that "members of the Commission *shall not* engage in any other business, vocation, or employment" 2 U.S.C. 437c(a)(3) (emphasis added); Add. 3. Yet, despite this clear and unambiguous command of no outside employment, the Commissioners promulgated a regulation that states a "member of the Commission shall not devote a substantial portion of his or her time to any other business, vocation, or employment." 11 C.F.R. 7.9(a) (emphasis added). This "substantial portion" qualification to outside employment is in direct defiance of Congress's command that Commissioners devote *all* of their professional time to FEC business with no exceptions. This provision, like the non-voting "voting" procedures, while certainly convenient for the Commissioners, is contrary to the statute.

In sum, Directive No. 52's "No-Objection" voting procedure allowing silence by a Commissioner to constitute an affirmative vote to take enforcement action violates the FEC's organic statute and was promulgated in violation of the Sunshine Act.

## II. THE DISTRICT COURT ERRED IN RULING THAT THE FEC'S FAILURE TO IMPOSE PERSONAL LIABILITY ON CVFC's TREASURER WAS A CONSIDERED DECISION BY THE COMMISSION AND NOT AN ABUSE OF DISCRETION OR OTHERWISE ARBITRARY

The district court ruled that it lacked jurisdiction to consider CVFC's claim that its treasurer should be held personally liable for the fines because such claims

are not permitted in the context of a Petition for Review filed under 2 U.S.C. 437g(a)(4)(C)(iii). JA24-25. The lower court erred for two reasons.

First, nothing in section 437g(a)(4)(C)(iii) limits the arguments that a person may make in its "written petition requesting that the determination be modified or set aside." *See also* 11 C.F.R. 111.38 (respondent may request "that the final determination be modified or set aside."). The only exception in the FEC regulation is that a "failure to raise an argument in a timely fashion during the administrative process shall be deemed a waiver of the respondent's right to present such argument in a petition to the district court under 2 U.S.C. 437g." *Id.* There is certainly no dispute that CVFC raised the argument of treasurer personal liability during the administrative process; hence, that argument was clearly preserved.

Secondly, CVFC brought this action under 28 U.S.C. 1331 and 5 U.S.C. 702-706 as well, and therefore, the court had jurisdiction to consider CVCF's treasurer liability claim under those provisions. JA39. While CVFC did not file a formal complaint against its errant treasurer with the FEC under 2 U.S.C. 437g(a)(8)(A) for violating FECA's reporting provisions as the district court noted, JA24-25, it was not required to do so in order to seek judicial review of the FEC's failure to hold the treasurer personally liable, either solely or jointly, given the detailed record in the FEC's possession as to the treasurer's malfeasance. As

discussed further, *infra*, the statutory provisions and FEC's own regulations make clear that the treasurer is personally responsible and liable for filing timely reports. Accordingly, the failure of the agency to impose sanctions on the guilty party caused injury to CVFC for which it can seek judicial review. Moreover, the FEC is required by 2 U.S.C. 437g(a)(2) to consider investigating and taking enforcement action against individuals "on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities" without requiring the filing of a formal complaint. Such information was clearly provided by CVFC to the FEC here and, as will be shown, even the FEC's Office of General Counsel recommended the Commissioners to consider the issue of the treasurer's personal liability.

Reaching the merits of the treasurer's personal liability, the district court alternatively held that the FEC "has broad discretionary power whether to investigate a claim, and whether to pursue civil enforcement under [FECA]" and, therefore, the court could not conclude that the agency "abused its discretion in choosing not to pursue Mr. Curry in his personal capacity for wilful or reckless failure to file reports." JA26. The court erred for two reasons. First, the Court mistakenly observed that the "*Commission considered* Mr. Curry's potential liability, and has supplied reasonable grounds for its failure to prosecute him in his personal capacity" and that the Commission made a "*decision*[] . . . not to pursue

Mr. Curry in his personal capacity for willful or reckless failure to file the reports." JA26 (emphasis added). Putting aside CVFC's argument regarding defective voting as to whether the Commissioners made any legally valid decision at all, the record does *not* reflect that the Commissioners "considered" or "decided" anything regarding the treasurer's personal liability, let alone supplying "reasonable grounds" for its failure to investigate and prosecute Mr. Curry personally, as the district court erroneously claimed it had. JA25. Moreover, the failure to pursue Mr. Curry does not give the FEC prosecutorial discretion to name a party not considered to be responsible by the relevant statute.

### A. Treasurers, Not Committees, Are Required Under FECA and FEC Regulations and Policies to File Reports and Are Personally Liable For Failure to Comply With Their Responsibilities Under the Act.

A close examination of the plethora of FEC statutory provisions, regulations, and policies expressly imposing personal liability on treasurers to file committee reports -- coupled with the FEC's enforcement staff recommendations to the Commissioners that the treasurer's personal liability be pursued in this case -- further demonstrates that the Commissioners either did not consider these authorities, and therefore failed to exercise their discretion, *or* arbitrarily ignored these authorities and enforcement duties without articulating "reasonable grounds" for their alleged decision, as the agency was required to do. See *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2010).

Under FECA, "[e]ach *treasurer of a political committee shall file* reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report." 2 U.S.C. § 434(a)(1) (emphasis added). Congress placed the responsibility to file reports squarely on treasurers, not on committees. *See also* 2 U.S.C. 432(c) (requiring treasurers to keep account of committee records); 432(d) (requiring treasurers to maintain records for three years). Congress intended through these FECA provisions to impose personal responsibility on treasurers as the only statutory officer required for the formation and operation of political committees. Congress did not impose reporting obligations on political committees themselves, or committee chairmen or other committee officers since the treasurer is the only statutory officer of a committee.

The FEC, through its implementing regulations, has further underscored Congress's imposition of personal liability on the treasurer. See 11 C.F.R. 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); 11 C.F.R. 114.12 ("Notwithstanding the corporate status of the political committee, *the treasurer remains personally responsible* for carrying out their respective duties under the Act") (emphasis added); 11 C.F.R. 104.1(a) ("*Who*

*must report*. Each treasurer of a political committee…shall report in accordance with 11 C.F.R. Part 104.")

In addition to the statutory provisions and the FEC's rules and regulations that impose affirmative legal duties upon Treasurers of political committees, FEC policy guidance also confirm that "the violation of [reporting requirements] makes [Treasurers] *personally liable*." See *Federal Election Commission Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings*, 70 Fed. Reg. 1, 5 (Jan. 3, 2005) (emphasis added); Add. 49. The law consistently tasks treasurers with affirmative legal obligations and duties, the violation of which subjects treasurers, and only treasurers, to personal liability. Congress did not empower the FEC to transfer this personal responsibility and pass it off to the committee or a blameless successor treasurer.

As the FEC has recognized:

> 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.'*

*Federal Election Commission Proposed Statement of Policy Regarding Naming of Treasurers in Enforcement Matters*, 69 Fed. Reg. 4092, 4093, n.6 (Jan. 28, 2004), Add. 44 (emphasis added).

In addition to the statutory provisions and FEC rules, regulations, and policy guidances, federal courts have recognized the personal liability of political committee Treasurers. *See FEC v. Toledano*, 317 F.3d 939, 947 (9th Cir. 2002) (the Act "holds [the treasurer] personally responsible for the committee's recordkeeping and reporting duties.") (emphasis added); *FEC v. Gus Savage for Congress '82 Comm. and Thomas J. Savage, Treasurer*, 606 F. Supp. 541, 547 (N.D. Ill. 1985) ("Liability . . . filters through the candidate to his amorphous campaign committee, or, more precisely, to the committee's treasurer, who is legally responsible for any violation of the Act. 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."); *FEC v. Dramesi for Congress Comm., 640 F. Supp. 985; 1986 U.S. Dist. LEXIS 22269* (treasurer assessed fine)*; FEC v. Dramesi for Congress Comm.*, No. 85-4039 (MHC) (D.N.J. Sept. 5, 1990) (unpublished opinion 3) ("[A]n individual will also stand responsible for his indiscretions as a treasurer. It is because of the ephemeral nature of such political committees that *Congress chose to place this burden upon treasurers.*") (emphasis added).[7]

[7] Against the thick forest of statutory provisions and regulations imposing personal liability on treasurers for reporting, the court below cites only one provision, 2 U.S.C. 434(a)(4), which states "All political committees *other than authorized committees of a candidate* shall file [the required reports."] (emphasis added) . JA20. But it is significant to note that Congress required that with respect to these

## B. FEC Staff Recommendation on Treasurer's Personal Liability

The wealth of authority providing that the treasurer is personally liable circumscribes the FEC's discretion to ignore that body of law. Moreover, FEC staff recommended in this case that the personal liability of Mr. Curry should be considered.

For example, the Reviewing Officer in this case, pursuant to guidance from the Office of General Counsel ("OGC") "request[ed] that the Commission consider the issue of the Treasurer's personal responsibility in these matters." JA321. In a Memorandum to the Reviewing Officer, the Acting General Counsel not only stated in a bold heading that the allegations of recklessness against the former treasurer "**MIGHT JUSTIFY PURSUING [THE FORMER] TREASURER**

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"authorized committees of a candidate," the "*treasurer* shall file" reports of a House or Senate candidate, 2 U.S.C. 434(a)(2)(A) (emphasis added) and that the "*treasurer* shall file" the reports for a Presidential candidate, 2 U.S.C. 434(a)(3) (emphasis added). Add. 2. Thus, as for committees "other than [candidate] committees," it is reasonable and consistent to construe congressional intent as requiring the "treasurer" of those committees to file the required reports. In other words, since Congress was listing the filing duties of *all* political committees, candidate and non-candidate alike, Congress intended for 2 U.S.C. 434(a)(4) to be read as follows: "[The treasurer of] [a]ll political committees other than authorized committees of a candidate shall file either. . . . " This reading comports with the general mandate by Congress at the beginning of this section, 2 USC 434(a)(1), that "[e]ach treasurer of a political committee shall file reports…in accordance with this subsection," which covers reporting by candidate and non-candidate committees. Therefore, the court erred by giving deference to the FEC's incongruous reading of the law. JA22. Indeed, the FEC interprets this provision in it regulations as requiring only treasurers to report. 11 C.F.R. 104.1(a).

**PERSONALLY"** but that if the FEC referred this matter to the OGC for pursuing personal liability against Mr. Curry in the enforcement context, the FEC "could consider Mr. Curry's actions as possible *mitigating factors* in determining the civil penalty" for the Committee. JA318. (emphasis added). The OGC concluded thusly: "[t]herefore, *we recommend that OAR raise this issue for the Commission's consideration* in the memorandum recommending final determinations in this matter." JA318 (emphasis added). The OAR, as noted, did indeed raise and specifically request the FEC consider the issue of personal liability in its report to the FEC. JA321. But due to the questionable and cryptic voting procedures, the FEC has not clearly demonstrated that the Commissioners actually exercised their discretion or considered personal liability in this matter, let alone articulate the requisite "reasonable grounds" for not pursuing the treasurer personally. The district court erred by concluding otherwise.

## III. THE DISTRICT COURT ERRED IN REJECTING CVFC'S CLAIMS THAT THE FEC FAILED TO EXERCISE ITS DISCRETION OR THAT ITS DECISION NOT TO MITIGATE THE FINES WAS ARBITARY AND CAPRICIOUS

Both the Office of General Counsel and the Reviewing Officer made it clear that the personal liability of the former treasurer, based on the substantial FEC record of his malfeasance, could serve to mitigate the fine against CVFC and its current Treasurer, presumably in whole or in part. See OGC Memorandum,

August 18, 2011 (”In the enforcement context [the Commission] could consider Mr. Curry’s actions as possible mitigating factors in determining the civil penalty.”) JA372; Reviewing Officer Final Determination Recommendation to the Commission , October 12, 2011 (“Mr. Curry’s actions could be considered as possible mitigating factors in determining the civil penalty for the Committee’s violations.”). JA374.

Nevertheless, the district court accepted the argument by FEC’s attorneys in this litigation that the Commission’s alleged reasons for rejecting any mitigation of the fine imposed on CVFC was based on the FEC’s so-called “best efforts” regulation, 11 C.F.R. 11.35(b)(3)-(d), that severely and unreasonably limits the circumstances which can constitute “best efforts.” JA28-30. The court therefore “[could not] conclude that the” Commission’s decision lacked a rational basis and constituted an abuse of discretion.” JA29.

In the first place, it is not clear based on the FEC’s cryptic and unlawful voting procedures that the Commissioners actually considered CVFC’s argument for mitigation at all or made any deliberative decision to reject it. Even if they did, they gave no reasons for the alleged decision not to mitigate the penalty imposed on CVFC. Nevertheless, the court below assumed that the alleged decision not to mitigate the penalty was based on the rigid “best efforts” regulation, and that it was not based on “any equitable considerations.” JA29 (Op.23) In particular, the court

accepted the FEC's argument that mitigation of the fine was unwarranted because the circumstances of the late filings in this case did not fall within the narrow "unforeseen circumstances" specified in the "best efforts" regulation of 11 C.F.R. 111.35(c). The FEC argued in its unsuccessful Motion for Summary Affirmance in this Court that the "knowing, wilful, and reckless" conduct by CVFC's treasurer was "akin" to simple "negligence," (FEC Motion at 14) and therefore not a circumstance warranting mitigation as the district court suggested. This was clearly erroneous.

The FEC's "best efforts" regulation provides for two categories of circumstances that either qualify or disqualify for mitigation consideration. Those circumstances that *do* qualify for a "best efforts" defense are spelled out in 11 C.F.R. 111.35(c) to include such things as the failure of Commission computer equipment, internet failures, or severe weather or other disaster-related incident. Add. 36. The circumstances that do *not* qualify, and thus are considered not "unreasonably foreseen" and "beyond the control of the respondent" are spelled out in 11 C.F.R. 111.35(d) to include simple "negligence," 111.35(d)(1); "illness, inexperience, or unavailability of the treasurer," 111.35(d)(3); or a Committee's computer crashing or disruption caused by the Internet service provider failure even though due to no fault of the Committee. Add. 36 See JA28.

Importantly, however, the regulation specifies that both these categories of circumstances "include, but are not limited to" the examples listed. Here, the failure to file timely reports was due to the well-documented "knowing, wilful or reckless" conduct of the treasurer and not simple negligence. After difficulty obtaining the FEC password and expending days retrieving and compiling financial and contributor information that the former treasurer had left disorganized and inaccessible, CVFC promptly filed the required reports as humanly possible. Thus, CVFC was not foreclosed by the "best efforts" regulation from requesting that it considered for mitigation. While CVFC conceded at the administrative that its former treasurer was not entitled to the "best efforts" defense, it did not concede that it was not entitled to it either, as the FEC erroneously suggested below. Despite this *apparent* flexibility of the regulation, the district court erred when it cited with approval the FEC staff report noting that the defense is precluded "if it is based on any of the circumstances *listed* at 11 C.F.R. 111.35d." JA29 (emphasis added) citing AF2355-AR046. But CVFC's defense of "reckless and wilful misconduct of the treasurer" is concededly not "listed" as an excludable category in the "best efforts" regulation. Moreover, with respect to excusable conduct of the treasurer, the regulation specifically excludes "inexperience" as an excuse, but not "knowing, willful or reckless conduct of the treasurer." The fact that the FEC specifically considered treasurer conduct and

only included "inexperience" and simple "negligence" as "reasonably unforeseen" suggests that "knowing, willful, and reckless" conduct is something that a Committee does not reasonably foresee.

In short, it appears that the FEC either did not fully understand or chose to ignore the discretion it possessed even under its "best efforts" regulation to consider the circumstances in this case as being eligible for mitigation under its regulation. Moreover, the FEC failed to consider that even if CVFC did not qualify for a "best efforts" defense, it had equitable discretion to mitigate the fine by considering the reasons such as those here, just as the FEC staff said it could.

In that regard, the district court misconstrued CVFC's arguments when it concluded that CVFC was " 'asking this Court to exercise its own judgment and rehear Plaintiffs' [case before the Commission],' " citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). JA29. Rather, CVFC submits that the district court should remand the matter to the Commission to rehear and consider CVFC's mitigation arguments because the agency failed to consider them properly the first time. On remand, the Commission may decide to remit all or part of the fine, particularly because of its excessiveness in comparison to culpability of CVFC when weighed alongside Mr. Curry's "knowing, willful, or reckless" conduct.

For example, the fines imposed on plaintiffs aggregating $8,690.00 for filing its reports late are unreasonable and are substantially greater -- in some cases by eightfold -- than fines that the FEC has imposed on other political and candidate committees which are found to violate far more serious, substantive provisions of FECA, such as receiving and failing to cure excessive contributions, or receiving prohibited contributions from corporations or foreign nationals. After all, while three reports of this small committee may have been filed late, it must be remembered that the overarching purpose of disclosure is to inform the voters of the source of the candidate's funds so they can make an informed decision in casting their ballots. Here, CVFC is an unaffiliated PAC unauthorized by any candidate. Any contributions made by CVFC to a candidate are reported on the receiving candidate's disclosure reports for voters to see what "special interest" funds are being contributed to the candidate. Because the recipient candidates filed their reports, the public interest in disclosure was not as paramount for a timely filing of the reports for CVFC, particularly where CVFC did not even make any campaign contributions or independent expenditures during the reporting periods in question. Yet, for purposes of both liability and the level of the fine, the Commission arbitrarily treats the two kinds of committees effectively the same, as it does all manner of campaign and non-campaign financial activity.

