



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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March 3, 2005

MEMORANDUM

AGENDA ITEM

For Meeting of: 03-10-05

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

SUBJECT: Final Rules and Explanation and Justification on Filing Documents by Priority Mail, Express Mail, and Overnight Delivery Service.

On December 22, 2004 the Commission published a Notice of Proposed Rulemaking ("NPRM") entitled "Filing Documents by Priority Mail, Express Mail, and Overnight Delivery Service." That NPRM addressed the 2004 Appropriations Act's amendments to FECA section 434(a), which added Priority Mail, Express Mail, and overnight delivery service to the forms of delivery options that filers may use to satisfy certain timely filing requirements. See 69 Fed. Register 76626 (Dec. 22, 2004). After reviewing the comments and considering the issues presented in the NPRM, the Office of General Counsel has prepared the attached Final Rules and Explanation and Justification for Commission consideration.

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 transmittal to Congress.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 100 and 104**

3 **[Notice 2005 - >>]**

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

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Final rules and transmittal of regulations to Congress.

7 **SUMMARY:** The Federal Election Commission is promulgating amended
8 rules regarding the timely filing of designations, reports, and
9 statements. Under these final rules, the Commission will
10 consider certain documents to be filed prior to actual receipt, if
11 such documents are sent using Priority Mail, Express Mail, or
12 delivered by an overnight delivery service. Further
13 information is provided in the Supplementary Information that
14 follows.

15 **EFFECTIVE DATE:** The effective date for the amendments to 11 CFR 100.19 and
16 104.5 is [Insert date thirty days after date of publication in the
17 FEDERAL REGISTER].

18 **FOR FURTHER
19 INFORMATION
20 CONTACT:**

Mr. Brad C. Deutsch, Assistant General Counsel, or Ms. Esa L.
21 Sferra, Attorney, 999 E Street, NW, Washington, DC 20463,
22 (202) 694-1650 or (800) 424-9530.

23 **SUPPLEMENTARY
24 INFORMATION:**

1 The Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. F, tit. VI,
2 § 641, 188 Stat. 3 (2004) (the “2004 Appropriations Act”) amended the Federal Election
3 Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq., (“FECA”) to permit political
4 committees and others required to file certain documents to use additional delivery
5 options to satisfy the Commission’s “timely filing” requirements for these documents
6 filed with the Commission or the Secretary of the Senate. Section 434(a) of FECA
7 previously permitted reliance on a U.S. Postal Service (“USPS”) postmark date as the
8 date the Commission considers certain designations, reports, and statements timely filed,
9 but only if the document was sent by either registered or certified mail.

10 The 2004 Appropriations Act amended section 434(a) of FECA, 2 U.S.C.
11 434(a)(2)(A)(i), (4)(A)(ii), and (5), by allowing filers that use priority mail and express
12 mail to treat the date of the USPS postmark as the date of filing, so long as the mailing
13 has a delivery confirmation. The amendments to section 434(a) of FECA also allow
14 filers using an overnight delivery service to treat the date of deposit with the overnight
15 delivery service as the date of filing, so long as the overnight delivery service has an on-
16 line tracking system. Accordingly, the Commission is amending 11 CFR 100.19, which
17 specifies when a document is “timely filed,” and 11 CFR 104.5, which establishes due
18 dates for reports.

19 On December 22, 2004, the Commission published a Notice of Proposed
20 Rulemaking (“NPRM”) in the Federal Register containing proposed rules to implement
21 the 2004 Consolidated Appropriations Act’s amendments to FECA. 69 FR 76626
22 (December 22, 2004). The Commission sought comments on the proposed changes and
23 on several issues raised in the NPRM. The comment period ended January 21, 2005.

1 The Commission received two comments, including a letter from the Internal Revenue
2 Service indicating that it had “no comments.” These comments are available at
3 http://www.fec.gov/law/law_rulemakings.shtml#filing.htm under “Filing Documents by
4 Priority Mail, Express Mail, and Overnight Delivery Service.”

5 Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional
6 Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules
7 to the Speaker of the House of Representatives and the President of the Senate and
8 publish them in the Federal Register at least 30 calendar days before they take effect.
9 The final rules that follow were transmitted to Congress on MONTH >>, 2005.

