



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

For Meeting of: 3-29-01

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrke
Staff Director

FROM: Lois G. Lerner
Acting General Counsel

N. Bradley Litchfield
Associate General Counsel

Rosemary C. Smith
Assistant General Counsel

Cheryl A. Fowle
Attorney

SUBJECT: Notice of Proposed Rulemaking on Independent Expenditure Reporting

The Office of General Counsel has drafted proposed independent expenditure reporting rules and prepared an accompanying narrative. The proposed rules would implement recent amendments to the FECA made in P.L. 106-346. The rules would allow persons other than political committees to file all reports of independent expenditures using facsimile machine or electronic mail and would allow political committees to file their 24 hour reports of independent expenditures using fax or e-mail. The proposed regulations would also require that 24 hour reports be received by the Commission or the Secretary of the Senate, as appropriate, within 24 hours of the time the independent expenditure is made.

Recommendation

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

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 100, 104, and 109**

3 **[NOTICE 2001->]**

4 **INDEPENDENT EXPENDITURE REPORTING**

5
6 **AGENCY:** Federal Election Commission.

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

8 **SUMMARY:** The Federal Election Commission is seeking comment on proposed
9 rules to implement statutory changes to the procedures for filing certain
10 reports of independent expenditures. The proposed rules would require
11 that reports of last minute independent expenditures ("24-hour
12 reports"), be received by the Commission or the Secretary of the
13 Senate's office within 24 hours of the time the expenditure was made.
14 To assist filers in meeting this new filing deadline, the proposed rules
15 would allow reports of last minute independent expenditures to be filed
16 by facsimile machine or electronic mail, unless the filer participates in
17 the Commission's electronic filing program. In addition to faxing or e-
18 mailing 24-hour reports, persons other than political committees (who
19 are not part of the electronic filing program) would be allowed to fax or
20 e-mail any reports of independent expenditures filed under the regular
21 reporting schedules. However, electronic filers must continue to file all
22 reports of independent expenditures (24-hour reports as well as
23 regularly scheduled reports) using the Commission's electronic filing

1 system. Please note that the draft rules that follow do not represent a
2 final decision by the Commission on the issues presented by this
3 rulemaking. Further information is provided in the supplementary
4 information that follows.

5 **DATES:** Comments must be received on or before [insert date 30 days after date
6 of publication in the Federal Register].

7 **ADDRESSES:** All comments should be addressed to Ms. Rosemary C. Smith,
8 Assistant General Counsel, and must be submitted in either written or
9 electronic form. Written comments should be sent to the Federal
10 Election Commission, 999 E Street, NW, Washington, DC 20463.
11 Faxed comments should be sent to (202) 219-3923, with printed copy
12 follow-up to insure legibility. Electronic mail comments should be sent
13 to IndyExpRep@fec.gov Commenters sending comments by electronic
14 mail must include their full name, electronic mail address and postal
15 service address within the text of their comments. Comments that do
16 not contain the full name, electronic mail address and postal service
17 address of the commenter will not be considered. The Commission
18 will make every effort to have public comments posted on its web site
19 within ten business days of the close of the comment period.

20 **FOR FURTHER**
21 **INFORMATION**
22 **CONTACT:**

Ms. Rosemary Smith, Assistant General Counsel, or Ms. Cheryl Fowle,
23 Attorney, 999 E Street, N.W., Washington, D.C. 20463, (202) 694-
24 1650 or (800) 424-9530.