Moreover, the arbitrariness of the $8,690 in fines imposed in this case is further underscored regarding the late filing of the October 2010 Quarterly Report that was originally due on October 15, 2010 but was filed late on November 21, 2010. JA139-41. Since that report was filed just over 30 days late, the FEC treats the report as having never been filed at all in terms of assessing the level of fine which was $4,400. 11 C.F.R. § 111.43(e)(1). This puts a new twist on the old maxim, "better late than never." According to the FEC's arbitrary fine schedule, it is "better *never* than late." Treating a 31-day *late* report the same as one never filed at all is on its face arbitrary and capricious. In addition, the FEC would allow a committee to timely file a wholly deficient disclosure report without any late fines being assessed, and then allow the committee to "amend" its report after-the-fact with the information that was required to be disclosed in the first place. Indeed, in this very case, after the reckless treasurer resigned and best efforts were expended to file the delinquent reports, CVFC undertook on its own initiative to amend earlier April and July Quarterly Reports 2010 that were timely filed but found to be grossly deficient, with no penalty for the deficiencies. The FEC appears to promote an arbitrary message: File your reports on time and worry later about whether they were complete and accurate.

In sum, CVFC's current Treasurer, Assistant Treasurer, and Chairman and other personnel used their best efforts to file the required reports as soon as

practicable following the malfeasance of its former treasurer. The malfeasance of the treasurer was not reasonably foreseeable and was beyond the control of the plaintiffs and, therefore, liability should not have been imposed on the plaintiffs and/or the fines should have been remitted in whole or in part. The failure by the Commission to consider mitigation in this case was an abuse of discretion.

## IV. THE FEC'S "BEST EFFORTS" REGULATION IS ARBITRARY AND CAPRICIOUS

If the FEC is correct that it cannot mitigate the fine imposed on CVFC because of the FEC's view of limited applicability of the "best efforts" regulation, then the regulation is arbitrary and capricious on its face. The lower court erred by concluding that it was not. As CVFC argued below, the regulation is both over-inclusive and under-inclusive. It excuses "unforeseeable" events like severe weather (which in fact is often foreseeable due to weather forecasts), but does not excuse what the FEC considers "foreseeable" events and those not "beyond the control" of a respondent (and therefore is not a "best efforts" defense) such as the committee's computers being suddenly attacked by a virus, or the treasurer being suddenly attacked by a virus or falling ill from food poisoning the night before the report is due, falling dead from a heart attack or accident (and thus is "unavailable"

under the regulation), or going into premature labor .[8] 11 C.F.R. § 111.35(d)(3). In such cases, the FEC will not accept these reasons as "best efforts" to comply with the filing deadline. This regulation is clearly arbitrary and capricious and unreasonable on its face because it arbitrarily excludes the opportunity to raise both legal and equitable reasons before the Commission to explain the late filings. On its face, the FEC's "best efforts" regulation is not rational to the extent that it forecloses any consideration of other mitigating circumstances.

The district court, referring to the FEC's argument below, stated that if "recklessness and negligence on the part of the treasurer - of the sort at issue here - were to qualify for 'best efforts' then the exception would swallow the rule and almost all late filings would be excusable." JA29-30. Not so. The conduct of the "sort at issue here" was not simple negligence but "knowing, wilful and reckless" and promptly brought to the attention of the Commission. That kind of conduct would not make "almost all late filings excusable." A Committee would be required by the FEC to submit evidence in such cases, as CVFC did here,

[8] Indeed, the FEC rejected a candidate's failure to timely file a post-election report in a special election which he lost and where the voters' interest in such post-election reports by definition will not inform the electorate in casting their vote, due to the campaign's treasurer going into premature labor just before the election as a reason for filing the report late. The FEC fined the small campaign $8,000. Presumably the FEC believes that the treasurer's premature labor was both "foreseen" and "under [her] control." See *Kuhn for Congress v. FEC*, Civ.. No.. 2:13-3337 (PMD-BHH) (D.S.C.,Charleston Div.), available on FEC's website at http://www.fec.gov/law/litigation/Kuhn.shtml

demonstrating that the treasurer was not simply negligent, but engaged in wilful and reckless conduct that the Committee could not foresee. There was no evidence or claim that CVFC was negligent in managing its treasurer that would estop CVFC from asserting a "best efforts" defense. On the contrary, CVFC made repeated attempts to correct the situation, but was prevented from doing so by the malfeasant Treasurer.

More significantly, a showing by a committee that its treasurer was "wilful and reckless" in not complying with the reporting requirements will not make "almost all late filings excusable" nor preclude the FEC from sanctioning and imposing appropriate fines on the guilty party – the treasurer himself – which procedure provides the only measure of proper accountability within the regulatory scheme and proper deterrence.[9]

To the extent that plaintiffs' best efforts to remedy the malfeasance of its former treasurer are not deemed to satisfy the "best efforts" described in 11 C.F.R. § 111.35, CVFC submit that such regulation is arbitrary, capricious, unreasonably

[9] Most committees are small operations, including many where the only person in the committee is the treasurer. The treasurer is the committee and vice-versa. If such committees filed late reports due to recklessness or wilfulness, and any fine were imposed on only the committee and treasurer "in their official capacities," those fines could easily be avoided by the committee going defunct, with the treasurer paying him or herself additional compensation, or contributing the committee's funds to other committees, thereby leaving the committee judgment proof or terminated, with no individual personally accountable.

narrow, contrary to law, on its face and as applied. See *U.S. Chamber of Commerce v. Securities and Exchange Commission*, 412 F.3d 133 (D.C. Cir. 2005); *Public Citizen v. Federal Motor Carrier Safety Administration*, 374 F.3d 1209 (D.C. Cir. 2004); 5 U.S.C. § 706(2)(A), (2)(D).

## CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

____/s/_____
Dan Backer
DB Capital Strategies PLLC
203 South Union Street, Suite 300
Alexandria, VA 22314
(202) 210-5431
dbacker@dbcapitolstrategies.com

Paul D. Kamenar
Coolidge Reagan Foundation
1612 K Street, N.W., Suite 300
Washington, DC 20006
(202) 603-5397
Paul.kamenar@gmail.com

*Counsel for Appellants*

Date: August 18, 2014

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Dated: August 18, 2014

/s/ Dan Backer
*Counsel for Appellants*

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**United States Code**

**Title 2**

* * *

**§ 432. Organization of political committees**

(a) *Treasurer: vacancy; official authorizations*. Every political committee shall have a treasurer. No contribution or expenditure shall be accepted or made by or on behalf of a political committee during any period in which the office of treasurer is vacant. No expenditure shall be made for or on behalf of a political committee without the authorization of the treasurer or his or her designated agent.

* * *

(c) *Recordkeeping*. The treasurer of a political committee shall keep an account of—

(1) all contributions received by or on behalf of such political committee;

(2) the name and address of any person who makes any contribution in excess of $50, together with the date and amount of such contribution by any person;

(3) the identification of any person who makes a contribution or contributions aggregating more than $200 during a calendar year, together with the date and amount of any such contribution;

(4) the identification of any political committee which makes a contribution, together with the date and amount of any such contribution; and

(5) the name and address of every person to whom any disbursement is made, the date, amount, and purpose of the disbursement, and the name of the candidate and the office sought by the candidate, if any, for whom the disbursement was made, including a receipt, invoice, or cancelled check for each disbursement in excess of $200.

(d) *Preservation of records and copies of reports*. The treasurer shall preserve all records required to be kept by this section and copies of all reports required to be filed by this subchapter for 3 years after the report is filed. For any report filed in electronic format under section 434(a)(11) of this title, the treasurer shall retain a machine-readable copy of the report as the copy preserved under the preceding sentence.

* * *

**§ 434. Reporting requirements**

(a) *Receipts and disbursements by treasurers of political committees; filing requirements.*

(1) Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report.

(2) If the political committee is the principal campaign committee of a candidate for the House of Representatives or for the Senate—

(A) in any calendar year during which there is a regularly scheduled election for which such candidate is seeking election, or nomination for election, the treasurer shall file the following reports:

* * *

(3) If the committee is the principal campaign committee of a candidate for the office of President—

(A) in any calendar year during which a general election is held to fill such office—

(i) the treasurer shall file monthly reports * * *

* * *

(4) All political committees other than authorized committees of a candidate shall file either—

(A) (i) quarterly reports * * *

* * *

(iv) * * * or

(B) monthly reports * * *

* * *

**§ 437c. Federal Election Commission**

(a) *Establishment; membership; term of office; vacancies; qualifications; compensation; chairman and vice chairman.*

(1) There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate.[1] No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

(2)

(A) Members of the Commission shall serve for a single term of 6 years,[2] except that of the members first appointed—

(i) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1977;

(ii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1979; and

(iii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1981.

(B) A member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission.

(C) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he or she succeeds.

(D) Any vacancy occurring in the membership of the Commission shall be filled in the same manner as in the case of the original appointment.

(3) Members shall be chosen on the basis of their experience, integrity, impartiality, and good judgment and members (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall be individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government. Such members of the Commission shall not engage in any other business, vocation, or employment. Any individual who is engaging in any other business, vocation, or employment at the time of his or her appointment to the Commission shall terminate or liquidate such activity no later than 90 days after such appointment.

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[1] The U.S. Court of Appeals for the District of Columbia found the ex officio membership of the Secretary of the Senate and the Clerk of the House on the Federal Election Commission to be unconstitutional, a holding left intact when the Supreme Court subsequently decided that it should not have agreed to hear the Commission's appeal. *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), cert. dismissed for want of jurisdiction, 513 U.S. 88 (1994). Therefore these ex officio members no longer serve on the Commission.

[2] This term limit applies to individuals nominated by the President to be members of the Federal Election Commission after December 31, 1997, unless the President announced his intent to nominate the individual prior to November 30, 1997. Pub. L. No. 105–61, § 512, 111 Stat. 1272, 1305 (1997), Pub. L. No. 105-119, § 631, 111 Stat. 2440, 2522 (1997).

(4) Members of the Commission (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall receive compensation equivalent to the compensation paid at level IV of the Executive Schedule (5 U.S.C. § 5315).

(5) The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of one year. A member may serve as chairman only once during any term of office to which such member is appointed. The chairman and the vice chairman shall not be affiliated with the same political party. The vice chairman shall act as chairman in the absence or disability of the chairman or in the event of a vacancy in such office.

(b) *Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office.*

(1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

(2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.

(c) *Voting requirements; delegation of authorities.* All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his or her vote or any decision making authority or duty vested in the Commission by the provisions of this Act, except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 437d(a) of this title or with chapter 95 or chapter 96 of title 26.

(d) *Meetings.* The Commission shall meet at least once each month and also at the call of any member.

(e) *Rules for conduct of activities; judicial notice of seal; principal office.* The Commission shall prepare written rules for the con duct of its activities, shall have an official seal which shall be judicially noticed, and shall have its principal office in or near the District of Columbia (but it may meet or exercise any of its powers anywhere in the United States).

(f) *Staff director and general counsel; appointment and compensation; appointment and compensation of personnel and procurement of intermittent services by staff director; use of assistance, personnel, and facilities of Federal agencies and departments; counsel for defense of actions.*

(1) The Commission shall have a staff director and a general counsel who shall be appointed by the Commission. The staff director shall be paid at a rate not to exceed the rate of basic pay in effect for level IV of the Executive Schedule (5 U.S.C. 5315). The general counsel shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule (5 U.S.C. 5316). With the approval of the Commission, the staff director may appoint and fix the pay of such additional personnel as he or she considers desirable

without regard to the provisions of title 5, United States Code, governing appointments in the competitive service.

(2) With the approval of the Commission, the staff director may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS–15 of the General Schedule (5 U.S.C. § 5332).

(3) In carrying out its responsibilities under this Act, the Commission shall, to the fullest extent practicable, avail itself of the assistance, including personnel and facilities of other agencies and departments of the United States. The heads of such agencies and departments may make available to the Commission such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request.

(4) Notwithstanding the provisions of paragraph (2), the Commission is authorized to appear in and defend against any action instituted under this Act, either—

(A) by attorneys employed in its office, or

(B) by counsel whom it may appoint, on a temporary basis as may be necessary for such purpose, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and whose compensation it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title. The compensation of counsel so appointed on a temporary basis shall be paid out of any funds otherwise available to pay the compensation of employees of the Commission.

**§ 437d. Powers of the Commission**

(a) *Specific authorities*. The Commission has the power—

(1) to require by special or general orders, any person to submit, under oath, such written reports and answers to questions as the Commission may prescribe;

(2) to administer oaths or affirmations;

(3) to require by subpoena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3);

(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 437g(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel;

(7) to render advisory opinions under section 437f of this title;

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of title 5, United States Code, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of title 26; and

(9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

(b) *Judicial orders for compliance with subpoenas and orders of Commission; contempt of court*. Upon petition by the Commission, any United States district court within the jurisdiction of which any inquiry is being carried on may, in case of refusal to obey a subpoena or order of the Commission issued under subsection (a) of this section, issue an order requiring compliance. Any failure to obey the order of the court may be punished by the court as a contempt there of.

(c) *Civil liability for disclosure of information*. No person shall be subject to civil liability to any person (other than the Commission or the United States) for disclosing information at the request of the Commission.

(d) *Concurrent transmissions to Congress or member of budget estimates, etc.; prior submission of legislative recommendations, testimony, or comments on legislation*.[3]

(1) Whenever the Commission submits any budget estimate or request to the President or the Office of Management and Budget, it shall concurrently transmit a copy of such estimate or request to the Congress.

(2) Whenever the Commission submits any legislative recommendation, or testimony, or comments on legislation, re quested by the Congress or by any Member of the Congress, to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress or to the Member requesting the same. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative

[3] These reports are no longer required. See House Document No. 103-7, cited in Note, 31 U.S.C. § 1113 and Pub. L. No. 104-66.

recommendations, testimony, or comments on legislation, to any office or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

(e) *Exclusive civil remedy for enforcement*. Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the exclusive civil remedy for the enforcement of the provisions of this Act.

* * *

**§ 437g. Enforcement**

(a) *Administrative and judicial practice and procedure*.[4]

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such com plaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4)

(A)

(i) Except as provided in clauses (ii) and subparagraph (C),[5] if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to

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[4] The Debt Collection Improvement Act, adopted in 1996, amended the Federal Civil Penalties Inflation Adjustment Act to require that the FEC and other executive agencies adjust the top amount of their current civil penalties. The general provisions at 2 U.S.C. § 437g(a)(5) and (6) now call for a maximum penalty of the greater of the amount of any contribution or expenditure involved in the violation or $5,500. The maximum penalty for knowing and willful violations increased to $11,000. Civil penalties assessed for violating the Act's confidentiality provisions at 2 U.S.C. § 437g(a)(12) increased to $2,200 and, for knowing and willful violations, to $5,500. These increases apply only to violations that occurred after April 29, 1997. See 62 FR 11316 and 62 FR 32021.

[5] Section 640 of the Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, amended 2 U.S.C. § 437g(a)(4) by adding subparagraph (C) plus conforming amendments at sections 437g(a)(4)(A)(i) and (a)(6)(A). These amendments applied with respect to violations occurring between January 1, 2000, and December 31, 2001. Section 642 of the Fiscal Year 2002 Treasury and General Government Appropriations Act, Pub. L. No.

believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B)

(i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(C)

(i) Notwithstanding subparagraph (A), in the case of a violation of any requirement of section 304(a) of the Act (2 U.S.C. § 434(a)), the Commission may—

(I) find that a person committed such a violation on the basis of information obtained pursuant to the procedures described in paragraphs (1) and (2); and

(II) based on such finding, require the person to pay a civil money penalty in an amount determined under a schedule of penalties which is established and published by the Commission and which takes into account the amount of the violation involved, the existence of previous violations by the person, and such other factors as the Commission considers appropriate.

(ii) The Commission may not make any determination adverse to a person under clause (i) until the person has been given written notice and an opportunity to be heard before the Commission.

(iii) Any person against whom an adverse determination is made under this subparagraph may obtain a review of such determination in the district court of the United States for the district in which the person resides, or transacts business, by

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107-67, extended the effective date to cover violations that relate to reporting periods through December 31, 2003. Section 639 of the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, further extended the effective date to cover violations that relate to reporting periods through December 31, 2005. See 69 FR 6525 (February 11, 2004) for more information. Section 721 of the Transportation, Treasury, Housing and Urban Development, Judiciary, District of Columbia and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, further extended the effective date to cover violations that relate to reporting periods through December 31, 2008. See 70 Fed. Reg. 75717 (December 21, 2005) for more information.

filing in such court (prior to the expiration of the 30-day period which begins on the date the person receives notification of the determination) a written petition requesting that the determination be modified or set aside.

(5)

(A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or in the case of a violation of section 320 (2 U.S.C. § 441f), which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1000 percent of the amount involved in the violation).[6]

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6)

(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that

[6] Section 315(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, inserted new language in sections 437g(a)(5)(B) and (6)(C). This amendment is effective for violations occurring on or after November 6, 2002.

the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court deter mines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or in the case of a violation of section 320 (2 U.S.C. § 441f), which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1000 percent of the amount involved in the violation.

