



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

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MEMORANDUM

**TO:** The Commission

**THROUGH:** James A. Pehrkon  
Staff Director

**FROM:** Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Rosemary C. Smith  
Assistant General Counsel

Rita A. Reimes  
Attorney

**AGENDA ITEM**  
For Meeting of: 3-16-00

**SUBJECT:** Final Rules and Accompanying Explanation and Justification to Revise 11 CFR Part 108, Filing Copies of Reports and Statements with State Officers

The Office of General Counsel has drafted final rules and an accompanying Explanation and Justification ("E&J") to revise 11 CFR Part 108, the Commission's rules governing filing copies of federal campaign finance reports and statements with State officers pursuant to 2 U.S.C. § 439. That section generally requires candidates and committees to file copies of their campaign finance reports with the appropriate State officer in each State where contributions are received or expenditures made on behalf of a Federal candidate appearing on that State's ballot, and for the States to maintain these documents for two years. However, in 1995 Congress enacted 2 U.S.C. § 439(c), which exempts from these receipt and maintenance requirements any State that the Commission determines to have in place a system that permits electronic access to and duplication of reports and statements that are filed with the Commission.

The draft rules reflect 2 U.S.C. § 439(c), as well as the Commission's discussion of this topic at the September 30, 1999 Open Meeting and "Implementation of 2 U.S.C. § 439(c): Waiver of State Office Filings," a memorandum approved by the Commission by tally vote on October 14, 1999. The rules provide, *inter alia*, that if a State obtains a

waiver pursuant to this section, the waiver applies to all documents that are available on the Commission's web site, regardless of whether the documents were filed with the Commission or with the Secretary of the Senate. They also drop the requirement that States maintain such records in paper or microfilm format for two years. Finally, they authorize States to charge a reasonable fee for access to and duplication of the covered documents.

The Commission sought comments on these changes to 11 CFR Part 108 in a 1997 Notice of Proposed Rulemaking. *62 Fed. Reg.* 50708 (Sept. 26, 1997). The attached E&J includes an analysis of the comments received and testimony at the public hearing held on that NPRM on February 11, 1998.

In drafting these final rules, OGC worked with the Commission's Public Disclosure and Data Systems Development Divisions. The Regulations Committee has reviewed this document.

**Recommendation:**

The Office of General Counsel recommends that the Commission approve the attached final rules and Explanation and Justification for publication in the *Federal Register*, and direct the Office of General Counsel to transmit the regulations and the Explanation and Justification to Congress pursuant to 2 U.S.C. § 438(d).

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 108**

3 **[NOTICE 2000 - ]**

4 **FILING COPIES OF CAMPAIGN FINANCE REPORTS AND STATEMENTS**

5 **WITH STATE OFFICERS**

6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Final rules; transmittal of regulations to Congress.

8 **SUMMARY:** The Federal Election Commission is revising its regulations that govern  
9 filing of campaign finance reports with State officers and the duties of  
10 State officers concerning the reports. The revisions implement  
11 amendments to the Federal Election Campaign Act that exempt States  
12 meeting certain criteria from these requirements.

13 **DATES:** Further action, including the announcement of an effective date, will be  
14 taken after these regulations have been before Congress for 30 legislative  
15 days pursuant to 2 U.S.C. 438(d). A document announcing the effective  
16 date will be published in the Federal Register.

17 **FOR FURTHER**  
18 **INFORMATION**

19 **CONTACT:** Ms. Rosemary C. Smith, Assistant General Counsel, or Ms. Rita A.  
20 Reimer, Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202)  
21 694-1650 or toll free (800) 424-9530.