1 **SUPPLEMENTARY**

2 **INFORMATION:** On October 23, 2000, Public Law 106-346 (Department of Transportation
3 and Related Agencies Appropriations Act, 2001, 114 Stat. 1356 (2000)) amended the Federal
4 Election Campaign Act of 1971, 2 U.S.C. 431 et seq., ("the Act" or "FECA") regarding the filing
5 of independent expenditure reports under 2 U.S.C. 434(b) and (c). Paragraphs (b) and (c) of 2
6 U.S.C. 434 require political committees and other persons making independent expenditures to
7 file reports or statements if their independent expenditures exceed a certain amount of money. In
8 addition, if independent expenditures of \$1,000 or more are made less than twenty (20) days but
9 more than twenty-four (24) hours before the day of an election, an additional statement must be
10 filed within 24 hours. Public Law 106-346 requires, inter alia, that the Commission issue rules
11 requiring that reports of independent expenditures made less than twenty (20) days but more than
12 twenty-four (24) hours before an election ("24-hour reports") must be received by the
13 Commission or the Secretary of the Senate, as appropriate,¹ within 24 hours of the time the
14 independent expenditure was made. The statutory change permits all 24-hour reports to be filed
15 using facsimile machines or electronic mail, unless the filer is part of the Commission's
16 electronic filing program (see 11 CFR 104.18). In addition to their 24-hour reports, persons
17 other than political committees may file by fax or e-mail other reports of independent
18 expenditures in accordance with the regular filing schedule (see 11 CFR 104.5). The statutory
19 amendment also requires the Commission to provide methods of verification of documents (other
20 than requiring a signature on the document) for all purposes, including penalties of perjury. The

¹ The Secretary of the United States Senate Office of Public Records is the proper recipient of reports of independent expenditures that either support or oppose only candidates for the United States Senate. 11 CFR 104.4(c)(2).

1 new law requires this system to be in place for elections occurring after January 1, 2001, subject
2 to regulations to be promulgated by the Commission.

3 These new filing methods are intended to speed up disclosure and to provide the political
4 committees and other filers with more flexibility in choosing methods of compliance.

5 In addition to the amendments regarding independent expenditures, the new law also requires
6 the Commission to amend its regulations to exclude from the definition of "contribution" loans
7 that candidates receive from brokerage accounts, lines of credit, or other credit instruments as
8 long as the loans were made under commercially reasonable terms and were from a source that
9 provides such loans in the normal course of business. That topic is being addressed in a separate
10 rulemaking.

11 **A. Reports of Independent Expenditures Filed by Facsimile Machine or Electronic Mail**

12 Currently, 24-hour reports are filed by political committees using Schedule E and by persons
13 other than political committees using either FEC Form 5, or a signed statement containing the
14 information specified in 11 CFR 109.2(a)(1). Currently, most reports of independent
15 expenditures are filed on paper. Note that those participating in the Commission's electronic
16 filing program are required to send a paper copy or to submit a digitized file in addition to their
17 electronic filing because the reports must be notarized. Under the new law and the proposed
18 revisions to the regulations at 11 CFR 100.19(d), 104.4(b) and 109.2(a), all filers who are not
19 part of the Commission's electronic filing program would be able to fax or electronically mail
20 their 24-hour reports. Note that the new law and proposed section 109.2(a) also allow persons
21 other than political committees (unless they submit reports under the Commission's electronic
22 filing program - see infra) to file any other reports of independent expenditures (in accordance
23 with the reporting schedule in 11 CFR 104.5) using a fax machine or e-mail.

1 Under current sections 104.4(b) and 109.2(a)(1)(v), Schedule E, Form 5, and the signed
2 statement must contain a notarized certification under penalty of perjury as to whether the
3 expenditures were "coordinated" with any candidate, authorized committee or agent thereof, and,
4 if the independent expenditures were made by a corporation, that the maker is a qualified
5 nonprofit corporation (see 11 CFR 114.10).

6 The Department of Transportation and Related Agencies Appropriations Act, 2001 requires
7 the Commission to create methods of verifying the independent expenditure statement filed,
8 other than by requiring a signature on the document, for all purposes (including penalties of
9 perjury). The Commission is proposing to allow self-certification by the filer to verify the filed
10 report. This means that notarization would no longer be required for Schedule E, Form 5, or
11 signed statements. Instead, the filer would be required to simply self-certify the document using
12 either a handwritten signature on a paper document or by typing his or her name on electronic
13 documents. Note that no other campaign finance reports filed with the Commission or the
14 Secretary of the Senate need to be notarized.