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8)

(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under para graph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(10) *Repealed.*

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12)

(A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of sub paragraph (A) shall be fined not more than $2,000. Any such

member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) *Notice to persons not filing required reports prior to institution of enforcement action; publication of identity of persons and unfiled reports.* Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i) of this title, the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) *Reports by Attorney General of apparent violations.* Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) *Penalties; defenses; mitigation of offenses.*

(1)

(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation or expenditure—

(i) aggregating $25,000 or more during a calendar year shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both; or

(ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, or imprisoned for not more than one year, or both.[7]

(B) In the case of a knowing and willful violation of section 441b(b)(3) of this title, the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) of this title may incorporate a violation of section 441c(b), 441f, and 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this sub section shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(D)[8] Any person who knowingly and willfully commits a violation of section 320 (2 U.S.C. § 441f) involving an amount aggregating more than $10,000 during a calendar year shall be—

(i) imprisoned for not more than 2 years if the amount is less than $25,000 (and subject to imprisonment under subparagraph (A) if the amount is $25,000 or more);

(ii) fined not less than 300 percent of the amount involved in the violation and not more than the greater of—

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[7] Section 312(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 437g(d)(1) to strike language in subparagraph (A) and insert subparagraphs (A)(i) and (ii). This amendment is effective for violations occurring on or after November 6, 2002.

[8] Section 315(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, amended section 437g(d)(1) to add new subparagraph (D). This amendment is effective for violations occurring on or after November 6, 2002.

(I) $50,000; or

(II) 1,000 percent of the amount involved in the violation; or

(iii) both imprisoned under clause (i) and fined under clause (ii).

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of this title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) of this section which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

**§ 437h. Judicial review**[9]

The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

* * *

[9] Section 403 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, provided special rules for actions challenging the constitutionality of that Act's provisions. See Note, 2 U.S.C. § 437h for more information.

**Title 5**

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**§ 552b. Open meetings**

(a) For purposes of this section—

(1) the term ‘‘agency’’ means any agency, as defined in section 552(e)[10] of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term ‘‘meeting’’ means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term ‘‘member’’ means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C)

[10] See References in Text note below.

constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would—

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or (10) specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d)

(1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly

available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: *Provided*, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

(e)

(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

(f)

(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting,

closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

(h)

(1) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the

court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

(2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to the Congress regarding the following:

(1) The changes in the policies and procedures of the agency under this section that have occurred during the preceding 1-year period.

(2) A tabulation of the number of meetings held, the exemptions applied to close meetings, and the days of public notice provided to close meetings.

(3) A brief description of litigation or formal complaints concerning the implementation of this section by the agency.

(4) A brief explanation of any changes in law that have affected the responsibilities of the agency under this section.

(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.

References in Text:

Section 552(e) of this title, referred to in subsec. (a)(1), was redesignated section 552(f) of this title by section 1802(b) of Pub. L. 99–570.

180 days after the date of enactment of this section, referred to in subsec. (g), means 180 days after the date of enactment of Pub. L. 94–409, which was approved Sept. 13, 1976.

* * *

**§ 704. Actions reviewable**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

* * *

**§ 706. Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

* * *

the Act to the Attorney General or other law enforcement authorities under 2 U.S.C. 437g(a)(5) and 437d(9). Information contained in FEC systems 2 and 3 contain the working papers of the Commission staff and form the basis for either civil and/or criminal proceedings pursuant to the exercise of the powers and duties of the Commission. These materials must be protected until such time as they are subject to public access under the provision of 2 U.S.C. 437g(a)(4)(B) or 5 U.S.C. 552, or other relevant statutes.

(b)(1) Pursuant to 5 U.S.C. 552a(j)(2), records contained in FEC 12, Office of Inspector General Investigative Files, are exempt from the provisions of 5 U.S.C. 552a, except subsections (b), (c) (1) and (2), (e)(4) (A) through (F), (e) (6), (7), (9), (10), and (11) and (f) , and the corresponding provisions of 11 CFR part 1, to the extent this system of records relates in any way to the enforcement of criminal laws.

(2) Pursuant to 5 U.S.C. 552a(k)(2), FEC 12, Office of Inspector General Investigative Files, is exempt from 552a (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f), and the corresponding provisions of 11 CFR part 1, to the extent the system of records consists of investigatory material compiled for law enforcement purposes, except for material that falls within the exemption included in paragraph (b)(1) of this section.

(c) The provisions of paragraph (a) of this section shall not apply to the extent that application of the subsection would deny any individual any right, privilege or benefit to which he or she would otherwise be entitled to receive.

[41 FR 43064, Sept. 29, 1976, as amended at 45 FR 21209, Apr. 1, 1980; 60 FR 4073, Jan. 20, 1995; 75 FR 31, Jan. 4. 2010]

## PART 2—SUNSHINE REGULATIONS; MEETINGS

Sec.


AUTHORITY: 5 U.S.C. 552b.

SOURCE: 50 FR 39972, Oct. 1, 1985, unless otherwise noted.

### §2.1 Scope.

These regulations are promulgated pursuant to the directive of 5 U.S.C. 552b(g) which was added by section 3(a) of Public Law 94–409, the Government in the Sunshine Act, and specifically implement section 3 of that Act.

### §2.2 Definitions.

(a) *Commission*. *Commission* means the Federal Election Commission, 999 E Street, NW., Washington, DC 20463.

(b) *Commissioner* or *Member*. *Commissioner* or *Member* means an individual appointed to the Federal Election Commission pursuant to 2 U.S.C. 437c(a), but does not include a proxy or other designated representative of a Commissioner.

(c) *Person*. *Person* means an individual, including employees of the Commission, partnership, corporation, association, or public or private organization, other than an agency of the United States Government.

(d) *Meeting*. (1) *Meeting* means the deliberation of at least four voting members of the Commission in collegia where such deliberations determine or result in the joint conduct or disposition of official Commission business. For the purpose of this section, *joint conduct* does not include, for example, situations where the requisite number of members is physically present in one place but not conducting agency business as a body (e.g., at a meeting at which one member is giving a speech while a number of other members are present in the audience). A deliberation conducted through telephone or similar communications equipment by means of which all persons participating can hear each other will be considered a *meeting* under this section.

(2) The term *meeting* does not include the process of notation voting by circulated memorandum for the purpose of expediting consideration of routine matters. It also does not include deliberations to schedule a meeting, to take action to open or close a meeting, or to release or withhold information, or to

change the subject matter of a meeting under 11 CFR 2.5, 2.6 and 2.7.

[50 FR 39972, Oct. 1, 1985, as amended at 50 FR 50778, Dec. 12, 1985; 65 FR 9206, Feb. 24, 2000]

### § 2.3 General rules.

(a) Commissioners shall not jointly conduct, determine or dispose of Commission business other than in accordance with this part.

(b) Except as provided in 11 CFR 2.4, every portion of every Commission meeting shall be open to public observation.

(c) No additional right to participate in Commission meetings is granted to any person by this part. A meeting is not part of the formal or informal record of decision of the matters discussed therein except as otherwise required by law. Statements of views or expressions of opinions made by Commissioners or FEC employees at meetings are not intended to represent final determinations or beliefs.

(d) Members of the public attending open Commission meetings may use small electronic sound recorders to record the meeting, but the use of other electronic recording equipment and cameras requires advance notice to and coordination with the Commission's Press Officer.

### § 2.4 Exempted meetings.

(a) *Meetings required by statute to be closed.* Meetings concerning matters specifically exempted from disclosure by statutes which require public withholding in such a manner as to leave no discretion for the Commission on the issue, or which establish particular types of matters to be withheld, shall be closed to public observation in accordance with the procedures of 11 CFR 2.5.

(1) As required by 2 U.S.C. 437g(a)(12), all Commission meetings, or portions of meetings, pertaining to any notification or investigation that a violation of the Act has occurred, shall be closed to the public.

(2) For the purpose of this section, *any notification or investigation that a violation of the Act has occurred* includes, but is not limited to, determinations pursuant to 2 U.S.C. 437g, the issuance of subpoenas, discussion of referrals to the Department of Justice, or consideration of any other matter related to the Commission's enforcement activity, as set forth in 11 CFR part 111.

(b) *Meetings closed by Commission determination.* Except as provided in 11 CFR 2.4(c), the requirement of open meetings will not apply where the Commission finds, in accordance with 11 CFR 2.5, that an open meeting or the release of information is likely to result in the disclosure of:

(1) Matters that relate solely to the Commission's internal personnel decisions, or internal rules and practices;

(i) This provision includes, but is not limited to, matters relating to Commission policies on working conditions, or materials prepared predominantly for internal use, the disclosure of which would risk circumvention of Commission regulations; but

(ii) This provision does not include discussions or materials regarding employees' dealings with the public, such as personnel manuals or Commission directives setting forth job functions or procedures;

(2) Financial or commercial information obtained from any person which is privileged or confidential;

(3) Matters which involve the consideration of a proceeding of a formal nature by the Commission against a specific person or the formal censure of any person;

(4) Information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(5) Investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would:

(i) Interfere with enforcement proceedings,

(ii) Deprive a person of a right to a fair trial or an impartial adjudication,

(iii) Constitute an unwarranted invasion of personal privacy,

(iv) Disclose the identity of a confidential source,

(v) Disclose investigative techniques and procedures, or

(vi) Endanger the life or physical safety of law enforcement personnel;

(6) Information the premature disclosure of which would be likely to have a considerable adverse effect on the implementation of a proposed Commission action, as long as the Commission has not already disclosed the content or nature of its proposed action, or is not required by law to disclose it prior to final action; or

(7) Matters that specifically concern the Commission's participation in a civil action or proceeding, or an arbitration, or involving a determination on the record after opportunity for a hearing.

(c) Nothwithstanding the applicability of any exemptions set forth in 11 CFR 2.4(b), the Commission may determine that the public interest requires a meeting to be open.

[50 FR 39972, Oct. 1, 1985, as amended at 75 FR 31, Jan. 4, 2010]

### §2.5 Procedures for closing meetings.

(a) *General.* No meeting or portion of a meeting may be closed to the public observation under this section unless a majority of the Commissioners votes to take such action. The closing of one portion of a meeting shall not justify closing any other portion of a meeting.

(b) *Certification.* Each time the Commission votes to close a meeting, the General Counsel shall publicly certify that, in his or her opinion, each item on the agenda may properly be closed to public observation. The certification shall state each relevant exemption provision. The original copy of the certification shall be attached to, and preserved with, the statement required by 11 CFR 2.5(d).

(c) *Voting procedures.* (1) No meeting need be held to consider closing a meeting. The Commission may vote to close a meeting or any portion thereof by using its notation vote procedures.

(i) A separate vote shall be taken with respect to each item on an agenda proposed to be closed in whole or in part pursuant to 11 CFR 2.4, or with respect to any information proposed to be withheld under 11 CFR 2.4.

(ii) A single vote may be taken with respect to a particular matter to be discussed in a series of closed meetings, or with respect to any information concerning such series of meetings, so long as each meeting in the series is scheduled to be held no more than 30 days after the initial meeting.

(iii) This section shall not affect the Commission's practice of setting dates for closed meetings more than 30 days in advance of such meetings.

(2) The Commission Secretary shall record the vote of each Commissioner participating in the vote. No proxies, written or otherwise, shall be counted.

(3)(i) A Commissioner may object to a recommendation to close the discussion of a particular matter or may assert a claim of exemption for a matter scheduled to be discussed in an open meeting. Such objection or assertion will be discussed by the Commission at the next scheduled closed meeting, to determine whether the matter in question should be discussed in a closed meeting.

(ii) An *objection for the record only* will not cause the objection to be placed on any agenda.

(d) *Public statement of vote.* (1) If the Commission votes to close a meeting, or any portion thereof, under this section, it shall make publicly available within 24 hours a written statement of the vote. The written statement shall contain:

(i) A citation to the provision(s) of 11 CFR 2.4 under which the meeting was closed to public observation and an explanation of why the specific discussion comes within the cited exemption(s);

(ii) The vote of each Commissioner participating in the vote;

(iii) A list of the names of all persons expected to attend the closed meeting and their affiliation. For purposes of this section, affiliation means title or position, and name of employer, and in the case of a representative, the name of the person represented. In the case of Commission employees, the statement will reflect, through the use of titles rather than individual names, that the Commissioners, specified division heads and their staff will attend; and

(iv) The signature of the Commission Secretary.

(2) The original copy of the statement shall be maintained by the Commission Secretary. A copy shall be posted on a public bulletin board located in the Commission's Public Records Office.

(e) *Public request to close a meeting.* A person whose interests may be directly affected by a portion of a meeting may request that the Commission close that portion to the public for any of the reasons referred to in 11 CFR 2.4. The following procedures shall apply to such requests:

(1) The request must be made in writing and shall be directed to the Chairman of the Commission.

(2) The request shall identify the provisions of 11 CFR 2.4 under which the requestor seeks to close all or a portion of the meeting.

(3) A recorded vote to close the meeting or a portion thereof shall be taken.

(4) Requests made under this section shall become part of the official record of the underlying matter and shall be disclosed in accordance with 11 CFR 2.6 on completion of the matter.

(5) If the Commission decides to approve a request to close, the Commission will then follow the procedures for closing a meeting set forth in 11 CFR 2.5 (a) through (d).

[50 FR 39972, Oct. 1, 1985, as amended at 65 FR 9206, Feb. 24, 2000]

### § 2.6 Transcripts and recordings.

(a) The Commission Secretary shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to public observation. An electronic recording of a meeting shall be coded, or other records shall be kept in a manner adequate to identify each speaker.

(b)(1) In the case of any meeting closed pursuant to 11 CFR 2.4(b), as the last item of business, the Commission will determine which, if any, portions of the electronic recording or transcript and which if any, items of information withheld under 11 CFR 2.5 contain information which should be withheld pursuant to 11 CFR 2.4.

(2) Portions of transcripts or recordings determined to be outside the scope of any exemptions under 11 CFR 2.6(b)(1) shall be promptly made available to the public through the Commission's Public Records Office at a cost sufficient to cover the Commission's actual cost of duplication or transcription. Requests for such copies shall be made and processed in accordance with the provisions of 11 CFR part 5.

(3) Portions of transcripts or electronic recordings not made available immediately pursuant to 11 CFR 2.6(b)(1), and portions of transcripts or recordings withheld pursuant to 11 CFR 2.4(a), will be made available on request when the relevant exemptions no longer apply. Such materials shall be requested and processed under the provisions of 11 CFR 2.6(b)(2).

(c) A complete verbatim copy of the transcript or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, shall be maintained by the Commission Secretary in confidential files of the Commission, for a minimum of two years subsequent to such meeting, or a minimum of one year after the conclusion of any agency proceeding with respect to which the meeting, or portion of the meeting, was held, whichever occurs later.

[50 FR 39972, Oct. 1, 1985, as amended at 75 FR 31, Jan. 4, 2010]

### § 2.7 Announcement of meetings and schedule changes.

(a)(1) In the case of each meeting, the Commission shall publicly announce and shall submit such announcement for publication in the FEDERAL REGISTER at least seven days prior to the day on which the meeting is to be called to order. The Commission Secretary shall also forward a copy of such announcement for posting in the Commission's Public Records Office.

(2) Announcements made under this section shall contain the following information:

(i) The date of the meeting;

(ii) The place of the meeting;

(iii) The subject matter of the meeting;

(iv) Whether the meeting is to be open or closed to the public; and

(v) The name and telephone number of the official designated by the agency to respond to requests for information about the meeting.

(b) The public announcement and submission for publication shall be made when required by 11 CFR 2.7(a) in the case of every Commission meeting unless a majority of the Commissioners

decide by recorded vote that Commission business requires that the meeting be called at an earlier date, in which case the Commission shall make at the earliest practicable time, the announcement required by this section and a concurrent submission for publication of that announcement in the FEDERAL REGISTER.

(c) The time or place of a meeting may be changed following the public announcement required by 11 CFR 2.7 (a) or (b) only if the Commission announces the change at the earliest practicable time.

(d) The subject matter of a meeting, or the determination of the Commission to open or close a meeting, or portions of a meeting, to the public may be changed following the public announcement required by 11 CFR 2.7 (a) or (b) only if:

(1) A majority of the entire membership of the Commission determines by recorded vote that Commission business so requires and that no earlier announcement of the change was possible; and

(2) The Commission publicly announces the change and the vote of each member upon the change at the earliest practicable time. Immediately following this announcement, the Commission shall submit for publication in the FEDERAL REGISTER a notice containing the information required by 11 CFR 2.7(a)(2), including a description of any change from the earlier published notice.

### §2.8 Annual report.

The Commission shall report annually to Congress regarding its compliance with the requirements of the Government in the Sunshine Act and of this part, including:

(a) A tabulation of the total number of Commission meetings open to the public;

(b) The total number of such meetings closed to the public;

(c) The reasons for closing such meetings; and

(d) A description of any litigation brought against the Commission under the Sunshine Act, including any costs assessed against the Commission in such litigation (whether or not paid by the Commission).

## PART 4—PUBLIC RECORDS AND THE FREEDOM OF INFORMATION ACT

Sec.



AUTHORITY: 5 U.S.C. 552, as amended.

SOURCE: 44 FR 33368, June 8, 1979, unless otherwise noted.

### §4.1 Definitions.

As used in this part:

(a) *Commission* means the Federal Election Commission, established by the Federal Election Campaign Act of 1971, as amended.

(b) *Commissioner* means an individual appointed to the Federal Election Commission pursuant to 2 U.S.C. 437c(a).

(c) *Request* means to seek the release of records under 5 U.S.C. 552.

(d) *Requestor* is any person who submits a request to the Commission.

(e) *Act* means the Federal Election Campaign Act of 1971, as amended by the Federal Election Campaign Act Amendments of 1974, 1976, and 1979, and unless specifically excluded, includes chapters 95 and 96 of the Internal Revenue Code of 1954 relating to public financing of Federal elections.

(f) *Public Disclosure Division* of the Commission is that division which is responsible for, among other things, the processing of requests for public access to records which are submitted to the Commission pursuant to 2 U.S.C. 437f(d), 437g(a)(4)(B)(ii), and 438(a).