22 **SUPPLEMENTARY**

23 **INFORMATION:** The Federal Election Campaign Act ("FECA" or the "Act"), 2 U.S.C.  
24 431 et seq., at 2 U.S.C. 439(a) requires all persons who file campaign finance reports and  
25 statements under the Act to file copies of these documents with the Secretary of State, or the  
26 officer charged by state law with maintaining state election campaign reports, in each State  
27 where contributions were received or expenditures made on behalf of a Federal candidate or

1 candidates appearing on that State's ballot. Under 2 U.S.C. 439(b), these officers must receive  
2 and maintain the documents for two years after their date of receipt, and must make them  
3 available for public inspection and copying during regular business hours.

4 In 1995, Congress enacted 2 U.S.C. 439(c), which exempts from these receipt and  
5 maintenance requirements any State that the Commission determines to have in place a system  
6 that permits electronic access to and duplication of reports and statements that are filed with  
7 the Commission. Pub. L. 104-79, 109 Stat. 791, section 2. If the Commission does not make  
8 this determination, the State remains obligated to maintain copies of the statements and  
9 disclosure reports that have been filed with it. These new rules revise the Commission's  
10 regulations at 11 CFR Part 108 to reflect this statutory change.

11 In September 1997, the Commission published a Notice of Proposed Rulemaking  
12 ("NPRM") that proposed a number of revisions to the Commission's recordkeeping and  
13 reporting requirements, including those addressed in this document, and corresponding changes  
14 to the relevant disclosure forms. 62 FR 50708 (Sept. 26, 1997). The Commission received  
15 three written comments in response to the NPRM, two of which addressed the state filing  
16 issues: one from the Secretary of State of South Dakota, and one from David S. Addington,  
17 Esq. In addition, the Internal Revenue Service submitted a comment in which it said that the  
18 proposed rules were not inconsistent with their regulations or the Internal Revenue Code. On  
19 February 11, 1998, the Commission held a public hearing on the NPRM at which one witness  
20 testified but did not discuss waivers of state filing requirements. One further comment was  
21 submitted in response to the announcement of the hearing.

22 The Commission has decided to proceed separately with this portion of the rulemaking,  
23 both because these issues are more straightforward than those addressed in other parts of the

1 NPRM, and because the Commission is in the process of granting waivers pursuant to section  
2 439(c) to States that meet certain requirements.

3 Section 438(d) of Title 2, United States Code, requires that any rules or regulations  
4 prescribed by the Commission to carry out the provisions of Title 2 of the United States Code  
5 be transmitted to the Speaker of the House of Representatives and the President of the Senate  
6 30 legislative days before they are finally promulgated. These regulations were transmitted to  
7 Congress on >, 2000.

## 8 EXPLANATION AND JUSTIFICATION

### 9 Part 108 - Filing Copies of Reports and Statements with State Officers

#### 10 Section 108.1 Filing requirements

11 Section 11 CFR 108.1, which sets out the general filing requirements for  
12 statements and reports, is being divided into two paragraphs. Paragraph (a) generally  
13 follows the previous rule setting out the requirement for filing with the appropriate  
14 State offices, and references the new statutory exception. New paragraph (b) tracks the  
15 language of 2 U.S.C. 439(c), stating that the filing requirements and duties of State  
16 officers under 11 CFR Part 108 shall not apply to a State if the Commission has  
17 determined that the State maintains a system that can electronically receive and  
18 duplicate reports and statements that are filed with the Commission. In addition, the  
19 Commission is exempting from these requirements reports and statements that are not  
20 filed with the Commission, but which can nevertheless be accessed electronically from  
21 the Commission's site on the World Wide Web, [www.fec.gov](http://www.fec.gov).

22 On October 14, 1999, the Commission approved a State filing waiver program to  
23 implement this provision of the Act. In order to qualify for the waiver, a State must

1 certify that it has a system in place that ensures public Internet access to the FEC's web  
2 site, where visitors can view and copy reports and statements. The system must include  
3 at least one computer terminal that can electronically access the Commission's web  
4 page, with at least one printer, connected either directly or through a network. The  
5 State must also certify that it will, to the greatest extent possible, allow anyone  
6 requesting Federal campaign finance data to use the computer terminal at any time  
7 during regular business hours.