15 To implement the self-certification verification, the proposed amendments to 11 CFR
16 109.2(a)(1)(v) would require that a prescribed statement of certification as to the independence of
17 the expenditure continue to be included in any statement filed by persons other than political
18 committees. Conforming amendments to FEC Form 5 and Schedule E would be made at a later
19 point, which would include self-certification and would remove notarization.

20 Proposed new paragraph (c) of 11 CFR 109.2 and proposed paragraphs (b)(1) and (2) of 11
21 CFR 104.4 set forth two methods for verifying reports of independent expenditures. Reports
22 filed in paper form (e.g., by hand delivery or fax machine), would be verified by the filer's
23 signature under the certification language. For reports filed by electronic mail, the Commission

1 proposes certification by requiring the filer to type his or her name under the certification
2 language.

3 As an alternative to self-certification, the Commission seeks comments on retaining the
4 current notarization requirement for faxed reports and requiring electronic notarizations for e-
5 mailed reports. Given that only a handful of states have electronic notary statutes, is this feasible
6 for filers from other states and territories? The Commission is concerned that differing standards
7 for electronic notarizations among the many states may require the Commission to accept dozens
8 of different electronic notaries, a process which could be cumbersome and expensive.

9 The Commission is also considering whether to require standard paper notarization for faxed
10 reports and digital signatures that are verified by a "Trusted Third Party" for e-mailed reports.
11 Such digital signatures are the basis for transactions in electronic commerce. Digital signatures
12 utilize a Public Key Infrastructure. That structure uses Public and Private Keys to encode a
13 message and to provide a method of positively identifying the sender.

14 The Commission requests comments on the proposed self-certification method of verification
15 of the filed documents and also on any other methods of verification, whether mentioned above
16 or not.

17 **B. Reports of Independent Expenditures Filed by Registered or Certified Mail**

18 Current Commission regulations at 11 CFR 100.19(b) state that a document is timely filed
19 when it is received by the close of the prescribed filing date or, in the case of documents filed by
20 certified or registered mail, when it is deposited in an established U.S. Post Office and is
21 postmarked no later than the prescribed filing date (with the exception of pre-election reports).

22 Hence, 24-hour reports are currently considered timely filed if they are deposited at a Post Office

1 and are postmarked for certified or registered mail within 24 hours of the time the independent
2 expenditure was made.

3 Under the P.L. 106-346 and proposed regulations at 11 CFR 100.19(b) and new paragraph
4 (d), 24-hour reports would be considered timely filed only upon their receipt by the Commission
5 or Secretary of the Senate within 24 hours of making the independent expenditure. Thus, while a
6 filer could use registered or certified mail for their 24-hour report, the report would no longer be
7 timely filed when postmarked. Moreover, it is unlikely that reports filed by certified or registered
8 mail would be received by the Commission within 24 hours of the making of the expenditure.

9 Since it appears that current filing methods will not satisfy the new filing deadlines, proposed
10 revisions to paragraph (b) of section 100.19 would make it clear that 24-hour reports are not
11 included in those reports that are considered timely filed when postmarked and sent by registered
12 or certified mail. Proposed paragraph (d) of 11 CFR 100.19 would state that 24-hour reports of
13 independent expenditures are considered timely filed upon receipt by the Commission or the
14 Secretary, as appropriate, in accordance with 11 CFR 104.4(c). Conforming amendments to 11
15 CFR 104.4(b), 104.5(g) and 109.2(b) would also clarify that 24-hour reports must be received by
16 the appropriate filing authority within 24 hours after the independent expenditure is made. In
17 addition, the Commission is proposing conforming amendments to 11 CFR 104.14(a) regarding
18 the new verification requirements for faxed or e-mailed reports of independent expenditures and
19 to reference the signature requirements for the electronic filing program in 11 CFR 114.18(g).