(g) *Direct costs* means those expenditures which the Commission actually incurs in searching for and duplicating (and, in the case of commercial use requestors, reviewing) documents to respond to a FOIA request. Direct costs include the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating equipment. Direct costs do not include overhead expenses such as the cost of space and

noting that the legality of the contribution is in question shall be included in the report noting the receipt of the contribution. If a contribution is refunded to the contributor because it cannot be determined to be legal, the treasurer shall note the refund on the report covering the reporting period in which the refund is made.

[52 FR 774, Jan. 9, 1987]

### § 103.4 Vice Presidential candidate campaign depositories.

Any campaign depository designated by the principal campaign committee of a political party's candidate for President shall be the campaign depository for that political party's candidate for the office of Vice President.

## PART 104—REPORTS BY POLITICAL COMMITTEES AND OTHER PERSONS (2 U.S.C. 434)

Sec.



AUTHORITY: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), 439a, 441a, and 36 U.S.C. 510.

SOURCE: 45 FR 15108, Mar. 7, 1980, unless otherwise noted.

### § 104.1 Scope (2 U.S.C. 434(a)).

(a) *Who must report.* Each treasurer of a political committee required to register under 11 CFR part 102 shall report in accordance with 11 CFR part 104.

(b) *Who may report.* An individual seeking federal office who has not attained candidate status under 11 CFR 100.3, the committee of such an individual or any other committee may voluntarily register and report in accordance with 11 CFR parts 102 and 104. An individual shall not become a candidate solely by voluntarily filing a report, nor shall such individual, the individual's committee, nor any other committee be required to file all reports under 11 CFR 104.5, unless the individual becomes a candidate under 11 CFR 100.3 or unless the committee becomes a political committee under 11 CFR 100.5.

### § 104.2 Forms.

(a) Each report filed by a political committee under 11 CFR part 104 shall be filed on the appropriate FEC form as set forth below at 11 CFR 104.2(e).

(b) Forms may be obtained from the Federal Election Commission, 999 E Street, NW., Washington, DC 20463.

(c) A committee may reproduce FEC forms for its own use provided they are not reduced in size.

(d) With prior approval of the Commission a committee may use, for reporting purposes, computer produced schedules of itemized receipts and disbursements provided they are reduced to the size of FEC forms. The committee shall submit a sample of the proposed format with its request for approval.

(e) The following forms shall be used by the indicated type of reporting committee:

(1) *Presidential committees.* The authorized committees of a candidate for President or Vice President shall file on FEC Form 3–P.

(2) *Congressional candidate committees.* The authorized committees of a candidate for the Senate or the House of

that any obligation incurred for rent, salary or other regularly reoccurring administrative expense shall not be reported as a debt before the payment due date. *See* 11 CFR 116.6. If the exact amount of a debt or obligation is not known, the report shall state that the amount reported is an estimate. Once the exact amount is determined, the political committee shall either amend the report(s) containing the estimate or indicate the correct amount on the report for the reporting period in which such amount is determined.

[45 FR 15108, Mar. 7, 1980, as amended at 55 FR 26386, June 27, 1990]

### § 104.12 Beginning cash on hand for political committees.

Political committees which have cash on hand at the time of registration shall disclose on their first report the source(s) of such funds, including the information required by 11 CFR 104.3(a)(1). The cash on hand balance is assumed to be composed of those contributions most recently received by the committee. The committee shall exclude from funds to be used for Federal elections any contributions not permissible under the Act. See 11 CFR parts 110, 114, and 115.

### § 104.13 Disclosure of receipt and consumption of in-kind contributions.

(a)(1) The amount of an in-kind contribution shall be equal to the usual and normal value on the date received. Each in-kind contribution shall be reported as a contribution in accordance with 11 CFR 104.3(a).

(2) Except for items noted in 11 CFR 104.13(b), each in-kind contribution shall also be reported as an expenditure at the same usual and normal value and reported on the appropriate expenditure schedule, in accordance with 11 CFR 104.3(b).

(b) Contributions of stocks, bonds, art objects, and other similar items to be liquidated shall be reported as follows:

(1) If the item has not been liquidated at the close of a reporting period, the committee shall record as a memo entry (not as cash) the item's fair market value on the date received, including the name and mailing address (and, where in excess of $200, the occupation and name of employer) of the contributor.

(2) When the item is sold, the committee shall record the proceeds. It shall also report the (i) name and mailing address (and, where in excess of $200, the occupation and name of employer) of the purchaser, if purchased directly from the candidate or committee (as the purchaser shall be considered to have made a contribution to the committee), and (ii) the identification of the original contributor.

### § 104.14 Formal requirements regarding reports and statements.

(a) Each individual having the responsibility to file a designation, report or statement required under this subchapter shall sign the original designation, report or statement except that:

(1) Reports or statements of independent expenditures filed by facsimile machine or electronic mail under 11 CFR 104.4(b) or 11 CFR 109.2 must be verified in accordance with those sections; and

(2) Reports, designations, or statements filed electronically under 11 CFR 104.18 must follow the signature requirements of 11 CFR 104.18(g).

(b) Each political committee or other person required to file any report or statement under this subchapter shall maintain all records as follows:

(1) Maintain records, including bank records, with respect to the matters required to be reported, including vouchers, worksheets, receipts, bills and accounts, which shall provide in sufficient detail the necessary information and data from which the filed reports and statements may be verified, explained, clarified, and checked for accuracy and completeness;

(2) Preserve a copy of each report or statement required to be filed under 11 CFR parts 102 and 104, and all records relevant to such reports or statements;

(3) Keep all reports required to be preserved under this section available for audit, inspection, or examination by the Commission or its authorized representative(s) for a period of not less that 3 years after the report or statement is filed (*See* 11 CFR 102.9(c) for requirements relating to preservation of records and accounts); and

(4) Candidates, who obtain bank loans or loans derived from an advance from the candidate's brokerage account, credit card, home equity line of credit, or other lines of credit available to the candidate, must preserve the following records for three years after the date of the election for which they were a candidate:

(i) Records to demonstrate the ownership of the accounts or assets securing the loans;

(ii) Copies of the executed loan agreements and all security and guarantee statements;

(iii) Statements of account for all accounts used to secure any loan for the period the loan is outstanding such as brokerage accounts or credit card accounts, and statements on any line of credit account that was used for the purpose of influencing the candidate's election for Federal office;

(iv) For brokerage loans or other loans secured by financial assets, documentation to establish the source of the funds in the account at the time of the loan; and

(v) Documentation for all payments made on the loan by any person.

(c) Acknowledgements by the Commission or the Secretary of the Senate, of the receipt of Statements of Organization, reports or other statements filed under 11 CFR parts 101, 102 and 104 are intended solely to inform the person filing the report of its receipt and neither the acknowledgement nor the acceptance of a report or statement shall constitute express or implied approval, or in any manner indicate that the contents of any report or statement fulfill the filing or other requirements of the Act or of these regulations.

(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.

[45 FR 15108, Mar. 7, 1980, as amended at 61 FR 3549, Feb. 1, 1996; 67 FR 12840, Mar. 20, 2002; 67 FR 38361, June 4, 2002]

### § 104.15 Sale or use restriction (2 U.S.C. 438(a)(4)).

(a) Any information copied, or otherwise obtained, from any report or statement, or any copy, reproduction, or publication thereof, filed under the Act, shall not be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose, except that the name and address of any political committee may be used to solicit contributions from such committee.

(b) For purposes of 11 CFR 104.15, *soliciting contributions* includes soliciting any type of contribution or donation, such as political or charitable contributions.

(c) The use of information, which is copied or otherwise obtained from reports filed under 11 CFR part 104, in newspapers, magazines, books or other similar communications is permissible as long as the principal purpose of such communications is not to communicate any contributor information listed on such reports for the purpose of soliciting contributions or for other commercial purposes.

[45 FR 15108, Mar. 7, 1980, as amended at 61 FR 3549, Feb. 1, 1996]

### § 104.16 Audits (2 U.S.C. 438(b)).

(a) The Commission may conduct audits of any political committee required to register under 11 CFR part 102 and to report under 11 CFR part 104. Prior to conducting any such audit or investigation, the Commission shall conduct an internal review of reports filed by selected committees to determine whether reports filed by a particular committee meet thresholds established by the Commission for substantial compliance with the Act. Such thresholds may vary according to the type of political committee being reviewed.

(b) The Commission may, upon affirmative vote of four members, conduct an audit and field investigation of any committee which meets the thresholds established pursuant to 11 CFR 104.16(a). All such audits and investigations shall commence within 30 days of such vote except that any audit

# PART 111—COMPLIANCE PROCEDURE (2 U.S.C. 437g, 437d(a))

## Subpart A—Enforcement

Sec.



## Subpart B—Administrative Fines



## Subpart C—Collection of Debts Arising From Enforcement and Administration of Campaign Finance Laws



AUTHORITY: 2 U.S.C. 432(i), 437g, 437d(a), 438(a)(8); 28 U.S.C. 2461 nt; 31 U.S.C. 3701, 3711, 3716–3719, and 3720A, as amended; 31 CFR parts 285 and 900–904.

SOURCE: 45 FR 15120, Mar. 7, 1980, unless otherwise noted.

## Subpart A—Enforcement

### § 111.1 Scope (2 U.S.C. 437g).

These regulations provide procedures for processing possible violations of the Federal Election Campaign Act of 1971, as amended (2 U.S.C. 431, *et seq.*) and chapters 95 and 96 of the Internal Revenue Code of 1954 (26 U.S.C. 9001, *et seq.* and 9031 *et seq.*).

**§ 111.2 Computation of time.**

(a) *General rule.* In computing any period of time prescribed or allowed by this part, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday. As used in this section, the term *legal holiday* includes New Year's Day, President's Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday for employees of the United States by the President or the Congress of the United States.

(b) *Special rule for periods less than seven days.* When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

(c) *Special rule for service by mail.* Whenever the Commission or any person has the right or is required to do some act within a prescribed period after the service of any paper by or upon the Commission or such person and the paper is served by or upon the Commission or such person by mail, three (3) days shall be added to the prescribed period.

**§ 111.3 Initiation of compliance matters (2 U.S.C. 437g(a)(1), (2)).**

(a) Compliance matters may be initiated by a complaint or on the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities.

(b) Matters initiated by complaint are subject to the provisions of 11 CFR 111.4 through 111.7. Matters initiated on the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities are subject to the provisions of 11 CFR 111.8. All compliance matters are subject to the provisions of 11 CFR 111.2 and 111.9 through 111.23.

**§ 111.4 Complaints (2 U.S.C. 437g(a)(1)).**

(a) Any person who believes that a violation of any statute or regulation over which the Commission has jurisdiction has occurred or is about to occur may file a complaint in writing to the General Counsel, Federal Election Commission, 999 E Street, NW., Washington, DC 20463. If possible, three (3) copies should be submitted.

(b) A complaint shall comply with the following:

(1) It shall provide the full name and address of the complainant; and

(2) The contents of the complaint shall be sworn to and signed in the presence of a notary public and shall be notarized.

(c) All statements made in a complaint are subject to the statutes governing perjury and to 18 U.S.C. 1001. The complaint should differentiate between statements based upon personal knowledge and statements based upon information and belief.

(d) The complaint should conform to the following provisions:

(1) It should clearly identify as a respondent each person or entity who is alleged to have committed a violation;

(2) Statements which are not based upon personal knowledge should be accompanied by an identification of the source of information which gives rise to the complainants belief in the truth of such statements;

(3) It should contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction; and

(4) It should be accompanied by any documentation supporting the facts alleged if such documentation is known of, or available to, the complainant.

[45 FR 15120, Mar. 7, 1980, as amended at 50 FR 50778, Dec. 12, 1985]

**§ 111.5 Initial complaint processing; notification (2 U.S.C. 437g(a)(1)).**

(a) Upon receipt of a complaint, the General Counsel shall review the complaint for substantial compliance with the technical requirements of 11 CFR 111.4, and, if it complies with those requirements shall within five (5) days after receipt notify each respondent that the complaint has been filed, advise them of Commission compliance procedures, and enclose a copy of the complaint.

(b) If a complaint does not comply with the requirements of 11 CFR 111.4,

the General Counsel shall so notify the complainant and any person(s) or entity(ies) identified therein as respondent(s), within the five (5) day period specified in 11 CFR 111.5(a), that no action shall be taken on the basis of that complaint. A copy of the complaint shall be enclosed with the notification to each respondent.

### § 111.6 Opportunity to demonstrate that no action should be taken on complaint-generated matters (2 U.S.C. 437g(a)(1)).

(a) A respondent shall be afforded an opportunity to demonstrate that no action should be taken on the basis of a complaint by submitting, within fifteen (15) days from receipt of a copy of the complaint, a letter or memorandum setting forth reasons why the Commission should take no action.

(b) The Commission shall not take any action, or make any finding, against a respondent other than action dismissing the complaint, unless it has considered such response or unless no such response has been served upon the Commission within the fifteen (15) day period specified in 11 CFR 111.6(a).

### § 111.7 General Counsel's recommendation on complaint-generated matters (2 U.S.C. 437g(a)(1)).

(a) Following either the expiration of the fifteen (15) day period specified by 11 CFR 111.6(a) or the receipt of a response as specified by 11 CFR 111.6(a), whichever occurs first, the General Counsel may recommend to the Commission whether or not it should find reason to believe that a respondent has committed or is about to commit a violation of statutes or regulations over which the Commission has jurisdiction.

(b) The General Counsel may recommend that the Commission find that there is no reason to believe that a violation has been committed or is about to be committed, or that the Commission otherwise dismiss a complaint without regard to the provisions of 11 CFR 111.6(a).

### § 111.8 Internally generated matters; referrals (2 U.S.C. 437g(a)(2)).

(a) On the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities, or on the basis of a referral from an agency of the United States or of any state, the General Counsel may recommend in writing that the Commission find reason to believe that a person or entity has committed or is about to commit a violation of statutes or regulations over which the Commission has jurisdiction.

(b) If the Commission finds reason to believe that a violation has occurred or is about to occur the notification to respondent required by 11 CFR 111.9(a) shall include a copy of a staff report setting forth the legal basis and the alleged facts which support the Commission's action.

(c) Prior to taking any action pursuant to this section against any person who has failed to file a disclosure report required by 11 CFR 104.5(a)(1)(iii) for the calendar quarter immediately preceding the election involved or by § 104.5(a)(1)(i), the Commission shall notify such person of failure to file the required reports. If a satisfactory response is not received within four (4) business days, the Commission shall publish before the election the name of the person and the report or reports such person has failed to file.

(d) Notwithstanding §§ 111.9 through 111.19, for violations of 2 U.S.C. 434(a), the Commission, when appropriate, may review internally generated matters under subpart B of this part.

[45 FR 15120, Mar. 7, 1980, as amended at 45 FR 21210, Apr. 1, 1980; 65 FR 31794, May 19, 2000]

### § 111.9 The reason to believe finding; notification (2 U.S.C. 437g(a)(2)).

(a) If the Commission, either after reviewing a complaint-generated recommendation as described in 11 CFR 111.7 and any response of a respondent submitted pursuant to 11 CFR 111.6, or after reviewing an internally-generated recommendation as described in 11 CFR 111.8, determines by an affirmative vote of four (4) of its members that it has reason to believe that a respondent has violated a statute or regulation over which the Commission has jurisdiction, its Chairman or Vice Chairman shall notify such respondent of the Commission's finding by letter, setting forth the sections of the statute or regulations alleged to have been violated

and the alleged factual basis supporting the finding.

(b) If the Commission finds no reason to believe, or otherwise terminates its proceedings, the General Counsel shall so advise both complainant and respondent by letter.

### § 111.10 Investigation (2 U.S.C. 437g(a)(2)).

(a) An investigation shall be conducted in any case in which the Commission finds reason to believe that a violation of a statute or regulation over which the Commission has jurisdiction has occurred or is about to occur.

(b) In its investigation, the Commission may utilize the provisions of 11 CFR 111.11 through 111.15. The investigation may include, but is not limited to, field investigations, audits, and other methods of information-gathering.

### § 111.11 Written questions under order (2 U.S.C. 437d(a)(1)).

The Commission may authorize its Chairman or Vice Chairman to issue an order requiring any person to submit sworn written answers to written questions and may specify a date by which such answers must be submitted.

### § 111.12 Subpoenas and subpoenas duces tecum; depositions (2 U.S.C. 437d(a) (3), (4)).

(a) The Commission may authorize its Chairman or Vice Chairman to issue subpoenas requiring the attendance and testimony of any person by deposition and to issue subpoenas duces tecum for the production of documentary or other tangible evidence in connection with a deposition or otherwise.

(b) If oral testimony is ordered to be taken by deposition or documents are ordered to be produced, the subpoena shall so state and shall advise the deponent or person subpoenaed that all testimony will be under oath. A deposition may be taken before any person having the power to administer oaths.

(c) The Federal Rules of Civil Procedure, Rule 30(e), shall govern the opportunity to review and sign depositions taken pursuant to this section.

### § 111.13 Service of subpoenas, orders and notifications (2 U.S.C. 437d(a) (3), (4)).

(a) Service of a subpoena, order or notification upon a person named therein shall be made by delivering a copy to that person in the manner described by 11 CFR 111.13 (b), (c), and (d). In the case of subpoenas, fees for one day's attendance and mileage shall be tendered as specified in 11 CFR 111.14.

(b) Whenever service is to be made upon a person who has advised the Commission of representation by an attorney pursuant to 11 CFR 111.23, the service shall be made upon the attorney by any of the methods specified in 11 CFR 111.13(c).