10 **Explanation and Justification**

11 **I. 11 CFR 100.19. File, filed or filing.**

12 Section 100.19 establishes filing deadlines for certain documents and sets out
13 criteria for when those documents will be considered timely filed. Paragraph (b) of
14 section 100.19 specifies when a mailed document will be considered “timely filed” and is
15 being revised and reorganized into three paragraphs as follows. Paragraph (b)(1)
16 contains an amended definition of “timely filed.” Paragraph (b)(2) retains the
17 requirement that documents sent by first class mail must be received by the close of
18 business on the prescribed filing date to be considered timely filed. Paragraph (b)(3)
19 contains new definitions of “overnight delivery service” and “postmark.”

20 A. 11 CFR 100.19(b)(1)

21 Paragraph (b)(1) now specifies that any document required to be filed under
22 Commission regulations, other than those specified in 11 CFR 100.19(c)-(g),¹ is

¹ Certain types of documents are specifically excluded from the general definition of “timely filed” at 11 CFR 100.19(b) because they have their own particular filing dates and methods specified in sections 100.19

1 considered “timely filed” so long as the document is postmarked² by the due date and is
2 deposited: (1) as registered or certified mail in an established U.S. Post Office; (2) as
3 Priority Mail or Express Mail with a delivery confirmation in an established U.S. Post
4 Office; or (3) with an overnight delivery service, so long as the document is scheduled to
5 be delivered the next business day after the date of deposit and is recorded in the delivery
6 service’s on-line tracking system.

7 The Commission received no comments on its initial interpretation that the
8 references to “priority mail” and “express mail” in the 2004 Appropriations Act denote
9 USPS Priority Mail and Express Mail because the terms are registered trademarks of
10 USPS.³ Accordingly, the final rules in paragraph (b)(1)(i)(B) reflect this interpretation.

11 Regarding use of an overnight delivery service, the NPRM requested comment on
12 whether the amended rules should permit filers who use an overnight delivery service to
13 choose any delivery option offered by such a service, so long the filing is scheduled to be
14 delivered within three business days from the date of deposit. Alternatively, the NPRM
15 invited comment on whether filers who use an overnight delivery service should be
16 limited to selecting only a next day delivery option offered by such a service. No
17 commenters addressed this issue.

18 The Commission concludes that it would be more consistent with the language of
19 the 2004 Appropriations Act, which specifies use of “an overnight delivery service,”
20 2 U.S.C. 434(a), as amended by 2004 Appropriations Act (emphasis added), to require

and 104.5 of the Commission’s rules. These include 48-hour statements of last minute contributions, independent expenditure reports, and 24-hour statements of electioneering communications. 11 CFR 100.19(d), (e), and (f); 11 CFR 104.5(f), (g), and (j). Additionally, candidate notifications of expenditures from personal funds are considered filed only upon receipt by certain parties. 11 CFR 100.19(g).

² As discussed below, the new definition of “postmark” includes a USPS postmark and the verifiable date of deposit with an overnight delivery service.

³ See <http://www.usps.com/all/welcome.htm>.

1 that filers using an overnight delivery service choose an overnight (i.e., next business
2 day) option. Accordingly, the final rules at 11 CFR 100.19(b)(1)(i)(C) require filers
3 using an overnight delivery service to select a next business day delivery option offered
4 by such a service.

5 For any filer who uses an overnight delivery service and wishes to treat the date
6 of deposit as the date of filing, the 2004 Appropriations Act amendment to FECA
7 requires that the filer use an overnight delivery service that has an on-line tracking
8 system. Although the 2004 Appropriations Act requires that the overnight delivery
9 service have an on-line tracking system, it does not specifically state that a filer must use
10 such a system. No commenters addressed whether the rule should require the use of an
11 on-line tracking system. Because an on-line tracking system will provide a means to
12 settle a dispute that may arise concerning the timely filing of a document (i.e., the date of
13 deposit), the Commission interprets the statutory requirement to mean that a filer must in
14 fact choose a delivery option that includes tracking of the document, thereby providing
15 the filer and the Commission, or any other person, with the ability to confirm deposit and
16 delivery dates.⁴ Accordingly, under amended 11 CFR 100.19(b)(1)(i)(C) a document
17 deposited with an overnight delivery service must be recorded in that delivery service's
18 on-line tracking system. The Commission received no comments about whether a
19 definition of "on-line tracking system" is necessary. The Commission believes that the
20 plain meaning of "on-line tracking system" refers to a publicly available Internet-based
21 tracking system and that a definition is unnecessary.

