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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2004 DEC -9 A 11: 20

December 9, 2004

MEMORANDUM

AGENDA ITEM

For Meeting of: 12-16-04

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Esa L. Sferra
Attorney

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by BED

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ELS

SUBJECT: Draft Notice of Proposed Rulemaking on Filing Documents by Priority Mail, Express Mail, and Overnight Delivery Service.

Attached is a draft Notice of Proposed Rulemaking ("NPRM") addressing issues related to the addition of USPS Priority Mail and Express Mail and overnight delivery services as delivery options to satisfy certain "timely filing" requirements.

Recommendation:

The Office of the General Counsel recommends that the Commission approve the attached NPRM for publication in the *Federal Register*.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 100 and 104**

3 **[Notice 2004 - >>]**

4 **Filing Documents by Priority Mail, Express Mail, and Overnight Delivery Service**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Notice of Proposed Rulemaking.

7 **SUMMARY:** The Federal Election Commission requests comments on proposed
8 changes to its rules regarding the timely filing of designations,
9 reports, and statements. The Consolidated Appropriations Act,
10 2004 added Priority Mail, Express Mail, and delivery by an
11 overnight delivery service to the section of the Federal Election
12 Campaign Act of 1971, as amended, setting forth when and by
13 what means certain paper documents are considered timely filed
14 prior to actual receipt by the Commission or the Secretary of the
15 Senate. No final decision has been made by the Commission on
16 the issues presented in this rulemaking. Further information is
17 provided in the supplementary information that follows.

18 **DATES:** Comments must be received on or before [insert date 30 days after
19 the date of publication in the FEDERAL REGISTER].

20 **ADDRESSES:** All comments should be addressed to Mr. Brad C. Deutsch,
21 Assistant General Counsel, and must be submitted in either
22 electronic or written form. Commenters are strongly encouraged
23 to submit comments electronically to ensure timely receipt and

1 consideration. Electronic mail comments should be sent to
2 timely05@fec.gov and may also be submitted through the Federal
3 eRegulations Portal at www.regulations.gov. All electronic
4 comments must include the full name, electronic mail address, and
5 postal service address of the commenter. Electronic comments that
6 do not contain the full name, electronic mail address, and postal
7 service address of the commenter will not be considered. If the
8 electronic comments include an attachment, the attachment must
9 be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format.
10 Faxed comments should be sent to (202) 219-3923, with printed
11 copy follow-up. Written comments and printed copies of faxed
12 comments should be sent to the Federal Election Commission, 999
13 E Street, N.W., Washington, D.C. 20463. The Commission will
14 post public comments on its website.

15 **FOR FURTHER**
16 **INFORMATION**
17 **CONTACT:**

Mr. Brad C. Deutsch, Assistant General Counsel, or Ms. Esa L.
18 Sferra, Attorney, 999 E Street N.W., Washington, D.C. 20463,
19 (202) 694-1650 or (800) 424-9530.

20 **SUPPLEMENTARY**
21 **INFORMATION:**

The Consolidated Appropriations Act, 2004, Pub. L. No. 108-199,
22 div. F, tit. VI, § 641, 188 Stat. 3, (the “2004 Appropriations Act”) amended the Federal
23 Election Campaign Act of 1971, as amended, (“FECA”) to permit filers to use additional
24 delivery options to satisfy the Commission’s “timely filing” requirements for certain
25 designations, reports, and statements filed on paper with the Commission or the Secretary

1 of the Senate. Section 434(a) of FECA previously permitted reliance on a U.S. Postal
2 Service (“USPS”) postmark date as the date the Commission considers certain documents
3 timely filed, but only if the document was sent by either registered or certified mail. The
4 2004 Appropriations Act amended 2 U.S.C. 434(a)(2)(A)(i), (4)(A)(ii), and (5) to allow
5 filers sending these documents via USPS Priority Mail and Express Mail also to rely on
6 the date of the USPS postmark as the date of filing, so long as the mailing has a delivery
7 confirmation. The amendments to 2 U.S.C. 434(a) also allow filers sending these
8 documents with an overnight delivery service to rely on the date of deposit with the
9 overnight delivery service as the date of filing, so long as the overnight delivery service
10 has an on-line tracking system.

11 To implement these statutory amendments, the Commission proposes to amend
12 11 CFR 100.19, which sets forth when a document is “timely filed,” and 11 CFR 104.5,
13 which specifies due dates for reports.¹

14 **I. 11 CFR 100.19(b). Timely filed.**

15 Under paragraph (b) of current 11 CFR 100.19, certain documents that are not
16 required to be filed electronically are “timely filed” if they are deposited as registered or
17 certified mail in a U.S. Post Office and are postmarked no later than 11:59 p.m. Eastern
18 Standard/Daylight Time on the date the document is due to be filed. One exception in
19 paragraph (b), however, is that pre-election reports filed by political committees must be
20 postmarked at least 15 days before the election to be “timely filed,” which is three days
21 earlier than such report’s due date.