8 Each State that wishes to obtain a waiver of the section 439 receipt and  
9 maintenance requirements must submit a written certification to the Commission that  
10 describes its system for electronically receiving and duplicating reports from the  
11 Commission, and the extent to which that system is available to the public. If the  
12 system satisfies the above criteria, the Commission will so notify the State. It will also  
13 publish this information in the FEC Record, and place it on the Commission's web site.  
14 If a State fails to submit a such a certification, the Commission will be unable to make  
15 the requisite determination, and the State will remain subject to the section 439(a) and  
16 (b) receipt and maintenance requirements. A number of States have already obtained  
17 waivers through this process, and further requests are pending.

18 Both commenters who addressed this issue objected to this portion of the  
19 proposed rule. They specifically questioned the NPRM's proposal to continue the  
20 obligation of a State to maintain duplicate reports if the Commission does not make the  
21 determination described above and, thus, the State does not meet the statutory  
22 requirements to be released from these duties. These commenters asserted that the  
23 provision is unconstitutional because the Federal Government cannot impose duties on

1 State officers to execute Federal laws. Printz v. United States, 117 S. Ct. 2365, 2384  
2 (1997) (invalidating the Brady Handgun Violence Prevention Act's requirement at  
3 18 U.S.C. 922(s)(2) that the States' chief law enforcement officers conduct background  
4 checks on prospective handgun purchasers as an unconstitutional obligation on State  
5 officers to execute Federal laws); see also United States v. New York, 505 U.S. 144  
6 (1992) (invalidating provisions of the Low-Level Radioactive Waste Policy Act that  
7 required States to accept ownership of waste or to regulate it according to congressional  
8 instructions). They suggested that the Commission change the proposed rule to request,  
9 but not require, State offices to discharge the filing and maintenance duties set out in the  
10 statute and in the NPRM.

11 While the Supreme Court has invalidated a number of Federal statutes imposing  
12 burdens on the States, the Commission believes that 2 U.S.C. 439 would pass  
13 constitutional muster under Congress' authority to regulate the time, place and manner  
14 of holding Federal elections. U.S. Const., Art. I, sec. 4, cl. 1. See Foster v. Love, 118  
15 S.Ct. 464 (1997) (holding Louisiana's open primary system to violate 2 U.S.C. 1, 7  
16 (which imposes a uniform national election day), which was enacted pursuant to the  
17 Elections Clause); Smiley v. Holm, 285 U.S. 335, 366-67 (1932) (Elections Clause  
18 encompasses congressional power to prevent "corrupt practices"); Ex Parte Siebold,  
19 100 U.S. 371, 392 (1879) ("[T]he [Elections Clause] contemplates such co-operation  
20 [between the States and the Federal government] whenever Congress deems it expedient  
21 to alter or add to existing regulations of the State" (emphasis added)); Condon v. Reno,  
22 913 F.Supp. 946 (D. S.C. 1995) (holding as valid under the Elections Clause imposition  
23 upon States of National Voter Registration Act).

1           As explained above, the Commission is not planning to force unwilling States to  
2 seek exemptions from the records receipt and maintenance requirements. Rather, the  
3 Commission is granting waivers from these requirements only to those States that  
4 request them. Moreover, the Commission has actively worked with the States to insure  
5 that the procedures to obtain a waiver are reasonable and not unduly burdensome.

6           The Commission also considered whether the new regulations would trigger the  
7 requirements of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, 109 Stat.  
8 48. See 2 U.S.C. 658(1). That Act prohibits federal agencies from imposing costly new  
9 burdens on State governments unless certain procedures are followed. These include  
10 consulting State and local governments that would be affected by the new rules, and  
11 checking to determine whether Federal funds might be available to help with the cost of  
12 their implementation.