20 **C. Proposed Changes to the Commission's Electronic Filing Program**

21 Under current regulations at 11 CFR 104.18(h), those participating in the Commission's
22 electronic filing program (either mandatory or voluntary) must file FEC Form 5 or Schedule E
23 electronically accompanied by a paper copy in order to file a notarized document. The new law

1 exempts such electronic filers from filing their reports of independent expenditures by fax or
2 electronic mail. In order to afford all electronic filers the ability to comply with the new
3 requirement that 24-hour reports be received by the Commission within 24 hours, the
4 Commission proposes revising 11 CFR 104.18(h) to drop Schedule E and FEC Form 5 from the
5 list of reports for which a paper copy follow-up is required. The Commission proposes requiring
6 those in the electronic filing program to verify all reports of independent expenditures using the
7 same process as they would in filing any other report.

8 The Commission's electronic filing software, FECFile, currently creates Schedule E for
9 electronic filing by political committees. The Commission's electronic filing system accepts
10 FEC Form 5 if created by another entity using the Commission's specifications (available on the
11 FEC web site, www.fec.gov), but FECFile does not currently create Form 5. The Commission
12 intends to make FEC Form 5 available in the FECFile software package. Note that this software
13 is available for free from the Commission.

14 **D. Reports Available on the Internet Within 24 Hours**

15 Section 502(a) of Public Law 106-346 requires that "the Commission shall make a document
16 which is filed electronically with the Commission pursuant to this paragraph accessible on the
17 Internet not later than 24 hours after the document is received by the Commission."

18 While the Commission believes that "electronically" could be construed to mean filed by
19 electronic mail only, the Commission proposes making all reports of independent expenditures
20 filed with the FEC by facsimile, electronic mail or, using the FEC's electronic filing system
21 available on the Commission's web site (www.fec.gov) within 24 hours of receipt. Note that
22 reports of independent expenditures that support or oppose only Senate candidates must be filed
23 with the Secretary of the Senate. Therefore, because they are not filed with the Commission,

1 reports faxed or e-mailed to the Secretary may not be available on the Commission's web site
2 within 24 hours of receipt by the Secretary of the Senate. The Commission will, however, make
3 every effort to get reports of independent expenditures filed with the Secretary on the FEC's web
4 site as soon as possible after the Commission receives the report from the Secretary.

5 **E. Reports of Last Minute Contributions**

6 The Commission also proposes revising its regulations at 11 CFR 104.5(f) and adding
7 paragraph (e) at 11 CFR 100.19 regarding reports by authorized committees receiving of
8 contributions of \$1,000 or more made less than 20 days but more than 48 hours before the day of
9 an election. These proposed changes do not stem from P.L. 106-346. The Commission has for
10 some time allowed authorized committees to file these reports by facsimile machine. See
11 Advisory Opinion 1988-32. In addition, in the fall of 2000, the Commission began allowing 48-
12 hour reports filed with the Commission to be filed on-line through its web site. Note that 48-
13 hour reports filed with the Secretary of the Senate cannot be filed using the on-line program at
14 the Commission's web site. They can, however, be filed by fax to the Secretary of the Senate.
15 The proposed revisions to 11 CFR 104.5(f) would recognize those filing methods in the
16 regulations.

17 Finally, the Commission welcomes comments on any other issues raised by the new statutory
18 requirements regarding independent expenditure reporting.

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

2 These proposed rules if promulgated, would not have a significant economic impact on
3 a substantial number of small entities. The basis of this certification that the Commission is
4 providing the regulated community with additional means of complying with the law, increasing
5 flexibility, allowing them to choose the most convenient and cost effective method. These
6 additional methods will likely result in a decrease in costs from present.