⁴ Filers should retain proof of mailing or other means of transmittal of documents. See 11 CFR 104.5(i).

1 Lastly, paragraph (b)(1)(ii) retains the requirement that a document must be
2 postmarked⁵ no later than 11:59pm Eastern Standard/Daylight Time on the due date, with
3 the exception that pre-election reports must be postmarked fifteen days before the
4 election, which is three days earlier than the report's due date.

5 B. 11 CFR 100.19(b)(2)

6 Paragraph (b)(2) continues to require that documents sent by first class mail must
7 be received by the close of business on the prescribed filing date to be considered "timely
8 filed." However, new language in section 100.19(b)(2) clarifies that documents, other
9 than those addressed in 11 CFR 100.19(c)-(g), sent by first class mail or by any means
10 other than those specified in 11 CFR 100.19(b)(1) (i.e., by any means other than
11 registered or certified mail, Priority Mail, Express Mail, or with an overnight delivery
12 service) must be received by the close of business on the prescribed filing date in order to
13 be considered "timely filed." The Commission received no comment on this clarification
14 and the clarifying language is almost identical to that proposed in the NPRM.

15 C. 11 CFR 100.19(b)(3)

16 New paragraph (b)(3) contains definitions of "overnight delivery service" and
17 "postmark." New paragraph (b)(3)(i) defines "overnight delivery service" as a private
18 delivery service of established reliability that offers an overnight (i.e., next business day)
19 delivery option. The Commission received no comments on this definition. This
20 definition is consistent with new section 100.19(b)(1)(i)(C), discussed above, which
21 requires filers using an overnight delivery service to select a next business day delivery
22 option.

⁵ As discussed below, the new definition of "postmark" includes a USPS postmark and the verifiable date of deposit with an overnight delivery service.

1 New paragraph (b)(3)(ii) defines “postmark” to include both a USPS postmark, as
2 well as the verifiable date that a document is deposited with an overnight delivery service
3 because filers may now also treat the date of deposit with an overnight delivery service as
4 the date of filing.⁶ One comment specifically supported this definition of “postmark.”

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

6 Section 104.5 specifies the filing due dates for certain documents filed by political
7 committees and other persons. The Commission is amending 11 CFR 104.5 consistent
8 with the Commission’s revised definition of “timely filing” in amended section
9 100.19(b), discussed above. These changes to 11 CFR 104.5 are almost identical to the
10 ones proposed in the NPRM, on which the Commission received no comment.

11 **A. 11 CFR 104.5(a)(2)(i)(A) and (c)(1)(ii)**

12 Paragraphs 104.5(a)(2)(i)(A) and (c)(1)(ii) of this section set forth the filing due
13 dates for pre-election reports filed by congressional candidates’ principal campaign
14 committees and non-authorized political committees. The Commission is revising these
15 paragraphs to specify that, like pre-election reports sent by registered or certified mail,
16 such reports sent by Priority Mail or Express Mail with a delivery confirmation, or sent
17 with an overnight delivery service and scheduled to be delivered the next business day,
18 must be postmarked no later than the fifteenth day before the election.

19

⁶ 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 B. 11 CFR 104.5(e)

2 Amended paragraph 104.5(e), which specifies the date the Commission considers
3 to be the filing date for certain designations, reports, and statements required under
4 section 104.5, now treats documents sent by Priority Mail or Express Mail with a delivery
5 confirmation, or sent with an overnight delivery service and scheduled to be delivered the
6 next business day in the same manner as documents sent by registered or certified mail.
7 Specifically, all such documents are considered filed on the date of the postmark. Pre-
8 election reports filed by these methods must be postmarked no later than the fifteenth day
9 before the election. Additionally, amended 11 CFR 104.5(e) contains changes to clarify
10 to which documents the final rules apply.

11 The Commission is also correcting one typographical error in paragraph 104.5(e)
12 to clarify that designations, reports, and statements sent by first class mail or by any
13 means other than registered or certified mail, Priority Mail, Express Mail, or an overnight
14 delivery service must be received by the close of business on, rather than of, the
15 prescribed filing date. This correction is technical and nonsubstantive and does not
16 require a notice and comment period under the Administrative Procedure Act, 5 U.S.C.
17 553.