13           The Commission believes the new rules do not trigger that Act, since the cost of  
14 implementation should fall far short of the \$100,000,000 figure cited as the threshold for  
15 coverage. See 2 U.S.C. 1532(a). Also, as part of the waiver program, the Commission  
16 is offering to provide participating offices with free computer equipment and free  
17 Internet access for the remainder of the 2000 election cycle, provided that the State  
18 agrees to provide the access effective March 1, 2001, at its own expense. The  
19 Commission is also providing staff training and assistance with state efforts to publicize  
20 this program, to those States that request this.

21           The final rules at Part 108 are also consistent with Executive Order ("E.O.")  
22 13132, "Federalism," which was issued on August 4, 1999 and took effect on  
23 November 2, 1999. 64 FR 43255 (Aug. 10, 1999). The Commission is not subject to



1 this Executive Order, which at section 1(c) incorporates the definition of agency found  
2 in the Paperwork Reduction Act at 44 U.S.C. 3502(1). That definition specifically  
3 excludes the Commission, at 44 U.S.C. 3502(1)(B). However, the procedures the  
4 Commission has adopted to implement the waiver program are consistent with the  
5 Executive Order's emphasis on cooperation between the States and the Federal  
6 Government in addressing matters of mutual concern.

7       Please note that certain candidates and political committees do not file their  
8 reports directly with the Commission. Candidates for nomination for election or election  
9 to the office of United States Senator; authorized committees supporting such  
10 candidates; other political committees that support only Senate candidates; and the  
11 National Republican Senatorial Committee ("NRSC") and the Democratic Senatorial  
12 Campaign Committees ("DSCC") file their reports with the Secretary of the Senate,  
13 who in turn provides copies to the Commission. 2 U.S.C. 432(g)(1); 11 CFR 105.2.

14       At its current level of technology, the Secretary of the Senate is unable to  
15 provide to the Commission copies of reports from Senate candidates and most  
16 unauthorized committees supporting Senate candidates in a form that can be reproduced  
17 on the Internet. Thus, these reports cannot currently be accessed electronically by State  
18 offices. Therefore, for the time being, copies of these reports must continue to be filed  
19 with the appropriate State office(s), and those offices must continue to maintain them  
20 and make them available to the public.

21       However, the Commission now receives copies of reports filed by the NRSC and  
22 the DSCC in a format that can be reproduced over the Internet, so these reports are  
23 available on the Commission's web site. The Commission anticipates that, over time,

1 reports filed by Senate candidates and other committees that support them will also  
2 become available on the web site. As this occurs, and as more States are certified to be  
3 eligible for a waiver, the responsibility of State offices to receive and maintain paper  
4 copies of these reports will diminish.

5 Section 108.2 Filing copies of reports and statements in connection with the campaign  
6 of any candidate seeking nomination for election to the Office of President or Vice-  
7 President

8  
9 The Commission is adding a cross reference to new 11 CFR 108.1(b), the records  
10 receipt and maintenance exception, to the first sentence of this section.

11 Section 108.3 Filing copies of reports and statements in connection with the campaign  
12 of any congressional candidate

13  
14 This section has been restructured to reflect the potential exemption. New  
15 paragraph (a) addresses Senate candidates, their authorized committees, committees that  
16 support only Senate candidates, and the NRSC and the DSCC, who must continue to  
17 file duplicate copies of reports with State officers, unless such reports are available on  
18 the Commission's web site, and the State has received a waiver pursuant to these rules.  
19 Paragraph (b) notes that other candidates and committees need not file duplicate reports  
20 in those States that have obtained a waiver pursuant to 2 U.S.C. 439(c). New  
21 paragraph (c) retains the language in the current rule stating that, for committees other  
22 than authorized committees, where reports cover activity in more than one State, the  
23 committees need file, and State offices retain, only those portions of reports that are  
24 applicable to candidates seeking election in that State. Please note that this applies only  
25 to States that have not obtained a waiver.