7 **List of Subjects**

8 **11 CFR Part 100**

9 Elections.

10 **11 CFR Part 104**

11 Campaign funds, Political committees and parties, Reporting and recordkeeping
12 requirements.

13 **11 CFR Part 109**

14 Elections, Reporting and recordkeeping requirements.

1 For the reasons set out in the preamble, it is proposed to amend subchapter A of chapter I of
2 title 11 of the Code of Federal Regulations to read as follows:

3 **PART 100--SCOPE AND DEFINITIONS (2 U.S.C. 431)**

4 1. The authority citation for part 100 would be revised to read as follows:

5 Authority: 2 U.S.C. 431, 434(a)(11), 434(c) and 438(a)(8).

6 2. Section 100.19 would be amended by revising paragraph (b) and adding new paragraphs
7 (d) and (e) to read as follows:

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

9
10 * * * * *

11 (b) A document other than a 24-hour report of an independent expenditure under 11 CFR
12 104.4(b) or 109.2(c) is timely filed upon deposit as registered or certified mail in an established
13 U.S. Post Office and postmarked no later than midnight of the day of the filing date, except that
14 pre-election reports so mailed must be postmarked no later than midnight of the fifteenth day
15 before the date of the election. Reports and statements sent by first class mail must be received
16 by the close of business of the prescribed filing date to be timely filed.

17 * * * * *

18 (d) A 24-hour report of independent expenditures under 11 CFR 104.4(b) or 109.2(c) is
19 timely filed when it is received by the appropriate filing officer as listed in 11 CFR 104.4(c)
20 within 24 hours of the time the independent expenditure was made. A 24-hour report may be
21 filed using a facsimile machine or by electronic mail.

22 (e) A 48-hour report may be filed using a facsimile machine or, if the report is being filed
23 with the Commission, using the Commission web site's on-line program.

PART 104 -- REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)

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

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

4. Section 104.4 would be amended by revising paragraph (b) to read as follows:

§ 104.4 Independent expenditures by political committees (2 U.S.C. 434(c)).

* * * * *

(b) 24-hour reports. ~~Reports of a~~Any independent expenditures aggregating \$1,000 or more made after the 20th day, but more than 24 hours, before 12:01 a.m. of the day of the election, ~~shall~~must be reported~~received by the appropriate officers listed in paragraph (c) of this section~~ within 24 hours after such independent expenditure is made. Such report ~~shall be filed with the appropriate officers listed in 11 CFR 104.4(e) and~~ shall contain the information required by 11 CFR 104.3(b)(3)(vii) indicating whether the independent expenditure is made in support of, or in opposition to, the candidate involved. Such report may be filed using a facsimile machine or electronic mail and must be verified by one of the following methods:

(1) For reports filed on paper (e.g., by hand delivery, U.S. Mail or facsimile machine), the certification required by 11 CFR 104.3(b)(3)(vii) must be immediately followed by the handwritten signature of the treasurer of the political committee that made the independent expenditure and who certifies, under penalty of perjury, its independence.

(2) For reports filed by electronic mail, the certification required by 11 CFR 104.4(b)(3)(vii) must be immediately followed by the typewritten name of the treasurer of the political committee that made the independent expenditure and who certifies, under penalty of perjury, its independence.

1 * * * * *

2 5. Section 104.5 would be amended by revising paragraphs (f) and (g) to read as follows:

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

4 * * * * *

5 (f) 48 hour notification of contributions. If any contribution of \$1,000 or more is received by
6 any authorized committee of a candidate after the 20th day, but more than 48 hours, before 12:01
7 a.m. of the day of the election, the principal campaign committee of that candidate shall notify
8 the Commission, the Secretary of the Senate and the Secretary of State, as appropriate, within 48
9 hours of receipt of the contribution. The notification shall be in writing and shall include the
10 name of the candidate and office sought by the candidate, the identification of the contributor,
11 and the date of receipt and amount of the contribution. The notification shall be filed in
12 accordance with 11 CFR 100.19. The notification shall be in addition to the reporting of these
13 contributions on the post-election report.

14 (g) 24-hour report of independent expenditures. ~~Statements disclosing any~~ Any independent
15 expenditures aggregating \$1,000 or more made after the 20th day, but more than 24 hours, before
16 12:01 a.m. of the day of the election, ~~shall~~ must be reported ~~received by the appropriate officers~~
17 listed in 11 CFR 104.4(c) within 24 hours after such independent expenditure is made. Such
18 ~~statement report shall be filed with the appropriate officers listed in 11 CFR 104.4(e) and shall~~
19 contain the information required by 11 CFR 104.3(b)(3)(vii) indicating whether the independent
20 expenditure is made in support of, or in opposition to, the candidate involved.