¹ The Commission notes that the proposed rules would not apply to any entity that is required to file electronically under 104.18(a) because electronic filings are considered filed only when they are received and validated by the Commission’s electronic filing system. See 11 CFR 100.19(c).

1 The Commission proposes to divide current paragraph (b) into three
2 subparagraphs: (1) one subparagraph containing the definition of “timely filed” for
3 documents that are sent by registered or certified mail, Priority Mail, Express Mail, or
4 with an overnight delivery service; (2) one subparagraph retaining the current
5 requirement that documents sent by first class mail are “timely filed” only upon receipt
6 by the Commission or Secretary of the Senate, as appropriate; and (3) one subparagraph
7 containing new definitions of “overnight delivery service” and “postmark.”

8 A. Proposed 11 CFR 100.19(b)(1)

9 Proposed paragraph (b)(1) specifies that any paper document required to be filed
10 under Commission regulations, other than those specified in 11 CFR 100.19(c)-(g),² will
11 be considered “timely filed” so long as the document is postmarked³ by the due date and
12 was deposited: (1) as registered or certified mail in an established U.S. Post Office; (2) as
13 Priority Mail or Express Mail with a delivery confirmation in an established U.S. Post
14 Office; or (3) with an overnight delivery service, so long as the document was scheduled
15 to be delivered within three business days of deposit and is recorded in the service’s
16 on-line tracking system.

17 The Commission interprets Congress’s reference to “priority mail” and “express
18 mail” as denoting USPS Priority Mail and Express Mail because both terms are registered

² Certain types of paper reports are specifically excluded from the definition of “timely filed” at 11 CFR 100.19(b) and have their own particular filing dates specified in section 104. Because 48-hour contribution reports, independent expenditure reports, and 24-hour electioneering communications reports are considered filed only upon receipt by the Commission, the proposed rules would not apply to these types of reports. Additionally, a candidate’s notification of expenditure from personal funds is considered filed only upon receipt of the notification by certain parties, and therefore the proposed rules would not apply to these notifications.

³ As discussed below, the Commission proposes to define “postmark” to include a USPS postmark and the verifiable date of deposit with an overnight delivery service.

1 trademarks of USPS.⁴ The Commission invites comment on whether this interpretation is
2 appropriate.

3 Additionally, the proposed rule would permit a filer using an overnight delivery
4 service (the proposed definition of which is discussed below) to use any delivery option
5 offered by such a delivery service, so long as the document is scheduled to be delivered
6 to the Commission or the Secretary of the Senate, as appropriate, within three business
7 days from the date of deposit, similar to the two-to-three day delivery time for USPS
8 Priority Mail service.⁵ In the alternative, the Commission invites comment on whether
9 filers who use an overnight delivery service should be limited to using only a next day
10 delivery option.

11 For any filer who uses an overnight delivery service and wishes to rely on the date
12 of deposit, the 2004 Appropriations Act amendment to FECA requires that the filer use a
13 delivery service that has an on-line tracking system. Because an on-line tracking system
14 will provide a means to settle a dispute that may arise concerning the timely filing of a
15 document (i.e., the date of deposit), the Commission interprets the statutory requirement
16 to mean that a filer must in fact choose a delivery option that includes tracking of the
17 document, thereby providing the filer, or any other person, with the ability to confirm
18 deposit and delivery dates.⁶ Accordingly, the proposed rule would require that a
19 document deposited with an overnight delivery service be recorded in that delivery
20 service's on-line tracking system. The Commission believes that a definition of "on-line
21 tracking system" is not necessary. The Commission invites comment on whether the

⁴ See <http://www.usps.com/all/welcome.htm>.

⁵ Priority Mail is a two-to-three day delivery option offered by USPS. See <http://www.usps.com/shipping/prioritymail.htm>.

⁶ The Commission notes that filers should continue to retain proof of mailing or other means of transmittal of reports. See 11 CFR 104.5(i).

1 amended rule should require the use of an on-line tracking system when a document is
2 sent via an overnight delivery service and on whether a definition for “on-line tracking
3 system” is necessary.

4 Proposed paragraph (b)(1) retains the current requirement that a document must
5 be postmarked no later than 11:59pm Eastern Standard/Daylight Time on the due date,
6 with the exception that pre-election reports must be postmarked three days earlier than
7 the report’s due date.