(c) Delivery of subpoenas, orders and notifications to a natural person may be made by handing a copy to the person, or leaving a copy at his or her office with the person in charge thereof, by leaving a copy at his or her dwelling place or usual place of abode with some person of suitable age and discretion residing therein, or by mailing a copy by registered or certified mail to his or her last known address, or by any other method whereby actual notice is given.

(d) When the person to be served is not a natural person delivery of subpoenas, orders and notifications may be made by mailing a copy by registered or certified mail to the person at its place of business or by handing a copy to a registered agent for service, or to any officer, director, or agent in charge of any office of such person, or by mailing a copy by registered or certified mail to such representative at his or her last known address, or by any other method whereby actual notice is given.

### § 111.14 Witness fees and mileage (2 U.S.C. 437d(a)(5)).

Witnesses subpoenaed to appear for depositions shall be paid the same fees and mileage as witnesses in the courts of the United States. Such fees may be tendered at the time the witness appears for such deposition, or within a reasonable time thereafter.

**§ 111.15 Motions to quash or modify a subpoena (2 U.S.C. 437d(a) (3), (4)).**

(a) Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 5 days after the date of receipt of such subpoena, apply to the Commission to quash or modify such subpoena, accompanying such application with a brief statement of the reasons therefor. Motions to quash shall be filed with the General Counsel, Federal Election Commission, 999 E Street, NW., Washington, DC 20463. If possible, three (3) copies should be submitted.

(b) The Commission may deny the application or quash the subpoena or modify the subpoena.

(c) The person subpoenaed and the General Counsel may agree to change the date, time, or place of a deposition or for the production of documents without affecting the force and effect of the subpoena, but such agreements shall be confirmed in writing.

[45 FR 15120, Mar. 7, 1980, as amended at 50 FR 50778, Dec. 12, 1985]

**§ 111.16 The probable cause to believe recommendation; briefing procedures (2 U.S.C. 437g(a)(3)).**

(a) Upon completion of the investigation, the General Counsel shall prepare a brief setting forth his or her position on the factual and legal issues of the case and containing a recommendation on whether or not the Commission should find probable cause to believe that a violation has occurred or is about to occur.

(b) The General Counsel shall notify each respondent of the recommendation and enclose a copy of his or her brief.

(c) Within fifteen (15) days from receipt of the General Counsel's brief, respondent may file a brief with the Commission Secretary, Federal Election Commission, 999 E Street, NW., Washington, DC 20463, setting forth respondent's position on the factual and legal issues of the case. If possible, ten (10) copies of such brief should be filed with the Commission Secretary and three (3) copies should be submitted to the General Counsel, Federal Election Commission, 999 E Street, NW., Washington, DC 20463.

(d) After reviewing the respondent's brief, the General Counsel shall advise the Commission in writing whether he or she intends to proceed with the recommendation or to withdraw the recommendation from Commission consideration.

[45 FR 15120, Mar. 7, 1980, as amended at 50 FR 50778, Dec. 12, 1985]

**§ 111.17 The probable cause to believe finding; notification (2 U.S.C. 437g(a)(4)).**

(a) If the Commission, after having found reason to believe and after following the procedures set forth in 11 CFR 111.16, determines by an affirmative vote of four (4) of its members that there is probable cause to believe that a respondent has violated a statute or regulation over which the Commission has jurisdiction, the Commission shall authorize the General Counsel to so notify the respondent by letter.

(b) If the Commission finds no probable cause to believe or otherwise orders a termination of Commission proceedings, it shall authorize the General Counsel to so notify both respondent and complainant by letter.

**§ 111.18 Conciliation (2 U.S.C. 437g(a)(4)).**

(a) Upon a Commission finding of probable cause to believe, the Office of General Counsel shall attempt to correct or prevent the violation by informal methods of conference conciliation and persuasion, and shall attempt to reach a tentative conciliation agreement with the respondent.

(b) A conciliation agreement is not binding upon either party unless and until it is signed by the respondent and by the General Counsel upon approval by the affirmative vote of four (4) members of the Commission.

(c) If the probable cause to believe finding is made within forty-five days prior to any election, such conciliation attempt shall continue for at least fifteen (15) days from the date of such finding. In all other cases such attempts by the Commission shall continue for at least thirty (30) days, not to exceed ninety (90) days.

(d) Nothing in these regulations shall be construed to prevent the Commission from entering into a conciliation

agreement with a respondent prior to a Commission finding of probable cause if a respondent indicates by letter to the General Counsel a desire to enter into negotiations directed towards reaching such a conciliation agreement. However, the Commission is not required to enter into any negotiations directed towards reaching a conciliation agreement unless and until it makes a finding of probable cause to believe. Any conciliation agreement reached under this subsection is subject to the provisions of subsection (b) of this section and shall have the same force and effect as a conciliation agreement reached after a Commission finding of probable cause to believe.

(e) If a conciliation agreement is reached between the Commission and the respondent, the General Counsel shall send a copy of the signed agreement to both complainant and respondent.

### § 111.19 Civil proceedings (2 U.S.C. 437g(a)(6)).

(a) If no conciliation agreement is finalized within the applicable minimum period specified by 11 CFR 111.18(c) the General Counsel may recommend to the Commission that the Commission authorize a civil action for relief in an appropriate court of the United States.

(b) Upon recommendation of the General Counsel, the Commission may, by an affirmative vote of four (4) of its members, authorize the General Counsel to commence a civil action for relief in an appropriate court of the United States.

(c) The provisions of 11 CFR 111.18(c) shall not preclude the Commission upon request of a respondent, from entering into a conciliation agreement even after a recommendation to file a civil action has been made pursuant to this section. Any conciliation agreement reached under this subsection is subject to the provisions of 11 CFR 111.18(b) and shall have the same force and effect as a conciliation agreement reached under 11 CFR 111.18(c).

### § 111.20 Public disclosure of Commission action (2 U.S.C. 437g(a)(4)).

(a) If the Commission makes a finding of no reason to believe or no probable cause to believe or otherwise terminates its proceedings, it shall make public such action and the basis therefor no later than thirty (30) days from the date on which the required notifications are sent to complainant and respondent.

(b) If a conciliation agreement is finalized, the Commission shall make public such conciliation agreement forthwith.

(c) For any compliance matter in which a civil action is commenced, the Commission will make public the nonexempt 2 U.S.C. 437g investigatory materials in the enforcement and litigation files no later than thirty (30) days from the date on which the Commission sends the complainant and the respondent(s) the required notification of the final disposition of the civil action. The final disposition may consist of a judicial decision which is not reviewed by a higher court.

[45 FR 15120, Mar. 7, 1980, as amended at 65 FR 31794, May 19, 2000]

### § 111.21 Confidentiality (2 U.S.C. 437g(a)(12)).

(a) Except as provided in 11 CFR 111.20, no complaint filed with the Commission, nor any notification sent by the Commission, nor any investigation conducted by the Commission, nor any findings made by the Commission shall be made public by the Commission or by any person or entity without the written consent of the respondent with respect to whom the complaint was filed, the notification sent, the investigation conducted, or the finding made.

(b) Except as provided in 11 CFR 111.20(b), no action by the Commission or by any person, and no information derived in connection with conciliation efforts pursuant to 11 CFR 111.18, may be made public by the Commission except upon a written request by respondent and approval thereof by the Commission.

(c) Nothing in these regulations shall be construed to prevent the introduction of evidence in the courts of the United States which could properly be introduced pursuant to the Federal Rules of Evidence or Federal Rules of Civil Procedure.

**§ 111.22 Ex parte communications.**

(a) In order to avoid the possibility of prejudice, real or apparent, to the public interest in enforcement actions pending before the Commission pursuant to 11 CFR part 111, except to the extent required for the disposition of ex parte matters as required by law (for example, during the normal course of an investigation or a conciliation effort), no interested person outside the agency shall make or cause to be made to any Commissioner or any member of any Commissioner's staff any ex parte communication relative to the factual or legal merits of any enforcement action, nor shall any Commissioner or member of any Commissioner's staff make or entertain any such ex parte communications.

(b) The prohibition of this regulation shall apply from the time a complaint is filed with the Commission pursuant to 11 CFR part 111 or from the time that the Commission determines on the basis of information ascertained in the normal course of its supervisory responsibilities that it has reason to believe that a violation has occurred or may occur pursuant to 11 CFR part 111, and remains in force until the Commission has finally concluded all action with respect to the enforcement matter in question.

(c) Nothing in this section shall be construed to prohibit contact between a respondent or respondent's attorney and any attorney or staff member of the Office of General Counsel in the course of representing the Commission or the respondent with respect to an enforcement proceeding or civil action. No statement made by such a Commission attorney or staff member during any such communication shall bind or estop the Commission in any way.

**§ 111.23 Representation by counsel; notification.**

(a) If a respondent wishes to be represented by counsel with regard to any matter pending before the Commission, respondent shall so advise the Commission by sending a letter of representation signed by the respondent, which letter shall state the following:

(1) The name, address, and telephone number of the counsel;

(2) A statement authorizing such counsel to receive any and all notifications and other communications from the Commission on behalf of respondent.

(b) Upon receipt of a letter of representation, the Commission shall have no contact with respondent except through the designated counsel unless authorized in writing by respondent.

**§ 111.24 Civil Penalties (2 U.S.C. 437g(a) (5), (6), (12), 28 U.S.C. 2461 nt.).**

(a) Except as provided in 11 CFR part 111, subpart B and in paragraph (b) of this section, a civil penalty negotiated by the Commission or imposed by a court for a violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.) shall be as follows:

(1) Except as provided in paragraph (a)(2) of this section, in the case of a violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.), the civil penalty shall not exceed the greater of $7,500 or an amount equal to any contribution or expenditure involved in the violation.

(2)*Knowing and willful violations.* (i) In the case of a knowing and willful violation of the Act or chapters 95 or 96 of title 26 (26 U.S.C.), the civil penalty shall not exceed the greater of $16,000 or an amount equal to 200% of any contribution or expenditure involved in the violation.

(ii) Notwithstanding paragraph (a)(2)(i) of this section, in the case of a knowing and willful violation of 2 U.S.C. 441f, the civil penalty shall not be less than 300% of the amount of any contribution involved in the violation and shall not exceed the greater of $65,000 or 1,000% of the amount of any contribution involved in the violation.

(b) Any Commission member or employee, or any other person, who in violation of 2 U.S.C. 437g(a)(12)(A) makes public any notification or investigation under 2 U.S.C. 437g without receiving the written consent of the person receiving such notification, or the person with respect to whom such investigation is made, shall be fined not more than $3,200. Any such member,

employee, or other person who knowingly and willfully violates this provision shall be fined not more than $7,500.

[62 FR 11317, Mar. 12, 1997; 62 FR 18167, Apr. 14, 1997; 65 FR 31794, May 19, 2000; 67 FR 76977, Dec. 13, 2002; 70 FR 34635, June 15, 2005; 74 FR 31347, July 1, 2009; 78 FR 44420, July 24, 2013]

## Subpart B—Administrative Fines

SOURCE: 65 FR 31794, May 19, 2000, unless otherwise noted.

### § 111.30 When will subpart B apply?

Subpart B applies to violations of the reporting requirements of 2 U.S.C. 434(a) committed by political committees and their treasurers that relate to the reporting periods that begin on or after July 14, 2000 and end on or before December 31, 2013.

[73 FR 72688, Dec. 1, 2008]

### § 111.31 Does this subpart replace subpart A of this part for violations of the reporting requirements of 2 U.S.C. 434(a)?

(a) No; §§ 111.1 through 111.8 and 111.20 through 111.24 shall apply to all compliance matters. This subpart will apply, rather than §§ 111.9 through 111.19, when the Commission, on the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities, and when appropriate, determines that the compliance matter should be subject to this subpart. If the Commission determines that the violation should not be subject to this subpart, then the violation will be subject to all sections of subpart A of this part.

(b) Subpart B will apply to compliance matters resulting from a complaint filed pursuant to 11 CFR 111.4 through 111.7 if the complaint alleges a violation of 2 U.S.C. 434(a). If the complaint alleges violations of any other provision of any statute or regulation over which the Commission has jurisdiction, subpart A will apply to the alleged violations of these other provisions.

### § 111.32 How will the Commission notify respondents of a reason to believe finding and a proposed civil money penalty?

If the Commission determines, by an affirmative vote of at least four (4) of its members, that it has reason to believe that a respondent has violated 2 U.S.C. 434(a), the Chairman or Vice-Chairman shall notify such respondent of the Commission's finding. The written notification shall set forth the following:

(a) The alleged factual and legal basis supporting the finding including the type of report that was due, the filing deadline, the actual date filed (if filed), and the number of days the report was late (if filed);

(b) The applicable schedule of penalties;

(c) The number of times the respondent has been assessed a civil money penalty under this subpart during the current two-year election cycle and the prior two-year election cycle;

(d) The amount of the proposed civil money penalty based on the schedules of penalties set forth in 11 CFR 111.43 or 111.44; and

(e) An explanation of the respondent's right to challenge both the reason to believe finding and the proposed civil money penalty.

### § 111.33 What are the respondent's choices upon receiving the reason to believe finding and the proposed civil money penalty?

The respondent must either send payment in the amount of the proposed civil money penalty pursuant to 11 CFR 111.34 or submit a written response pursuant to 11 CFR 111.35.

### § 111.34 If the respondent decides to pay the civil money penalty and not to challenge the reason to believe finding, what should the respondent do?

(a) The respondent shall transmit payment in the amount of the civil money penalty to the Commission within forty (40) days of the Commission's reason to believe finding.

(b) Upon receipt of the respondent's payment, the Commission shall send the respondent a final determination that the respondent has violated the statute or regulations and the amount

of the civil money penalty and an acknowledgment of the respondent's payment.

### § 111.35 If the respondent decides to challenge the alleged violation or proposed civil money penalty, what should the respondent do?

(a) To challenge a reason to believe finding or proposed civil money penalty, the respondent must submit a written response to the Commission within forty (40) days of the Commission's reason to believe finding.

(b) The respondent's written response must assert at least one of the following grounds for challenging the reason to believe finding or proposed civil money penalty:

(1) The Commission's reason to believe finding is based on a factual error including, but not limited to, the committee was not required to file the report, or the committee timely filed the report in accordance with 11 CFR 100.19;

(2) The Commission improperly calculated the civil money penalty; or

(3) The respondent used best efforts to file in a timely manner in that:

(i) The respondent was prevented from filing in a timely manner by reasonably unforeseen circumstances that were beyond the control of the respondent; and

(ii) The respondent filed no later than 24 hours after the end of these circumstances.

(c) Circumstances that will be considered reasonably unforeseen and beyond the control of respondent include, but are not limited to:

(1) A failure of Commission computers or Commission-provided software despite the respondent seeking technical assistance from Commission personnel and resources;

(2) A widespread disruption of information transmissions over the Internet not caused by any failure of the Commission's or respondent's computer systems or Internet service provider; and

(3) Severe weather or other disaster-related incident.

(d) Circumstances that will not be considered reasonably unforeseen and beyond the control of respondent include, but are not limited to:

(1) Negligence;

(2) Delays caused by committee vendors or contractors;

(3) Illness, inexperience, or unavailability of the treasurer or other staff;

(4) Committee computer, software or Internet service provider failures;

(5) A committee's failure to know filing dates; and

(6) A committee's failure to use filing software properly.

(e) Respondent's written response must detail the factual basis supporting its challenge and include supporting documentation.

[72 FR 14667, Mar. 29, 2007]

### § 111.36 Who will review the respondent's written response?

(a) A reviewing officer shall review the respondent's written response. The reviewing officer shall be a person who has not been involved in the reason to believe finding.

(b) The reviewing officer shall review the reason to believe finding with supporting documentation and the respondent's written response with supporting documentation. The reviewing officer may request supplemental information from the respondent and/or the Commission staff. The respondent shall submit the supplemental information to the reviewing officer within a time specified by the reviewing officer. The reviewing officer will be entitled to draw an adverse inference from the failure by the respondent to submit the supplemental information.

(c) All documents required to be submitted by the respondents pursuant to this section and § 111.35 should be submitted in the form of affidavits or declarations.

(d) If the Commission staff, after the respondent files a written response pursuant to § 111.35, forwards any additional documents pertaining to the matter to the reviewing officer for his or her examination, the reviewing officer shall also furnish a copy of the document(s) to the respondents.

(e) Upon completion of the review, the reviewing officer shall forward a written recommendation to the Commission along with all documents required under this section and 11 CFR 111.32 and 111.35.

(f) The reviewing office shall also forward a copy of the recommendation to

the respondent. The respondent may file with the Commission Secretary a written response to the recommendation within ten (10) days of transmittal of the recommendation. This response may not raise any arguments not raised in the respondent's original written response or not directly responsive to the reviewing officer's recommendation.

### § 111.37 What will the Commission do once it receives the respondent's written response and the reviewing officer's recommendation?

(a) If the Commission, after having found reason to believe and after reviewing the respondent's written response and the reviewing officer's recommendation, determines by an affirmative vote of at least four (4) of its members, that the respondent has violated 2 U.S.C. 434(a) and the amount of the civil money penalty, the Commission shall authorize the reviewing officer to notify the respondent by letter of its final determination.

(b) If the Commission, after reviewing the reason to believe finding, the respondent's written response, and the reviewing officer's written recommendation, determines by an affirmative vote of at least four (4) of its members, that no violation has occurred (either because the Commission had based its reason to believe finding on a factual error or because the respondent used best efforts to file in a timely manner) or otherwise terminates its proceedings, the Commission shall authorize the reviewing officer to notify the respondent by letter of its final determination.

(c) The Commission will modify the proposed civil money penalty only if the respondent is able to demonstrate that the amount of the proposed civil money penalty was calculated on an incorrect basis.

