

Proposed Rules

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

FEDERAL ELECTION COMMISSION

11 CFR Parts 100 and 104

[Notice 2004–19]

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

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

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

DATES: Comments must be received on or before January 21, 2005.

ADDRESSES: All comments should be addressed to Mr. Brad C. Deutsch, Assistant General Counsel, and must be submitted in either electronic or written form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic mail comments should be sent to timely05@fec.gov and may also be submitted through the Federal eRegulations Portal at www.regulations.gov. All electronic comments must include the full name, electronic mail address, and postal service address of the commenter. Electronic comments that do not contain the full name, electronic mail address, and postal service address of the commenter will not be considered. If the

electronic comments include an attachment, the attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219–3923, with printed copy follow-up. Written comments and printed copies of faxed comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. The Commission will post public comments on its Web site.

FOR FURTHER INFORMATION CONTACT: Mr. Brad C. Deutsch, Assistant General Counsel, or Ms. Esa L. Sferra, Attorney, 999 E Street NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Consolidated Appropriations Act, 2004, Pub. L. 108–199, div. F, tit. VI, § 641, 188 Stat. 3, (the “2004 Appropriations Act”) amended the Federal Election Campaign Act of 1971, as amended, (“FECA”) to permit filers to use additional delivery options to satisfy the Commission’s “timely filing” requirements for certain designations, reports, and statements filed on paper with the Commission or the Secretary of the Senate. Section 434(a) of FECA previously permitted reliance on a U.S. Postal Service (“USPS”) postmark date as the date the Commission considers certain documents timely filed, but only if the document was sent by either registered or certified mail. The 2004 Appropriations Act amended 2 U.S.C. 434(a)(2)(A)(i), (4)(A)(ii), and (5) to allow filers sending these documents via USPS Priority Mail and Express Mail also to rely on the date of the USPS postmark as the date of filing, so long as the mailing has a delivery confirmation. The amendments to 2 U.S.C. 434(a) also allow filers sending these documents with an overnight delivery service to rely on the date of deposit with the overnight delivery service as the date of filing, so long as the overnight delivery service has an on-line tracking system.

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

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

I. 11 CFR 100.19(b). Timely Filed

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

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

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

Proposed paragraph (b)(1) specifies that any paper document required to be filed under Commission regulations, other than those specified in 11 CFR 100.19(c)–(g),² will be considered “timely filed” so long as the document is postmarked³ by the due date and was deposited: (1) As registered or certified mail in an established U.S. Post Office;

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).

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.

(2) as Priority Mail or Express Mail with a delivery confirmation in an established U.S. Post Office; or (3) with an overnight delivery service, so long as the document was scheduled to be delivered within three business days of deposit and is recorded in the service's on-line tracking system.

The Commission interprets Congress's reference to "priority mail" and "express mail" as denoting USPS Priority Mail and Express Mail because both terms are registered trademarks of USPS.⁴ The Commission invites comment on whether this interpretation is appropriate.

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

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

overnight delivery service and on whether a definition for "on-line tracking system" is necessary.

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

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

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

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

Proposed paragraph (b)(3) contains definitions of "overnight delivery service" and "postmark." Proposed paragraph (b)(3)(i) would define "overnight delivery service" as a private delivery service of established reliability that offers an overnight delivery option. As discussed above, the Commission proposes to allow filers who use an overnight delivery service to select a two-to-three day delivery option; however, because the 2004 Appropriations Act specifies "deliver[y] to an overnight delivery service," the Commission interprets this to mean that a delivery service used must *offer* an overnight (*i.e.*, next day) delivery option, even if the sender does not choose that option. 2 U.S.C. 434(a), as amended by 2004 Appropriations Act. The Commission invites comment on this proposed definition.

Proposed paragraph (b)(3)(ii) would define "postmark" to include both a USPS postmark, as well as the verifiable date that a document is deposited with an overnight delivery service because filers may now also rely on the date of deposit with an overnight delivery service as the date of filing.⁷ This

proposed definition recognizes that overnight delivery services may record the date of deposit in different manners and provides flexibility for verification of deposit date. The Commission invites comment on this proposed definition of "postmark."

II. 11 CFR 104.5. Filing Dates

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

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

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

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

"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 * * *").

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).

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

proposed rules would not increase costs of compliance and may decrease such costs.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 104

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

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

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

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

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

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

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

* * * * *

(b) *Timely filed.* (1) A document, other than those addressed in paragraphs (c) through (g) of this section, is timely filed if:

(i) Deposited:

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

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

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

(ii) The postmark on the document must be dated no later than 11:59 p.m. Eastern Standard/Daylight Time on the filing date, except that pre-election reports must have a postmark dated no later than 11:59 p.m. Eastern Standard/Daylight Time on the fifteenth day before the date of the election.

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

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

(i) *Overnight delivery* service means a private delivery service business of

established reliability that offers an overnight delivery service option.

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

* * * * *

PART 104—REPORTS BY POLITICAL COMMITTEES AND OTHER PERSONS (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), 439a, 441a, and 36 U.S.C. 510.

4. Section 104.5 would be amended by revising paragraphs (a)(2)(i)(A), (c)(1)(ii)(A), and (e) to read as follows:

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

(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 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 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 an on-line tracking system, the postmark on the report shall be dated no later than the 15th day before any election.

* * * * *

(e) *Date of filing.* A designation, report or statement, other than those addressed in paragraphs (f), (g), and (j) of this section, 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 an on-line tracking system, shall be considered filed on the date of the postmark except that a twelve day pre-election report sent by such mail or overnight delivery service must have a postmark dated no later than the 15th day before any election. Designations, reports or statements, other than those addressed in paragraphs (f), (g), and (j) of this section, sent by first class mail, or by any means other than those lists in this paragraph (e), must be received by the close of business of the prescribed filing date to be timely filed. Designations, reports or statements electronically filed must be received and validated at or before 11:59 p.m., Eastern Standard/Daylight Time on the prescribed filing date to be timely filed.

* * * * *

Dated: December 17, 2004.

Bradley A. Smith,

Chairman, Federal Election Commission.

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FEDERAL ELECTION COMMISSION

11 CFR Part 114

[Notice 2004-18]

Payroll Deductions by Member Corporations for Contributions to a Trade Association's Separate Segregated Fund

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission requests comments on proposed amendments to its rules regarding contributions to the separate segregated fund ("SSF") of a trade association by employee-stockholders and executive and administrative personnel (collectively, "restricted class employees") of corporations that are members of the trade association. Currently, the Commission's regulations prohibit any corporate member of a trade association from using a payroll deduction or check-off system for employee contributions to the trade association's SSF. The Commission proposes to amend its regulations to permit a corporate member of a trade association to provide incidental services to collect and forward contributions from its restricted class employees to the SSF of the trade association, including a payroll