8 B. Proposed 11 CFR 100.19(b)(2)

9 Proposed paragraph (b)(2) retains the current requirement that documents sent by
10 first class mail must be received by the close of business on the prescribed filing date to
11 be “timely filed.” However, the Commission proposes to add language to clarify that
12 paper documents, other than those addressed in 11 CFR 100.19(c)-(g), sent by any means
13 other than those specified in 11 CFR 100.19(b)(1) (*i.e.*, by registered or certified mail,
14 Priority Mail, Express Mail, or with an overnight delivery service) must be received by
15 the close of business on the prescribed filing date in order to be “timely filed.” The
16 Commission invites comments on this proposed clarification.

17 C. Proposed 11 CFR 100.19(b)(3)

18 Proposed paragraph (b)(3) contains definitions of “overnight delivery service”
19 and “postmark.” Proposed paragraph (b)(3)(i) would define “overnight delivery service”
20 as a private delivery service of established reliability that offers an overnight delivery
21 option. As discussed above, the Commission proposes to allow filers who use an
22 overnight delivery service to select a two-to-three day delivery option; however, because
23 the 2004 Appropriations Act specifies “deliver[y] to an overnight delivery service,” the

1 Commission interprets this to mean that a delivery service used must offer an overnight
2 (i.e., next day) delivery option, even if the sender does not choose that option. 2 U.S.C.
3 434(a), as amended by 2004 Appropriations Act. The Commission invites comment on
4 this proposed definition.

5 Proposed paragraph (b)(3)(ii) would define “postmark” to include both a USPS
6 postmark, as well as the verifiable date that a document is deposited with an overnight
7 delivery service because filers may now also rely on the date of deposit with an overnight
8 delivery service as the date of filing.⁷ This proposed definition recognizes that overnight
9 delivery services may record the date of deposit in different manners and provides
10 flexibility for verification of deposit date. The Commission invites comment on this
11 proposed definition of “postmark.”

12 **II. 11 CFR 104.5. Filing Dates.**

13 As discussed above, the Commission’s current rules specify that a filer may rely
14 on the postmark as the date of filing for certain paper documents only if the document is
15 sent by registered or certified mail. Consistent with the amendment to FECA resulting
16 from the 2004 Appropriations Act, however, the proposed revision of section 100.19(b)
17 would expand the Commission’s definition of “timely filed” to allow reliance also on a
18 postmark as the date of filing for these documents sent by Priority Mail, Express Mail, or
19 with an overnight delivery service.

⁷ Internal Revenue Service regulations and Department of Homeland Security regulations also define “postmark” to include private carrier postmarks. *See e.g.*, 26 CFR 301.7502-1(c)(1)(iii)(B) and 8 CFR 245a.12(a)(3) and (4); *see also* 50 CFR 600.10 (Wildlife and Fisheries regulations defining “postmark” as “independently verifiable evidence of the date of mailing, such as a U.S. Postal Service postmark, or other private carrier postmark, certified mail receipt, overnight mail receipt, or a receipt issued upon hand delivery . . .”).

1 The Commission’s rules at 11 CFR 104.5(a)(2)(i)(A) and (c)(1)(ii), which specify
2 the filing due date for pre-election reports, and at 11 CFR 104.5(e), which specifies the
3 date the Commission considers to be the filing date for certain reports required under
4 section 104.5, also contain several references to reliance on a postmark as the date of
5 filing for documents that are sent by registered or certified mail. Accordingly, the
6 Commission proposes to modify these references within section 104.5 to include Priority
7 Mail, Express Mail, and use of an overnight delivery service, consistent with the
8 proposed changes to section 100.19(b), discussed above. Additionally, the Commission
9 proposes to further amend 11 CFR 104.5(e) to clarify to which reports the proposed rules
10 would apply. The Commission invites comment on these proposed changes.

11

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

13 The attached proposed rules, if promulgated, would not have a significant
14 economic impact on a substantial number of small entities. The basis of this certification
15 is that, to whatever limited extent these proposed rules would affect small entities,
16 expanding options for delivering Commission-required reports provides more flexibility
17 to filers in choosing the method of fulfilling their filing requirements and the new
18 methods are permissive, not required. Therefore, the proposed rules would not increase
19 costs of compliance and may decrease such costs.

20

21 **List of Subjects**

22 11 CFR Part 100

23 Elections.

1 11 CFR Part 104

2 Campaign funds.

3 Political committees and parties.

4 Reporting and recordkeeping requirements.

5

1 For the reasons set forth in the preamble, the Federal Election Commission
2 proposes to amend Subchapter A of Chapter I of Title 11 of the Code of Federal
3 Regulations as follows:

4 **PART 100 – SCOPE AND DEFINITIONS (2 U.S.C. 431)**

5 1. The authority citation for Part 100 would continue to read as follows:

6 **Authority:** 2 U.S.C. 431, 434, and 438(a)(8).