(d) When the Commission makes a final determination under this section, the statement of reasons for the Commission action will, unless otherwise indicated by the Commission, consist of the reasons provided by the reviewing officer for the recommendation, if approved by the Commission, although statements setting forth additional or different reasons may also be issued. If the reviewing officer's recommendation is modified or not approved, the Commission will indicate the grounds for its action and one or more statements of reasons may be issued.

[65 FR 31794, May 19, 2000, as amended at 72 FR 14668, Mar. 29, 2007]

### § 111.38 Can the respondent appeal the Commission's final determination?

Yes; within thirty (30) days of receipt of the Commission's final determination under 11 CFR 111.37, the respondent may submit a written petition to the district court of the United States for the district in which the respondent resides, or transacts business, requesting that the final determination be modified or set aside. The respondent's failure to raise an argument in a timely fashion during the administrative process shall be deemed a waiver of the respondent's right to present such argument in a petition to the district court under 2 U.S.C. 437g.

### § 111.39 When must the respondent pay the civil money penalty?

(a) If the respondent does not submit a written petition to the district court of the United States, the respondent must remit payment of the civil money penalty within thirty (30) days of receipt of the Commission's final determination under 11 CFR 111.37.

(b) If the respondent submits a written petition to the district court of the United States and, upon the final disposition of the civil action, is required to pay a civil money penalty, the respondent shall remit payment of the civil money penalty to the Commission within thirty (30) days of the final disposition of the civil action. The final disposition may consist of a judicial decision which is not reviewed by a higher court.

(c) Failure to pay the civil money penalty may result in the commencement of collection action under 31 U.S.C. 3701 *et seq.* (1996), or a civil suit pursuant to 2 U.S.C. 437g(a)(6)(A), or any other legal action deemed necessary by the Commission.

### § 111.40 What happens if the respondent does not pay the civil money penalty pursuant to 11 CFR 111.34 and does not submit a written response to the reason to believe finding pursuant to 11 CFR 111.35?

(a) If the Commission, after the respondent has failed to pay the civil money penalty and has failed to submit a written response, determines by an affirmative vote of at least four (4) of its members that the respondent has violated 2 U.S.C. 434(a) and determines the amount of the civil money penalty, the respondent shall be notified by letter of its final determination.

(b) The respondent shall transmit payment of the civil money penalty to the Commission within thirty (30) days of receipt of the Commission's final determination.

(c) Failure to pay the civil money penalty may result in the commencement of collection action under 31 U.S.C. 3701 *et seq.* (1996), or a civil suit pursuant to 2 U.S.C. 437g(a)(6)(A), or any other legal action deemed necessary by the Commission.

### § 111.41 To whom should the civil money penalty payment be made payable?

Payment of civil money penalties shall be made in the form of a check or money order made payable to the Federal Election Commission.

### § 111.42 Will the enforcement file be made available to the public?

(a) Yes; the Commission shall make the enforcement file available to the public.

(b) If neither the Commission nor the respondent commences a civil action, the Commission shall make the enforcement file available to the public pursuant to 11 CFR 4.4(a)(3).

(c) If a civil action is commenced, the Commission shall make the enforcement file available pursuant to 11 CFR 111.20(c).

### § 111.43 What are the schedules of penalties?

(a) The civil money penalty for all reports that are filed late or not filed, except election sensitive reports and pre-election reports under 11 CFR 104.5, shall be calculated in accordance with the following schedule of penalties:

| If the level of activity in the report was: | And the report was filed late, the civil money penalty is: | Or the report was not filed, the civil money penalty is: |
|---|---|---|
| $1–4,999.99 [a] | [$27.50 + ($5 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $275 × [1 + (.25 × Number of previous violations)]. |
| $5,000–9,999.99 | [$55 + ($5 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $330 × [1 + (.25 × Number of previous violations)]. |
| $10,000–24,999.99 | [$110 + ($5 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $550 × [1 + (.25 × Number of previous violations)]. |
| $25,000–49,999.99 | [$200 + ($20 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $1090 × [1 + (.25 × Number of previous violations)]. |
| $50,000–74,999.99 | [$330 + ($92.50 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $2970 × [1 + (.25 × Number of previous violations)]. |
| $75,000–99,999.99 | [$440 + ($110 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $3850 × [1 + (.25 × Number of previous violations)]. |
| $100,000–149,999.99 | [$660 + ($125 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $4950 × [1 + (.25 × Number of previous violations)]. |
| $150,000–199,999.99 | [$980 + ($150 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $6050 × [1 + (.25 × Number of previous violations)]. |
| $200,000–249,999.99 | [$1100 + ($175 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $7150 × [1 + (.25 × Number of previous violations)]. |
| $250,000–349,999.99 | [$1500 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $9800 × [1 + (.25 × Number of previous violations)]. |
| $350,000–449,999.99 | [$2000 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $10,900 × [1 + (.25 × Number of previous violations)]. |
| $450,000–549,999.99 | [$2750 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $10,450 × [1 + (.25 × Number of previous violations)]. |
| $550,000–649,999.99 | [$3300 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $11,000 × [1 + (.25 × Number of previous violations)]. |
| $650,000–749,999.99 | [$3850 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $11,550 × [1 + (.25 × Number of previous violations)]. |
| $750,000–849,999.99 | [$4400 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $12,100 × [1 + (.25 × Number of previous violations)]. |
| $850,000–949,999.99 | [$4950 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $12,650 × [1 + (.25 × Number of previous violations)]. |

| If the level of activity in the report was: | And the report was filed late, the civil money penalty is: | Or the report was not filed, the civil money penalty is: |
|---|---|---|
| $950,000 or over ..... | [$5500 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $13,200 × [1 + (.25 × Number of previous violations)]. |

[a] The civil money penalty for a respondent who does not have any previous violations will not exceed the level of activity in the report.

(b) The civil money penalty for election sensitive reports that are filed late or not filed shall be calculated in accordance with the following schedule of penalties:

| If the level of activity in the report was: | And the report was filed late, the civil money penalty is: | Or the report was not filed, the civil money penalty is: |
|---|---|---|
| $1–$4,999.99[a] ..... | [$55 + ($10 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $550 × [1 + (.25 × Number of previous violations)]. |
| $5,000–$9,999.99 ..... | [$110 + ($10 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $660 × [1 + (.25 × Number of previous violations)]. |
| $10,000–24,999.99 ..... | [$150 + ($10 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $1090 × [1 + (.25 × Number of previous violations)]. |
| $25,000–49,999.99 ..... | [$330 + ($27.50 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $1,400 × [1 + (.25 × Number of previous violations)]. |
| $50,000–74,999.99 ..... | [$495 + ($92.50 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $3300 × [1 + (.25 × Number of previous violations)]. |
| $75,000–99,999.99 ..... | [$660 + ($110 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $4400 × [1 + (.25 × Number of previous violations)]. |
| $100,000–149,999.99 ..... | [$1090 + ($125 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $5500 × [1 + (.25 × Number of previous violations)]. |
| $150,000–199,999.99 ..... | [$1200 + ($150 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $6600 × [1 + (.25 × Number of previous violations)]. |
| $200,000–249,999.99 ..... | [$1500 + ($175 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $9250 × [1 + (.25 × Number of previous violations)]. |
| $250,000–349,999.99 ..... | [$2475 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $10,900 × [1 + (.25 × Number of previous violations)]. |
| $350,000–449,999.99 ..... | [$3300 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $11,000 × [1 + (.25 × Number of previous violations)]. |
| $450,000–549,999.99 ..... | [$4125 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $12,100 × [1 + (.25 × Number of previous violations)]. |
| $550,000–649,999.99 ..... | [$4950 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $13,200 × [1 + (.25 × Number of previous violations)]. |
| $650,000–749,999.99 ..... | [$5775 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $14,300 × [1 + (.25 × Number of previous violations)]. |
| $750,000–849,999.99 ..... | [$6600 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $15,400 × [1 + (.25 × Number of previous violations)]. |
| $850,000–949,999.99 ..... | [$7425 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $16,500 × [1 + (.25 × Number of previous violations)]. |
| $950,000 or over ..... | [$9250 + ($200 × Number of days late)] × [1 + (.25 × Number of previous violations)]. | $17,600 × [1 + (.25 × Number of previous violations)]. |

[a] The civil money penalty for a respondent who does not have any previous violations will not exceed the level of activity in the report.

(c) If the respondent fails to file a required report and the Commission cannot calculate the level of activity under paragraph (d) of this section, then the civil money penalty shall be $6,050.

(d) *Definitions.* For this section only, the following definitions will apply:

(1) *Election Sensitive Reports* means third quarter reports due on October 15th before the general election (for all committees required to file this report except committees of candidates who do not participate in that general election); monthly reports due October 20th before the general election (for all committees required to file this report except committees of candidates who do not participate in that general election); and pre-election reports for primary, general, and special elections under 11 CFR 104.5.

(2) *Estimated level of activity* means:

(i) For an authorized committee, total receipts and disbursements reported in the current two-year election cycle divided by the number of reports filed to date covering the activity in the current two-year election cycle. If the respondent has not filed a report

covering activity in the current two-year election cycle, estimated level of activity for an authorized committee means total receipts and disbursements reported in the prior two-year election cycle divided by the number of reports filed covering the activity in the prior two-year election cycle.

(ii)(A) For an unauthorized committee, estimated level of activity is calculated as follows: [(Total receipts and disbursements reported in the current two-year cycle)—(Transfers received from non-Federal account(s) as reported on Line 18(a) of FEC Form 3X Disbursements for the non-Federal share of operating expenditures attributable to allocated Federal/non-Federal activity as reported on Line 21(a)(ii) of FEC Form 3X)] ÷ Number of reports filed to date covering the activity in the current two-year election cycle.

(B) If the unauthorized committee has not filed a report covering activity in the current two-year election cycle, the estimated level of activity is calculated as follows: [(Total receipts and disbursements reported in the prior two-year election cycle)—(Transfers received from non-Federal account(s) as reported on Line 18(a) of FEC Form 3X Disbursements for the non-Federal share of operating expenditures attributable to allocated Federal/non-Federal activity as reported on Line 21(a)(ii) of FEC Form 3X)] ÷ Number of reports filed covering the activity in the prior two-year election cycle.

(3) *Level of activity* means:

(i) For an authorized committee, the total amount of receipts and disbursements for the period covered by the late report. If the report is not filed, the level of activity is the estimated level of activity as set forth in paragraph (d)(2)(i) of this section.

(ii) For an unauthorized committee, the total amount of receipts and disbursements for the period covered by the late report minus the total of: Transfers received from non-Federal account(s) as reported on Line 18(a) of FEC Form 3X and disbursements for the non-Federal share of operating expenditures attributable to allocated Federal/non-Federal activity as reported on Line 21(a)(ii) of FEC Form 3X for the period covered by the late report. If the report is not filed, the level of activity is the estimated level of activity as set forth in paragraph (d)(2)(ii) of this section.

(4) *Number of previous violations* means all prior final civil money penalties assessed under this subpart during the current two-year election cycle and the prior two-year election cycle.

(e) For purposes of the schedules of penalties in paragraphs (a) and (b) of this section,

(1) Reports that are not election sensitive reports are considered to be filed late if they are filed after their due dates but within thirty (30) days of their due dates. These reports are considered to be not filed if they are filed after thirty (30) days of their due dates or not filed at all.

(2) Election sensitive reports are considered to be filed late if they are filed after their due dates but prior to four (4) days before the primary election for pre-primary reports, prior to four (4) days before the special election for pre-special election reports, or prior to four (4) days before the general election for all other election sensitive reports. These reports are considered to be not filed if they are not filed prior to four (4) days before the primary election for pre-primary reports, prior to four (4) days before the special election for pre-special election reports or prior to four (4) days before the general election for all other election sensitive reports.

[65 FR 31794, May 19, 2000, as amended at 68 FR 12577, Mar. 17, 2003; 70 FR 34636, June 15, 2005; 74 FR 31348, July 1, 2009; 74 FR 37161, July 28, 2009; 78 FR 44421, July 24, 2013]

### § 111.44 What is the schedule of penalties for 48-hour notices that are not filed or are filed late?

(a) If the respondent fails to file timely a notice regarding contribution(s) received after the 20th day but more than 48 hours before the election as required under 2 U.S.C. 434(a)(6), the civil money penalty will be calculated as follows:

(1) Civil money penalty = $110 + (.10 × amount of the contribution(s) not timely reported).

(2) The civil money penalty calculated in paragraph (a)(1) of this section shall be increased by twenty-five percent (25%) for each prior violation.

(b) For purposes of this section, prior violation means a final civil money penalty that has been assessed against the respondent under this subpart in the current two-year election cycle or the prior two-year election cycle.

[65 FR 31794, May 19, 2000, as amended at 70 FR 34636, June 15, 2005; 74 FR 31349, July 1, 2009]

### § 111.45 [Reserved]

### § 111.46 How will the respondent be notified of actions taken by the Commission and the reviewing officer?

If a statement designating counsel has been filed in accordance with 11 CFR 111.23, all notifications and other communications to a respondent provided for in subpart B of this part will be sent to designated counsel. If a statement designating counsel has not been filed, all notifications and other communications to a respondent provided for in subpart B of this part will be sent to respondent political committee and its treasurer at the political committee's address as listed in the most recent Statement of Organization, or amendment thereto, filed with the Commission in accordance with 11 CFR 102.2.

[68 FR 12580, Mar. 17, 2003]

## Subpart C—Collection of Debts Arising From Enforcement and Administration of Campaign Finance Laws

SOURCE: 75 FR 19876, Apr. 16, 2010, unless otherwise noted.

### § 111.50 Purpose and scope.

Subpart C prescribes standards and procedures under which the Commission will collect and dispose of certain debts owed to the United States, as described in 11 CFR 111.51. The regulations in this subpart implement the Debt Collection Improvement Act of 1996, 31 U.S.C. 3701, 3711, and 3716–3720A, as amended; and the Federal Claims Collection Standards, 31 CFR parts 900–904. The activities covered include: The collection of claims of any amount; compromising claims; suspending or terminating the collection of claims; and referring debts to the U.S. Department of the Treasury for collection action.

### § 111.51 Debts that are covered.

(a) The procedures of this subpart C of part 111 apply to claims for payment or debt arising from, or ancillary to, any action undertaken by or on behalf of the Commission in furtherance of efforts to ensure compliance with the Federal Election Campaign Act, 2 U.S.C. 431 *et seq.*, as amended, and to administer the Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.*, or the Presidential Primary Matching Payment Account Act, 26 U.S.C. 9031 *et seq.*, and Commission regulations, including:

(1) Negotiated civil penalties in enforcement matters and alternative dispute resolution matters;

(2) Civil money penalties assessed under the administrative fines program;

(3) Claims reduced to judgment in the courts and that are no longer in litigation;

(4) Repayments of public funds under the Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.;* or

(5) Repayment of public funds under the Presidential Primary Matching Payment Account Act, 26 U.S.C. 9031 *et seq.*

(c) The procedures covered by this subpart do not apply to any of the following debts:

(1) Debts that result from administrative activities of the Commission that are governed by 11 CFR part 8.

(2) Debts involving criminal actions of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other person having an interest in the claim.

(3) Debts based in whole or in part on conduct in violation of the antitrust laws.

(4) Debts under the Internal Revenue Code of 1986.

(b) An employee participation plan must be made available to all employees including members of a labor organization who are employees of the corporation. Communications about participation in the plan may be conducted by either the corporation or the labor organization or both.

(c) A labor organization may establish and administer an employee participation plan subject to the above provisions, except that the cost shall be borne by the labor organization.

(d) The method used to transmit employee or member contributions to the candidate or political committee may not in any manner identify the corporation or labor organization which established the employee particiption plan.

[41 FR 35955, Aug. 25, 1976]

### § 114.12 Incorporation of political committees; payment of fringe benefits.

(a) An organization may incorporate and not be subject to the provisions of this part if the organization incorporates for liability purposes only, and if the organization is a political committee as defined in 11 CFR 100.5. Notwithstanding the corporate status of the political committee, the treasurer of an incorporated political committee remains personally responsible for carrying out their respective duties under the Act.

(b) [Reserved]

(c)(1) A corporation of labor organization may not pay the employer's share of the cost of fringe benefits, such as health and life insurance and retirement, for employees or members on leave-without-pay to participate in political campaigns of Federal candidates. The separate segregated fund of a corporation or a labor organization may pay the employer's share of fringe benefits, and such payment would be a contribution in-kind to the candidate. An employee or member may, out of unreimbursed personal funds, assure the continuity of his or her fringe benefits during absence from work for political campaigning, and such payment would not be a contribution in-kind.

(2) Service credit for periods of leave-without-pay is not considered compensation for purposes of this section if the employer normally gives identical treatment to employees placed on leave-without-pay for nonpolitical purposes.

[41 FR 35955, Aug. 25, 1976, as amended at 45 FR 21210, Apr. 1, 1980; 60 FR 31382, June 15, 1995; 60 FR 64279, Dec. 14, 1995]

### § 114.13 Use of meeting rooms.

Notwithstanding any other provisions of part 114, a corporation or labor organization which customarily makes its meeting rooms available to clubs, civic or community organizations, or other groups may make such facilities available to a political committee or candidate if the meeting rooms are made available to any candidate or political committee upon request and on the same terms given to other groups using the meeting rooms.

[60 FR 64279, Dec. 14, 1995]

### § 114.14 Further restrictions on the use of corporate and labor organization funds for electioneering communications.