21 * * * * *

22 6. Section 104.14 would be amended by revising paragraph (a) to read as follows:

1 § 104.14 Formal requirements regarding reports and statements.

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

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

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

9 *****

10 7. Section 104.18 would be amended by revising paragraph (h) to read as follows:

11 § 104.18 Electronic filing of reports (2 U.S.C. 432(d) and 434(a)(11)).

12 *****

13 (h) Schedules and forms with special requirements. The following list of schedules,
14 materials, and forms have special signature and other requirements and reports containing these
15 documents shall include, in addition to providing the required data within the electronic report,
16 either a paper copy submitted with the political committee's or other person's electronic report or
17 a digitized version submitted as a separate file in the electronic submission: Schedule C-1
18 (Loans and Lines of Credit From Lending Institutions), including copies of loan agreements
19 required to be filed with the Schedule, ~~Schedule E (Itemized Independent Expenditures), Form 5~~
20 ~~(Report of Independent Expenditures Made and Contributions Received),~~ and Form 8 (Debt
21 Settlement Plan). The political committee or other person shall submit any paper materials
22 together with the electronic media containing the report.

1 * * * * *

2 **PART 109 — INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 434(c)).**

3 8. The authority for part 109 would continue to read as follows:

4 Authority: 2 U.S.C. 431(17), 434(a)(11) and (c), 438(a)(8), and 441d.

5 9. Section 109.2 would be amended by revising the introductory language in paragraphs (a),
6 (a)(1), and (b), by revising paragraph (a)(1)(v) and by adding paragraph (c) to read as
7 follows:

8 **§ 109.2 Reporting of independent expenditures by persons other than a political committee**
9 **(2 U.S.C. 434(c)).**

10 (a) Every person other than a political committee, who makes independent expenditures
11 aggregating in excess of \$250 in a calendar year shall file a signed/verified statement or report on
12 FEC Form 5 with the Commission or Secretary of the Senate in accordance with 11 CFR
13 104.4(c).

14 (1) If a signed/verified statement is submitted, the statement shall include:

15 * * * * *

16 (v) A signed/verified certification under penalty of perjury as to whether such
17 expenditure was made in cooperation, consultation or concert with, or at
18 the request or suggestion of any candidate or any authorized committee or
19 agent thereof, and whether they involved the financing, dissemination,
20 distribution or republication of any campaign materials prepared by a
21 candidate or a candidate's agent or authorized committee.

22 * * *

1 (b) Reports of Independent expenditures aggregating \$1,000 or more made by any person
2 after the twentieth day, but more than 24 hours before 12:01 a.m of the day of an election
3 shall must be received by the appropriate officers as listed in paragraph (c) of this section-reported
4 within 24 hours after such independent expenditure is made. Such report or statement shall
5 contain the information required by paragraph (a) of this section indicating whether the
6 independent expenditure is made in support of, or in opposition to, a particular candidate, and
7 shall be filed with the appropriate officers in accordance with 11 CFR 104.4(e).

8 (c) Verification of independent expenditure statements and reports: For reports filed on
9 paper (e.g., by hand delivery, U.S. Mail or facsimile machine), the certification required by
10 paragraph (a)(1)(v) of this section must be immediately followed by the handwritten signature of
11 the person who made the independent expenditure and who certifies, under penalty of perjury, its
12 independence. For reports filed by electronic mail, the certification required by paragraph
13 (a)(1)(v) of this section must be immediately followed by the typewritten name of the person who
14 made the independent expenditure and who certifies, under penalty of perjury, its independence.

15
16
17
18 _____
19 Danny L. McDonald
20 Chairman
21 Federal Election Commission
22

23 DATED: _____
24 BILLING CODE: 6715-01-U