7 3. Section 100.19 would be amended by revising paragraph (b) to read as follows:

8 **§ 100.19 File, filed or filing (2 U.S.C. 434(a)).**

9 * * * * *

10 (b) Timely filed.

11 (1) A document, other than those addressed in paragraphs (c) through (g) of
12 this section, is timely filed ~~upon~~if:

13 (i) Deposited:

14 (A) As registered or certified mail in an established U.S.
15 Post Office;

16 (B) As Priority Mail or Express Mail, with a delivery
17 confirmation, in an established U.S. Post Office; or

18 (C) With an overnight delivery service and scheduled to
19 be delivered no more than three business days after
20 the date of deposit and recorded in the overnight
21 delivery service's on-line tracking system; and

22 (ii) The postmarked on the document must be dated no later than 11:59

23 p.m. Eastern Standard/Daylight Time on the filing date, except that

1 pre-election reports ~~so mailed~~ must have a be-postmarked dated no
2 later than 11:59 p.m. Eastern Standard/Daylight Time on the
3 fifteenth day before the date of the election.

4 (2) Documents, other than those addressed in paragraphs (c) through (g) of
5 this section, sent by first class mail or by any means other than those listed
6 in paragraph (b)(1)(i) of this section must be received by the close of
7 business on the prescribed filing date to be timely filed.

8 (3) As used in this paragraph (b) and in section 104.5,

9 (i) Overnight delivery service means a private delivery service
10 business of established reliability that offers an overnight delivery
11 service option.

12 (ii) Postmark means a U.S. Postal Service postmark or the verifiable
13 date of deposit with an overnight delivery service.

14 * * * * *

15
16 **PART 104 – REPORTS BY POLITICAL COMMITTEES AND OTHER**
17 **PERSONS (2 U.S.C. 434)**

18 3. The authority citation for Part 104 would continue to read as follows:

19 **Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), 439a,
20 441a, and 36 U.S.C. 510.

21 4. Section 104.5 would be amended by revising paragraphs (a)(2)(i)(A),

22 (c)(1)(ii)(A), and (e) to read as follows:

23 **§ 104.5 Filing dates (2 U.S.C. 434(a)(2)).**

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(a) * * *

(2) Additional reports in the election year.

(i) Pre-election reports.

(A) Pre-election reports for the primary and general election must be filed no later than 12 days before any primary or general election in which the candidate seeks election. If sent by registered or certified mail, Priority Mail or Express Mail with a delivery confirmation, or by an overnight delivery service and scheduled to be delivered no more than three business days from deposit and recorded in the overnight delivery service's on-line tracking system, the postmark on the report must be mailed-dated no later than the 15th day before any election.

* * * * *

(c) * * *

(1) * * *

(ii) Pre-election reports.

(A) Pre-election reports for the primary and general election shall be filed by a political committee which makes contributions or expenditures in connection with any such election if such disbursements have not been previously disclosed. Pre-election reports shall be filed no later than 12 days before any primary or general election. If sent by

1 registered or certified mail, Priority Mail or Express Mail
2 with a delivery confirmation, or by an overnight delivery
3 service and scheduled to be delivered no more than three
4 business days from deposit and recorded in an on-line
5 tracking system, the postmark on the report shall be ~~mailed~~
6 dated no later than the 15th day before any election.

7 * * * * *

8 (e) Date of filing. A designation, report or statement, other than those addressed in
9 paragraphs (f), (g), and (j) of this section, sent by registered or certified mail,
10 Priority Mail or Express Mail with a delivery confirmation, or by an overnight
11 delivery service and scheduled to be delivered no more than three business days
12 from deposit and recorded in an on-line tracking system, shall be considered filed
13 on the date of the U.S. ~~post mark~~ postmark except that a twelve day pre-election
14 report sent by such mail or overnight delivery service ~~certified or registered mail~~
15 ~~shall be mailed~~ must have a postmark dated no later than the 15th day before any
16 election. Designations, reports or statements, other than those addressed in
17 paragraphs (f), (g), and (j) of this section, sent by first class mail, or by any means
18 other than those lists in this paragraph (e), must be received by the close of
19 business of the prescribed filing date to be timely filed. Designations, reports or
20 statements electronically filed must be received and validated at or before 11:59
21 p.m., Eastern Standard/Daylight Time on the prescribed filing date to be timely
22 filed.

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Bradley A. Smith
Chairman
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-U