1 Section 108.4 Filing copies of reports by committees other than principal campaign  
2 committees

3  
4 The Commission has added a cross reference to new paragraph 11 CFR 108.1(b)  
5 to this section, which requires unauthorized committees that file reports and statements  
6 in connection with Presidential elections to file copies with the State officer(s) of the  
7 State(s) in which both the recipient and the contributing committees have their  
8 headquarters. The Commission has also slightly reworded this section for clarity.

9 Section 108.6 Duties of State officers

10 The Commission has added a cross reference to new paragraph 11 CFR 108.1(b)  
11 to this section, which provides guidance to State officers on how to organize, preserve  
12 and make available for public copying and inspection the reports and statements filed  
13 with those offices. It is also revising paragraph (b) to provide that paper or microfilm  
14 copies of documents that are available electronically from the Commission need not be  
15 kept for two years. This is consistent with the language at 2 U.S.C. 439(b)(2), which  
16 states that covered documents must be kept for two years "either in original filed form  
17 or in facsimile copy by microfilm or otherwise" (emphasis added). The Commission  
18 interprets this to cover reports that it makes available through its web site, and its  
19 practice is to make electronic copies available for more than two years.

20 The Commission is also adding a new paragraph (e) to this section, which allows  
21 States that obtain waivers to charge reasonable fees to those who access and copy  
22 campaign finance documents electronically. The new paragraph is consistent with  
23 paragraph (c) of this section, which allows States to charge reasonable fees to those  
24 making copies of paper or microfilm documents.

1           The Commission is also correcting the reference in the introductory material to  
2 read "108.6(a) through (e)".

3           **Certification of No Effect Pursuant to 5 U.S.C. § 605(b)**  
4           **(Regulatory Flexibility Act)**

5  
6           The attached rules will not have a significant economic impact on a substantial number  
7 of small entities. The new rules conform to statutory amendments, and also reduce the  
8 reporting burden of affected entities. Therefore, these rules will not have a significant economic  
9 effect on a substantial number of small entities.

10           **List of Subjects**

11           **11 CFR Part 108**

12           Elections, reporting and recordkeeping requirements

1 For the reasons set out in the preamble, Subchapter A of Chapter I, Title 11 of the Code  
2 of Federal Regulations is amended to read as follows:

3 **PART 108 - FILING COPIES OF REPORTS AND STATEMENTS WITH STATE**  
4 **OFFICERS (2 U.S.C. 439)**

5  
6 1. The authority citation for Part 108 continues to read as follows:

7 Authority: 2 U.S.C. 434(a)(2), 438(a)(8), 439, 453.

8 2. Section 108.1 is amended by redesignating the text as paragraph (a), revising the first  
9 sentence of paragraph (a), and adding new paragraph (b) to read as follows:

10 **§ 108.1 Filing Requirements (2 U.S.C. 439(a)(1)).**

11 (a) Except as provided in paragraph (b) of this section, a copy of each report and statement  
12 required to be filed by any person under the Act shall be filed either with the Secretary of State  
13 of the appropriate State or with the State officer who is charged by State law with maintaining  
14 state election campaign reports. \* \* \*

15 (b) The filing requirements and duties of State officers under 11 CFR part 108 shall not  
16 apply to a State if the Commission has determined that the State maintains a system that can  
17 electronically receive and duplicate reports and statements filed with the Commission. Once a  
18 State has obtained a waiver pursuant to this paragraph, the waiver shall apply to all reports that  
19 can be electronically accessed and duplicated from the Commission, regardless of whether the  
20 report or statement was originally filed with the Commission.