(a)(1) Corporations and labor organizations shall not give, disburse, donate or otherwise provide funds, the purpose of which is to pay for an electioneering communication that is not permissible under 11 CFR 114.15, to any other person.

(2) A corporation or labor organization shall be deemed to have given, disbursed, donated, or otherwise provided funds under paragraph (a)(1) of this section if the corporation or labor organization knows, has reason to know, or willfully blinds itself to the fact, that the person to whom the funds are given, disbursed, donated, or otherwise provided, intended to use them to pay for such an electioneering communication.

(b) Persons who accept funds given, disbursed, donated or otherwise provided by a corporation or labor organization shall not:

(1) Use those funds to pay for any electioneering communication that is not permissible under 11 CFR 114.15; or

(2) Provide any portion of those funds to any person, for the purpose of defraying any of the costs of an electioneering communication that is not permissible under 11 CFR 114.15.

(c) The prohibitions at paragraphs (a) and (b) of this section shall not apply

# Proposed Rules

Federal Register
Vol. 69, No. 18
Wednesday, January 28, 2004

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

## FEDERAL ELECTION COMMISSION

### 11 CFR Part 111

**[Notice 2004–3]**

### Proposed Statement of Policy Regarding Naming of Treasurers in Enforcement Matters

**AGENCY:** Federal Election Commission.

**ACTION:** Draft statement of policy with request for comments.

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

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

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

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

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

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

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

## II. The Official/Personal Capacity Distinction

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

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

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

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

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

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

Id.

## III. Naming Treasurers in Their Official Capacity

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

## IV. Naming Treasurers in Their Personal Capacity

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

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

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

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

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

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

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

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

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

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

**V. Naming Treasurers in Both Capacities**

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

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

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

**VI. Successor Treasurers/Substitution**

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

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

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

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

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

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

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

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

### VII. Proposed Policy

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

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

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

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

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

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

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

Dated: January 23, 2004.

**Bradley A. Smith,**

*Chairman, Federal Election Commission.*

[FR Doc. 04–1790 Filed 1–27–04; 8:45 am]

**BILLING CODE 6715–01–P**

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

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

## CONSUMER PRODUCT SAFETY COMMISSION

### 16 CFR Chapter II

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

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Notice of systematic review of current regulations.

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

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

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

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

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

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

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

**SUPPLEMENTARY INFORMATION:**

### A. The Pilot Review Program

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

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

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## FEDERAL ELECTION COMMISSION

### 11 CFR Part 111

**[Notice 2004—20]**

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

**AGENCY:** Federal Election Commission.

**ACTION:** Statement of policy.

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

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

**DATES:** December 16, 2004.

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

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

The Commission is modifying its current practices to specify more clearly when a treasurer is subject to a Commission enforcement proceeding in his or her ''official'' and/or ''personal'' capacity.[1] Specifically, when a complaint asserts sufficient allegations to warrant naming a political committee as a respondent, the committee's current treasurer will also be named as a respondent in his or her official capacity. In these circumstances, reason-to-believe and probable cause findings against the committee will also be accompanied by findings against the current treasurer in his or her official capacity. When the complaint asserts allegations that involve a past or present treasurer's violation of obligations that the Act or regulations impose specifically on treasurers, then that treasurer may, in the circumstances described below, be named in his or her personal capacity, and findings may be made against the treasurer in that capacity. Thus, in some matters the current treasurer could be named in both official and personal capacities. Maintaining the Commission's ability to pursue a treasurer as a respondent in either official or personal capacity allows the Commission discretion to fashion an appropriate remedy for violations of the Act.[2]

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

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

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

[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.

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

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

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

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

## II. The Official/Personal Capacity Distinction

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

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

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

[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).

## III. Treasurers in Their Official Capacity

Clearly indicating that the current treasurer is a party to an enforcement proceeding in his or her official capacity will improve the Commission's enforcement of the law in a number of ways. Most importantly, it clarifies that findings by the Commission (whether ''Reason To Believe'' or ''Probable Cause To Believe'') or the signing of a conciliation agreement only concerns the treasurer in his or her capacity as representative of the committee, not personally. The practice also ensures that a named individual who signs the conciliation agreement on behalf of the committee (or obtains legal representation on behalf of the committee) is the one empowered by law to disburse committee funds to pay a civil penalty, disgorge funds, make refunds, and carry out other monetary remedies that the committee agrees to through the conciliation agreement.[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 a party to an enforcement proceeding in his or her official or personal capacity is consistent with use of these terms as pleading conventions in court actions. A probable cause finding against a treasurer in his or her official capacity makes clear to a district court in enforcement litigation that the Commission is seeking relief against the committee, and would only entitle the

[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.

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

**IV. Treasurers in Their Personal Capacities**

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

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

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

**V. Treasurers in Both Capacities**

There will likely be cases in which the treasurer is subject to Commission action in both his or her official and personal capacity, as explained in *supra* sections III. and IV. In such cases, the Commission will clearly designate that the findings are being made against the treasurer in both capacities. *See, e.g., United States* v. *Johnson,* 541 F.2d 710, 711 (8th Cir. 1976) (applying a similar standard in an action involving the Federal Trade Commission when finding that ''[t]he propriety of including a person both as an individual and as a corporate officer in a cease and desist order has consistently been upheld in instances where the person included was instrumental in formulating, directing and controlling the acts and practices of the corporation'') (citing *Fed. Trade Comm'n* v. *Standard Ed. Soc'y,* 302 U.S. 112 (1937); *Standard Distrib.* v. *Fed. Trade Comm'n,* 211 F.2d 7 (2d Cir. 1954); *Benrus Watch Co.* v. *Fed. Trade Comm'n,* 352 F.2d 313 (8th Cir. 1965)).

For example, if a complaint alleges a violation such as coordination or receipt of contributions in the name of another, the Commission intends initially to name the treasurer as a respondent only in his or her official capacity. Notably, in these cases the reporting violation stems from the same operative facts as the principal violation. Only if the Commission learns later that the treasurer had knowledge of the operative facts—for example, the treasurer knew that an in-kind contribution stemming from coordination went unreported—or acted recklessly, or intentionally deprived himself or herself of the relevant facts, might the Commission make findings

[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).

[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 CFR 104.7(b) (best efforts).

[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.

against the treasurer in his or her personal capacity.

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

**VI. Successor Treasurers/Substitution**

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

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

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

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

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

**VII. Conclusion**

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

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

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

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

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

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

[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.

[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.

Dated: December 23, 2004.

**Bradley A. Smith,**

*Chairman, Federal Election Commission.*

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

**BILLING CODE 6715–01–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

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

**RIN 2120–AA64**

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

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

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

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

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

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

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

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

You may get the service information identified in this AD from Bell Helicopter Textron Canada, 12,800 Rue de l'Avenir, Mirabel, Quebec J7J1R4, telephone (450) 437–2862 or (800) 363–8023, fax (450) 433–0272.

### Examining the Docket

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

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

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

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

BHTC has issued Alert Service Bulletin (ASB) No. 222–04–100 for Model 222 and 222B helicopters, No. 222U–04–71 for Model 222U helicopters, No. 230–04–31 for Model 230 helicopters, and No. 430–04–31 for Model 430 helicopters, all dated August 27, 2004. The ASBs specify a repetitive visual inspection every 3 hours time-in-service (TIS) and a 50-hour inspection of the blade root end around the feathering bearings for a crack. Transport Canada classified these ASBs as mandatory and issued AD CF–2004–21, dated October 28, 2004, to ensure the continued airworthiness of these helicopters in Canada.

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

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

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

| FEDERAL ELECTION COMMISSION | | |
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| MANUAL OF DIRECTIVES | COMMISSION DIRECTIVE | |
| | REVOKES: | NO. 10 |
| | | EFFECTIVE DATE: June 8, 1978 Amended December 20, 2007 |
| RULES OF PROCEDURE OF THE FEDERAL ELECTION COMMISSION PURSUANT TO 2 U.S.C. 437c(e) | | |

A. Meetings

The Commission shall meet at least once every month and also at the call of any Member, pursuant to U.S.C. 437c(d).

1. For the purpose of these rules, the word Member means a Commissioner appointed by the President with the advice and consent of the Senate pursuant to 2 U.S.C. 437c(a)(1).
2. For the purpose of these rules, the word meeting means the collegiate deliberation of at least four Members of the Commission pursuant to 2 U.S.C. 437c(d).

B. Quorum

Four Members of the Commission shall constitute a quorum for the consideration and resolution of matters that involve the exercise of its duties and powers under the Federal Election Campaign Act of 1971 as amended and Chapters 95 and 96 of the Internal Revenue Code of 1954 (the Act). If less than four Members of the Commission are present at any time during a Commission meeting, the Chairman shall declare a temporary recess until a quorum is again present at which time the meeting may resume.

C. Presiding Officer

1. The Chairman of the Commission shall be the presiding officer over meetings of the Commission.
2. He or she shall call meetings to order.

3. The Vice-Chairman shall act as presiding officer in the absence or disability of the Chairman or in the event of a vacancy in the office of Chairman. In the absence of the Chairman and Vice-Chairman, the Members of the Commission present shall select a presiding officer, to act during the absence of the Chairman and Vice-Chairman.

D. Introduction of Business

1. Meetings of the Commission shall be called to order by the Chairman.
2. The Chairman shall ascertain the presence of a quorum before proceeding with the business of any meeting.
3. All business before the Commission shall be brought by the presiding officer.

E. Motions

1. Any motion shall be reduced to writing at the request of any Member of the Commission.
2. Any motion may be withdrawn or modified by the movant at any time before it is amended or voted upon.
3. Any principal or secondary motion that exercises a duty or power of the Commission under the Act shall require four votes for approval.
4. Any motion to adjourn or recess shall require a majority vote of at least three Members of the Commission for approval.
5. Any principal or secondary motion regarding a procedural matter shall require a majority vote of at least three Members of the Commission for approval.
6. For the purpose of these rules, a procedural motion is any matter not exercising the powers of the Commission under the Federal Election Campaign Act, as amended or Chapter 95 or 96 of the Internal Revenue Code of 1954, including but not limited to any motion to delay a vote on a matter to any subsequent meeting; or any motion requesting a status report; or directing further studies, information and reports from the

General Counsel, the Staff Director or any division thereof; or any motion to waive the timely submission requirement for circulation of material for the agenda of the Commission.

7. Motions to Consider

The introduction of a principal motion puts a matter before the Commission for deliberation. When any such matter is under debate the Chairman shall entertain no motion except:

(a) A motion to adjourn.

(b) A motion to recess.

(c) A motion to call for the order of the day.

(d) Motion to Reconsider. The effect of the adoption of a motion to reconsider is to place before the Commission again the question on which the vote to reconsider was taken in the exact position in which it was before the original vote. Four votes are necessary to adopt a motion to reconsider. It is in order for any such motion to be offered by a member who was on the prevailing side of the question when it was initially adopted.

(e) A motion to lay a matter over. Any such motion shall require a majority vote of at least three members of the Commission; at least three votes will be required for any subsequent motion to take any such matter from the table. Any such motion shall be undebatable. Any such matter which is laid on the table pursuant to these rules shall be taken from the table pursuant to these rules at the next subsequent meeting or the matter dies. In order to table any agenda item which was placed on the agenda for a particular meeting by a Member of the Commission who is absent at that meeting a vote of a majority of at least three members of the Commission is required for approval. A motion to lay a matter over takes precedence over any motion to move the previous question.

(f) A motion to postpone consideration of a matter to a date certain. Any such motion shall require a majority vote of at least three members of the Commission.

(g) A motion to move the previous question.

(h) A motion in the nature of a substitute.

(i) A motion to amend. Any motion to amend takes precedence over the motion that it proposes to amend but is subordinate to all other motions. The effect of the foregoing is that the adoption of any such motion to amend does not result in the adoption of the motion to be amended; instead, that motion remains pending in its modified form. Rejection of a motion to amend leaves the pending motion as it was before the amendment was offered.

F. Personal Privilege

Any Commissioner may as a matter of personal privilege obtain recognition to speak upon any subject matter which in his or her judgment may affect the Commission~ or the Commissioner.

G. General Consent

In cases where there appear to be no opposition, the Chairman may state that in the absence of objection, action shall be considered taken on a matter.

H. Members Subsequently Recorded as Voting

Whenever any Member of the Commission who was absent when a vote was taken subsequently requests consent to be recorded as having voted on the matter, he or she shall place the reason for his or her absence on the record. Any such request shall be in order only on the same day on which the vote was taken.

I. Points of Order

Points of order shall be debatable at the discretion of the chair. Any Member of the Commission may appeal any decision of the chair but for any such appeal to prevail it must receive a majority vote of at least three Members of the Commission.

J. Proxies

No vote by any Member of the Commission with respect to any matter may be cast by proxy; 2 U.S.C. 437c(c).

K. Miscellany

Any parliamentary situation or circumstance not addressed in these Rules shall be governed by Roberts Rules of Order, Newly Revised or if not covered therein by a decision of the Chairman. Any Member of the Commission may appeal any such decision of the Chair but for any such appeal to prevail it must receive a majority vote of at least three Members of the Commission.

L. Special Rules to apply only when the Commission has fewer than four Members

When the Commission has fewer than four Members, all of the foregoing provisions of this directive shall apply, except as follows:

1. Notwithstanding section A.2 of this directive, the word "meeting" shall mean the collegiate deliberation of two or more Members.
2. Notwithstanding section B of this directive, all Members of the Commission must be present to constitute a quorum for the consideration or resolution of any matter. If any Member of the Commission is absent at any time during a Commission meeting, the Chairman shall automatically declare a temporary recess (notwithstanding the absence of a call for a quorum) until a quorum is again present at which time the meeting may resume.
3. When these special rules are in effect, the Commission may discuss any matter otherwise in order for discussion pursuant to the other provisions of this Directive. However, the Commission may not act on any matter except for the following:

(a) Documents such as *Campaign Guides* and any other brochures or public education materials that may customarily be voted on by the Commission;

(b) Notices of filing dates, including filing dates for special elections;

(c) Any action otherwise requiring Commission approval with respect to FEC Conferences or invitations for public appearances;

(d) Election of which Members shall serve as chairman and vice chairman solely for the period during which the Commission has fewer than four Members, provided that in each instance that there is a Member eligible to hold the position pursuant to the eligibility requirements of 2 U.S.C. § 437c(a)(5);

(e) Appointment of an acting general counsel, an acting staff director, an acting chief financial officer or an acting inspector general, approval of temporary personnel actions at the GS-15 level and above, and approval of other personnel actions;

(f) Budget estimates or requests for concurrent submission to the President and Congress, and other budget related matters requiring Commission approval;

(g) Minutes of previous meetings;

(h) Non-filer notices issued pursuant to 2 U.S.C. § 438(a)(7);

(i) Debt settlement plans pursuant to 11 C.F.R. Part 116;

(j) Administrative terminations pursuant to 11 C.F.R. § 102.4 and Commission Directive 45;

(k) Systems of Records Notices pursuant to the Privacy Act;

(l) Policies, procedures and directives pursuant to the Privacy Act or Section 522 of the Consolidated Appropriations Act, 2005;

(m) Agency head review of labor-management agreements;

(n) Any other action where a statute imposes a duty of "agency head review" on the Commission;

(o) Appeals under the Freedom of Information and Privacy Acts;

(p) Sunshine Act recommendations for items on an agenda;

(q) Contracts;

(r) The FEC Management Plan, pursuant to OMB Circular A-123 and the Federal Managers' Financial Integrity Act;

(s) Corrective action plans prepared in response to audits both financial and non-financial pursuant to FEC Directive 50 and/or the Accountability of Tax Dollars Act; or,

(t) EEO-related Federal Register notices.

4. Notwithstanding any provision of sections E, I or K of this directive, approval of any motion or appeal properly before the Commission under this section L shall require the affirmative vote of a majority of the Members of the Commission. However, if such majority comprises exclusively the affirmative votes of Members affiliated with the same political party (or Members whose positions are aligned for the purpose of nomination by the President), then the motion or appeal shall be deemed not approved.

5. Section H of this directive shall not be operative during any period in which these special rules are in effect.

The Commission approved the amendment to Directive 10 on December 20, 2008.

PATRINA M. CLARK
STAFF DIRECTOR

| FEDERAL ELECTION COMMISSION | | |
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| MANUAL OF DIRECTIVES | COMMISSION DIRECTIVE: | |
| | REVOKES: Revision dated December 12, 2006 | NO. 52 |
| | | EFFECTIVE DATE: September 10, 2008 |
| SUBJECT: Circulation Vote Procedure | | |

The purpose of this directive is to provide written guidelines on circulation votes at the Federal Election Commission. It is intended to supplement other Commission documents and clarify procedures when matters circulated for a vote are subsequently addressed at a Commission meeting.[1]

## I. CIRCULATION VOTE POLICIES

A. General. Matters requiring formal Commission action that have not been placed on a meeting agenda will be circulated for a vote. Vote circulations requiring certification shall be made by the Commission Secretary. In certain instances, the Staff Director, the General Counsel or the Chief Financial Officer may determine that direct circulation by his or her office is warranted for administrative matters not requiring certification. All documents circulated to the Commission for a vote shall include a ballot.

B. Objection and Withdrawal. If a Commissioner objects to a document by the voting deadline, the matter will be added to the agenda for a meeting[2] unless the Commissioner formally withdraws the objection before the meeting by notifying the Commission Secretary in writing or by e-mail communication. An objection that is "for the record" does not cause a matter to be added to the agenda for a meeting. The General Counsel shall be consulted in appropriate instances on matters that have Sunshine Act implications.