18

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

20 The Commission certifies that the attached rules will not have a significant
21 economic impact on a substantial number of small entities. The basis of this certification
22 is that, to whatever limited extent these rules may affect small entities, expanding options
23 for delivering statutorily required documents provides more flexibility to filers in

1 choosing the method of fulfilling their filing requirements. In addition, these new filing
2 methods are permissive, not required. Therefore, the rules do not increase costs of
3 compliance and may decrease such costs.

4

5 **List of Subjects**

6 11 CFR Part 100

7 Elections.

8 11 CFR Part 104

9 Campaign funds.

10 Political committees and parties.

11 Reporting and recordkeeping requirements.

12

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

4

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

6 1. The authority citation for Part 100 continues to read as follows:

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

8 2. In section 100.19, paragraph (b) is revised to read as follows:

9 **§ 100.19 File, filed or filing (2 U.S.C. 434(a)).**

10 * * * * *

11 (b) Timely filed.

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

14 (i) ~~_____d~~Deposited:

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

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

19 (C) With an overnight delivery service and scheduled to be
20 delivered the next business day after the date of deposit and
21 recorded in the overnight delivery service's on-line
22 tracking system; and

1 (ii) The postmarked on the document must be dated no later than 11:59
2 p.m. Eastern Standard/Daylight Time on the filing date, except that
3 pre-election reports ~~so mailed~~ must have a be postmarked dated no
4 later than 11:59 p.m. Eastern Standard/Daylight Time on the
5 fifteenth day before the date of the election.

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

10 (3) As used in this paragraph (b) of this section and in 11 CFR 104.5,

11 (i) Overnight delivery service means a private delivery service
12 business of established reliability that offers an overnight (i.e., next
13 business day) delivery option.

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

16 * * * * *

17
18 **PART 104 – REPORTS BY POLITICAL COMMITTEES AND OTHER**

19 **PERSONS (2 U.S.C. 434)**

20 3. The authority citation for Part 104 continues to read as follows:

21 **Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), 439a,
22 441a, and 36 U.S.C. 510.

1 4. In section 104.5, paragraphs (a)(2)(i)(A), (c)(1)(ii)(A), and (e) are revised to read
2 as follows:

3 **§ 104.5 Filing dates (2 U.S.C. 434(a)(2)).**

4 (a) * * *

5 (2) Additional reports in the election year.

6 (i) Pre-election reports.

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

17 * * * * *

18 (c) * * *

19 (1) * * *

20 (ii) Pre-election reports.

21 (A) Pre-election reports for the primary and general election
22 shall be filed by a political committee which makes
23 contributions or expenditures in connection with any such

1 election if such disbursements have not been previously
2 disclosed. Pre-election reports shall be filed no later than
3 12 days before any primary or general election. If sent by
4 registered or certified mail, Priority Mail or Express Mail
5 with a delivery confirmation, or with an overnight delivery
6 service and scheduled to be delivered the next business day
7 after the date of deposit and recorded in the overnight
8 delivery service's on-line tracking system, the postmark on
9 the report shall be ~~mailed~~ dated no later than the 15th day
10 before any election.

11 * * * * *

12 (e) Date of filing. A designation, report or statement, other than those addressed in
13 paragraphs (f), (g), and (j) of this section, sent by registered or certified mail, Priority
14 Mail or Express Mail with a delivery confirmation, or with an overnight delivery service
15 and scheduled to be delivered the next business day after the date of deposit and recorded
16 in the overnight delivery service's on-line tracking system, shall be considered filed on
17 the date of the ~~U.S. post mark~~ postmark except that a twelve day pre-election report sent
18 by such mail or overnight delivery service ~~certified or registered mail shall be mailed~~
19 must have a postmark dated no later than the 15th day before any election. Designations,
20 reports or statements, other than those addressed in paragraphs (f), (g), and (j) of this
21 section, sent by first class mail, or by any means other than those listed in this paragraph
22 (e), must be received by the close of business ~~on~~ the prescribed filing date to be timely
23 filed. Designations, reports or statements electronically filed must be received and

1 validated at or before 11:59 p.m., Eastern Standard/Daylight Time on the prescribed
2 filing date to be timely filed.

3 * * * * *

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12 DATED: _____

13 BILLING CODE: 6715-01-U

Scott E. Thomas
Chairman
Federal Election Commission