1 3. Section 108.2 is amended by revising the first sentence to read as follows:

2  
3 **§ 108.2 Filing copies of reports and statements in connection with the campaign of any**  
4 **candidate seeking nomination for election to the Office of President or Vice-**  
5 **President (2 U.S.C. 439(a)(2)).**

6  
7 Except as provided in 11 CFR 108.1(b), a copy of each report and statement required to  
8 be filed under the Act (including 11 CFR part 104) by a Presidential or Vice Presidential  
9 candidate's principal campaign committee, or under 11 CFR 104.4 or part 109 by any other  
10 person making independent expenditures, in connection with a candidate seeking nomination  
11 for election to the office of President or Vice-President, shall be filed with the State officer of  
12 each State in which an expenditure is made in connection with the campaign of a candidate  
13 seeking nomination for election to the office of President or Vice-President. \* \* \*

14 4. Section 108.3 is revised to read as follows:

15 **§ 108.3 Filing copies of reports and statements in connection with the campaign of any**  
16 **congressional candidate (2 U.S.C. 439(a)(2)).**

17 (a) Except as provided in 11 CFR 108.1(b), a copy of each report and statement required to  
18 be filed under 11 CFR part 104 by candidates, and the authorized committees of candidates, for  
19 nomination for election or election to the office of Senator; by other committees that support  
20 only such candidates; and by the National Republican Senatorial Committee and the  
21 Democratic Senatorial Campaign Committees shall be filed with the appropriate State officer  
22 of that State in which an expenditure is made in connection with the campaign.

23 (b) Except as provided in 11 CFR 108.1(b), a copy of each report and statement required to  
24 be filed under 11 CFR part 104 by candidates, and authorized committees of candidates, for  
25 nomination for election or election to the office of Representative in, Delegate or Resident  
26 Commissioner to the Congress, or by unauthorized committees, or by any other person under

1 11 CFR part 109, in connection with these campaigns shall be filed with the appropriate State  
 2 officer of that State in which an expenditure is made in connection with the campaign.

3 (c) Unauthorized committees that file reports pursuant to paragraph (b) of this section are  
 4 required to file, and the Secretary of State is required to retain, only that portion of the report  
 5 applicable to candidates seeking election in that State.

6 5. Section 108.4 is revised to read as follows:

7 **§ 108.4 Filing copies of reports by committees other than principal campaign**  
 8 **committees (2 U.S.C. 439(a)(2)).**

9 Except as provided in 11 CFR 108.1(b), any unauthorized committee that makes  
 10 contributions in connection with a Presidential election and that is required to file a report(s)  
 11 and statement(s) under the Act shall file a copy of such report(s) and statement(s) with the State  
 12 officer of the State in which both the recipient and contributing committees have their  
 13 headquarters.

14 6. Section 108.6 is amended by revising the introductory text and paragraph (b), by  
 15 deleting the period and adding “; and” at the end of paragraph (d), and by adding new paragraph  
 16 (e), to read as follows:

17 18 **§ 108.6 Duties of State officers (2 U.S.C. 439(b)).**

19 Except as provided in 11 CFR 108.1(b), the Secretary of State, or the equivalent State  
 20 officer, shall carry out the duties set forth in paragraphs (a) through (e) of this section:

21 \* \* \* \* \*

22 (b) Preserve such reports and statements (either in original form or in facsimile copy by  
 23 microfilm or otherwise) filed under the Act for a period of 2 years from the date of receipt,  
 24  
 25  
 26

1 except that reports and statements that can be accessed and duplicated electronically from the  
2 Commission need not be so preserved:

3 \* \* \* \* \*

4 (d) \* \* \* \* \* ; and

5 (e) If the State has received a waiver of these filing requirements pursuant to 11 CFR  
6 108.1(b), allow access to and duplication of reports and statements covered by that waiver,  
7 except that such access and duplication shall be at the expense of the person making the request  
8 and at a reasonable fee.

9  
10  
11  
12 Darryl R. Wold  
13 Chairman  
14 Federal Election Commission  
15

16 DATED: \_\_\_\_\_  
17 BILLING CODE: 6715-01-P