Before the Commission discusses at a meeting a document to which there is an objection, the originating office may withdraw the document. A written or e-mailed notice of withdrawal shall be given to the Commission Secretary, who will then notify the Commission. Withdrawal of the document by the originating office nullifies votes previously submitted.

C. Impact of Revisions. Suggested revisions agreed to by the originating office or division should be addressed by withdrawal and recirculation or by objection and discussion at a Commission meeting. If a Commissioner suggests minor changes without substantive impact, the originating office may advise the other Commissioners orally and seek approval of the changes.

[1] See also Directive No. 10, Rules of Procedure of the Federal Election Commission.
[2] See also Directive No. 17, Agenda Deadline Procedures and Sunshine Act Regulations.

D. Timing of Votes; Changing of Votes. A Commissioner may amend, withdraw, or cast a vote at any point up to the official certification (which normally takes place immediately after the voting deadline for any matter that has received the requisite four votes and has not received an objection). Any vote so amended, withdrawn, or cast will have the same effect as a vote cast by the voting deadline (e.g., an objection to a matter not previously objected to anytime prior to the official certification would place the matter on a meeting agenda[3] or, conversely, the withdrawal of a previously cast objection would negate the need for a meeting discussion if the withdrawal results in a unanimous tally).

For any circulated matter that is discussed at a Commission meeting, any Commissioner may cast or change his or her vote at the meeting. Prior votes of individual Commissioners will stand unless changed at the meeting. If an intervening motion is adopted, prior votes are superseded.

E. Certification of Votes. Certifications of tally votes and no-objection items will be prepared by the Commission Secretary as soon as possible after the vote deadline has passed. The original certification will be kept in the Commission Secretary's office and a copy with the official seal will be delivered to the Staff Director, the General Counsel and the Chief Financial Officer.

F. Suspension of Voting Deadlines. Voting deadlines may be suspended by Commission approval of such a recommendation circulated on a 24-hour no-objection basis with the following exceptions: Title 26 certification matters, publication of Non-filers, and setting of filing dates for special elections. The normal voting deadlines for these exceptions shall prevail.

## II. CIRCULATION VOTE PROCEDURES

A. Tally Votes. Sensitive matters shall be circulated on green paper and non-sensitive matters on white paper. Matters for tally votes shall generally be circulated daily and shall have a voting deadline of 4:00 P.M. the second Wednesday following the day of circulation, unless the matter is circulated on a Wednesday, in which case the voting deadline will be the Wednesday following the date of circulation. Public funding certification matters will have a voting deadline of 4:00 P.M. one full business day ("24-hour deadline") from the day of circulation.

An office or division may request for cause a compression or an extension of the timeframe for matters circulated for tally vote (such as certain expedited advisory opinions and special election notices). If the Staff Director, the General Counsel or the Chief Financial Officer approves the request, the matter shall be circulated with the appropriate deadline indicated on the ballot sheet. Offices should be diligent in submitting matters that conform to established deadlines and only request modifications for exceptional circumstances.

The Chairman, after consultation with the other Commissioners, may extend the voting deadline for a particular matter circulated for tally vote if it appears that a majority of the Commissioners will not have an adequate opportunity to review the material.

[3] Subject to deadlines established in Directive No. 17.

B. No-Objection Matters. Sensitive no-objection matters shall be circulated on yellow paper and non-sensitive matters on white paper. No-objection matters shall generally have a 24-hour deadline. An office may request for cause a compression or an extension of the timeframe. If the Staff Director, the General Counsel or the Chief Financial Officer approves the request, the matter shall be circulated with the appropriate deadline indicated on the ballot sheet.

The Staff Director, or the Staff Director and the Chief Financial Officer,[4] shall circulate recommendations to the Commission on a 24-hour no-objection basis for competitive selections (including initial appointments, transfers, and temporary and permanent promotions) for all positions at the Senior Level (SL), as well as certain pay matters for SL employees.[5]

Additionally, items that have no substantive recommendations of first impression for consideration by the Commission or documents to which the Commission has given prior acceptance subject to certain modifications may be circulated on a 24-hour no-objection basis. In the Administrative Fines Program, reason to believe recommendations and final determination recommendations where the respondents do not challenge the reason to believe finding may also be circulated on a 24-hour no-objection basis.

Matters circulated on a 24-hour no-objection basis shall be deemed approved unless an objection is received in the Commission Secretary's Office by the voting deadline. An objection will result in the matter being placed on the agenda of an Open Meeting or Executive Session, whichever is appropriate, according to the deadlines provided in Directive 17. A vote must be taken during the meeting, which supersedes all previous no-objection ballots cast.

C. Non-filer Circulation. Reports Analysis Division (RAD) recommendations regarding publication of non-filer information will be circulated on goldenrod paper immediately upon receipt in the Commission Secretary's Office. Publication will occur immediately after the vote deadline or as soon as there are four affirmative votes.

D. Inspector General's Semiannual Report. Section 5 of the Inspector General Act of 1978 (as amended) requires Inspectors General to report to Congress on a semiannual basis for the 6-month periods ending March 31 and September 30. Section 5(b) specifies that the Head of Agency shall be provided the semiannual reports by April 30 and October 31 for "any comment such head determines appropriate" and other information as appropriate. The reports are to be transmitted by the Head of Agency to the Congress within 30 days.

To preserve the independent expression of the Inspector General while assuring the opportunity for any Commissioner to comment, the following circulation procedures are established:

The Inspector General shall circulate his or her final report to the Commission, the Staff Director, the General Counsel and the Chief Financial Officer.

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[4] Recommendations for personnel actions that **do not** have budget implications are placed into circulation by the Staff Director; recommendations for personnel actions that **do** have budget implications are placed into circulation jointly by the Staff Director **and** the Chief Financial Officer. See Directive No. 17.

[5] See Personnel Instruction 319.1, Senior Level Pay.

The Staff Director, in coordination with the Chief Financial Officer, will draft the Head of Agency report containing substantive comment on the Inspector General's Report. This report will be prepared for the Chairman's signature and shall be circulated for a tally vote.

In order to include the Head of Agency report in the published Inspector General's semiannual report, the Staff Director shall provide the Inspector General the approved Head of Agency report at least two business days prior to the transmittal of the report to Congress. The Inspector General's Office will then provide the published semiannual report to the Staff Director for his or her transmittal.

## III. DELIVERY AND PHOTOCOPYING OF DOCUMENTS

A. Delivery of Circulation Materials. Matters circulated for tally vote will be delivered to each Commissioner's office and other recipients by the Commission Secretary's Office at 11:00 A.M. daily. Other matters will be delivered to each Commissioner's office and other recipients by the Commission Secretary's Office at 11:00 A.M. and 4:00 P.M., Monday through Thursday. On Friday, there will be a circulation of documents at 12:00 P.M. Expedited or emergency circulations may be made when warranted by special circumstances.

To assure that matters circulated for tally vote are included in the 11:00 A.M. daily circulation, documents are due at the Secretary's Office by 3:00 P.M. the previous working day. For other matters, to assure inclusion in the 11:00 A.M. circulation, documents are due at the Secretary's Office by 5:00 P.M. the previous working day. To assure inclusion in the 4:00 P.M. circulation, documents are due at the Secretary's office by 1:00 P.M. the same day. To assure inclusion in the Friday circulation, documents are due in the Secretary's Office by 10:00 a.m. that day. Documents received after these times will only be included in a circulation at the Commission Secretary's discretion subject to workload constraints.

B. Photocopying. The Administrative Division shall give priority attention to the photocopying of circulation vote materials and shall immediately notify the Commission Secretary of any difficulty in accomplishing requested photocopying services in a timely manner. The Commission Secretary's Office will communicate as soon as practicable to the Administrative Division any known extraordinary circumstances that may affect the production schedule.

## IV. DOCUMENT SIGNING AUTHORITY ON VOTING BALLOTS[6]

Votes on circulations may only be made via a signed ballot delivered to the Commission Secretary's Office. A Commissioner may not delegate to any person his or her vote or decision-making authority. However, a Commissioner may delegate to a member of his or her staff the authority to affix the Commissioner's name to a circulation vote provided the Commissioner has given instructions to the staff member regarding the matter being acted on and the staff member is acting in accordance with those instructions. In this way, the Commissioner is actually casting the vote and the staff member is signing in a purely ministerial capacity. In each instance in which a Commissioner's staff member has acted as agent in casting the Commissioner's vote, the

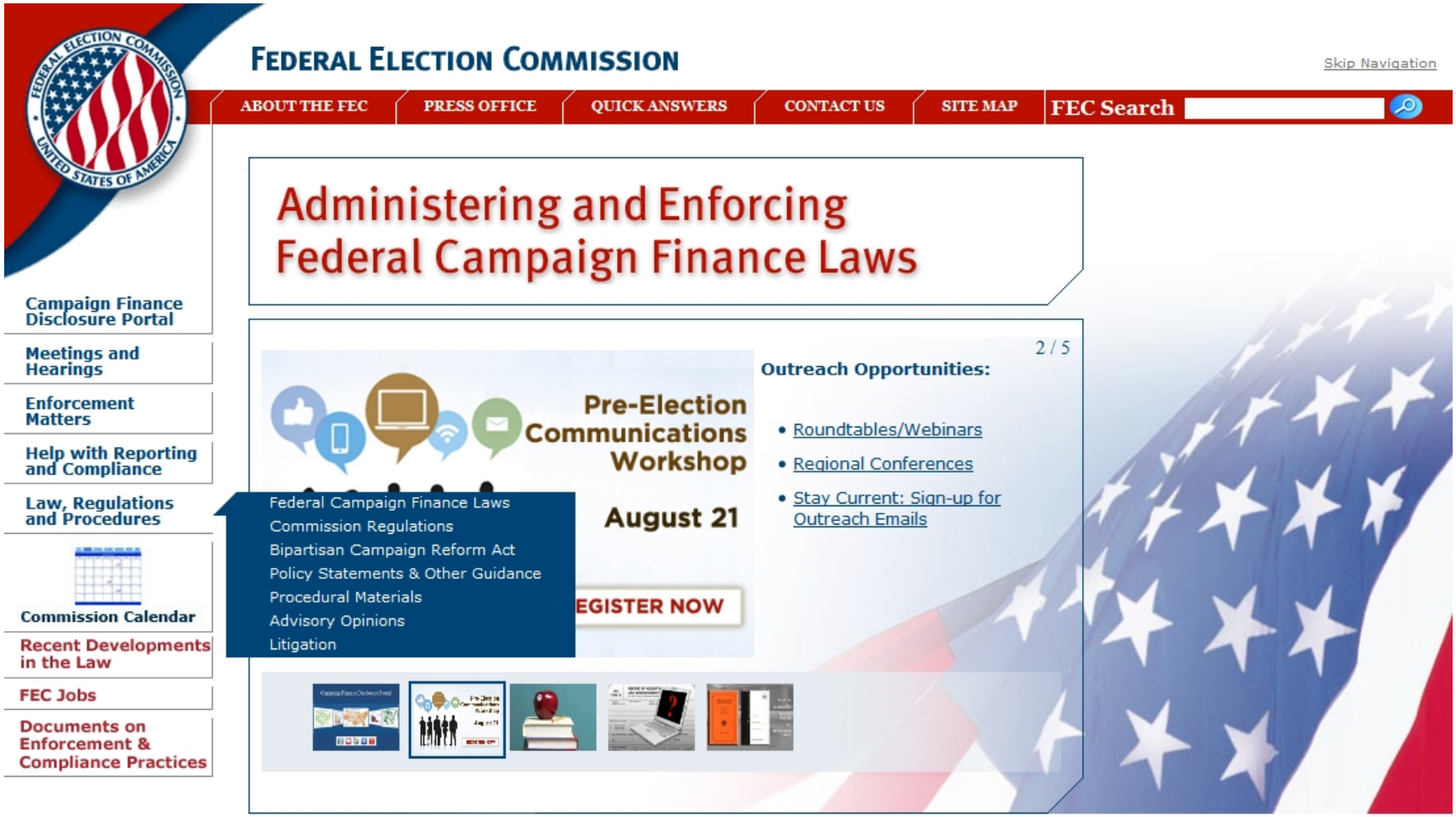
[6] See Commission Memorandum No. 1247, from General Counsel William Oldaker entitled "Delegation of Document Signing Authority," discussed at the April 7, 1977 Commission Meeting.

Secretary shall maintain with the ballot any written authorization, instructions, or after-the-fact ratification provided by the Commissioner.

No proxy voting shall be permitted in Commission meetings.

This Directive was adopted on September 10, 2008.

Joseph F. Stoltz
Acting Staff Director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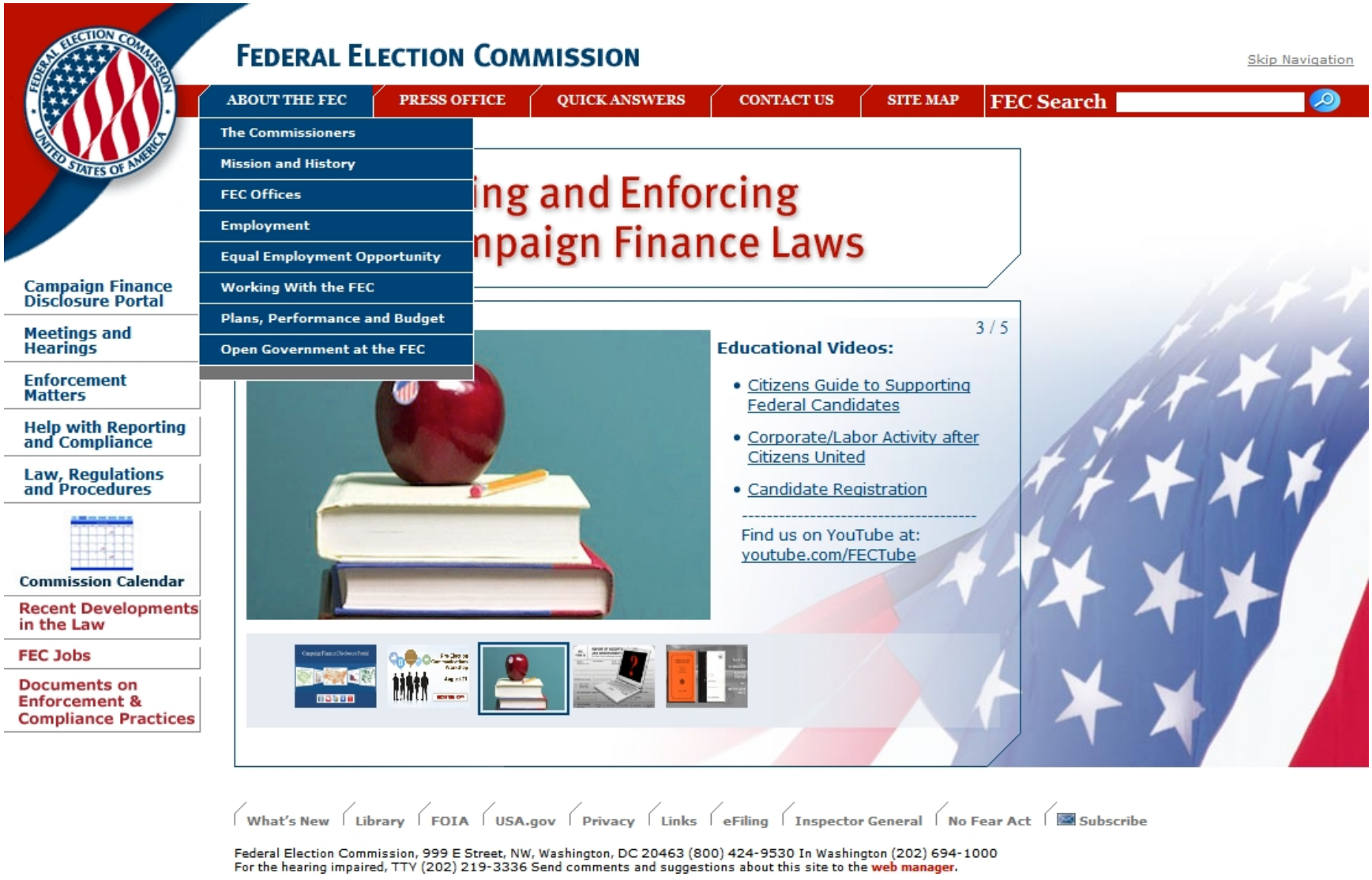
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# About the FEC

In 1975, Congress created the Federal Election Commission (FEC) to administer and enforce the Federal Election Campaign Act (FECA) - the statute that governs the financing of federal elections. The duties of the FEC, which is an independent regulatory agency, are to disclose campaign finance information, to enforce the provisions of the law such as the limits and prohibitions on contributions, and to oversee the public funding of Presidential elections.

The Commission is made up of six members, who are appointed by the President and confirmed by the Senate. Each member serves a six-year term, and two seats are subject to appointment every two years. By law, no more than three Commissioners can be members of the same political party, and at least four votes are required for any official Commission action. This structure was created to encourage nonpartisan decisions. The Chairmanship of the Commission rotates among the members each year, with no member serving as Chairman more than once during his or her term.

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  - Former FEC Commissioners
- FEC Offices
  - Staff Director
  - General Counsel
  - Inspector General
  - Chief Financial Officer
  - Organizational Chart
- Employment
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- FEC Mission and History
  - The FEC and the Federal Election Campaign Act
  - The Commission's Thirty Year Report [PDF]
  - The Commission's Twenty Year Report [PDF]
  - Annual Reports
- Working with the FEC
  - Procurement & Contracting
  - Federal Activities Inventory Reform Act
  - Limited English Proficiency Access Plan
- Plans, Performance and Budget
- Commission Directives

# Commission Directives

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