MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
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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
FEDERAL ELECTION COMMISSION

11 CFR Parts 100 and 104

[Notice 2005 - >>]

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

AGENCY: Federal Election Commission.

ACTION: Final rules and transmittal of regulations to Congress.

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

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

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:
Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq., ("FECA") to permit political
committees and others required to file certain documents to use additional delivery
options to satisfy the Commission's "timely filing" requirements for these documents
filed 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 designations, reports, and statements timely filed,
but only if the document was sent by either registered or certified mail.

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

On December 22, 2004, the Commission published a Notice of Proposed
Rulemaking ("NPRM") in the Federal Register containing proposed rules to implement
the 2004 Consolidated Appropriations Act's amendments to FECA. 69 FR 76626
(December 22, 2004). The Commission sought comments on the proposed changes and
on several issues raised in the NPRM. The comment period ended January 21, 2005.
The Commission received two comments, including a letter from the Internal Revenue
Service indicating that it had "no comments." These comments are available at
http://www.fec.gov/law/law_rulemakings.shtml#filing.htm under "Filing Documents by
Priority Mail, Express Mail, and Overnight Delivery Service."

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

Explanation and Justification

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

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

A. 11 CFR 100.19(b)(1)

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

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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
considered “timely filed” so long as the document is postmarked\(^2\) by the due date and is

deposited: (1) as registered or certified mail in an established U.S. Post Office; (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 is scheduled to

be delivered the next business day after the date of deposit and is recorded in the delivery

service’s on-line tracking system.

The Commission received no comments on its initial interpretation that the

references to “priority mail” and “express mail” in the 2004 Appropriations Act denote

USPS Priority Mail and Express Mail because the terms are registered trademarks of

USPS.\(^3\) Accordingly, the final rules in paragraph (b)(1)(i)(B) reflect this interpretation.

Regarding use of an overnight delivery service, the NPRM requested comment on

whether the amended rules should permit filers who use an overnight delivery service to

choose any delivery option offered by such a service, so long the filing is scheduled to be

delivered within three business days from the date of deposit. Alternatively, the NPRM

invited comment on whether filers who use an overnight delivery service should be

limited to selecting only a next day delivery option offered by such a service. No

commenters addressed this issue.

The Commission concludes that it would be more consistent with the language of

the 2004 Appropriations Act, which specifies use of “an overnight delivery service,”

2 U.S.C. 434(a), as amended by 2004 Appropriations Act (emphasis added), to require

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

For any filer who uses an overnight delivery service and wishes to treat the date
of deposit as the date of filing, the 2004 Appropriations Act amendment to FECA
requires that the filer use an overnight delivery service that has an on-line tracking
system. Although the 2004 Appropriations Act requires that the overnight delivery
service have an on-line tracking system, it does not specifically state that a filer must use
such a system. No commenters addressed whether the rule should require the use of 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 and the Commission, or any other person, with the ability to confirm deposit and
delivery dates. Accordingly, under amended 11 CFR 100.19(b)(1)(i)(C) a document
deposited with an overnight delivery service must be recorded in that delivery service’s
on-line tracking system. The Commission received no comments about whether a
definition of “on-line tracking system” is necessary. The Commission believes that the
plain meaning of “on-line tracking system” refers to a publicly available Internet-based
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).
Lastly, paragraph (b)(1)(ii) retains the requirement that a document must be postmarked\(^5\) no later than 11:59pm Eastern Standard/Daylight Time on the due date, with the exception that pre-election reports must be postmarked fifteen days before the election, which is three days earlier than the report’s due date.

B. 11 CFR 100.19(b)(2)

Paragraph (b)(2) continues to require that documents sent by first class mail must be received by the close of business on the prescribed filing date to be considered “timely filed.” However, new language in section 100.19(b)(2) clarifies that documents, other than those addressed in 11 CFR 100.19(c)-(g), sent by first class mail or by any means other than those specified in 11 CFR 100.19(b)(1) (i.e., by any means other than 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 considered “timely filed.” The Commission received no comment on this clarification and the clarifying language is almost identical to that proposed in the NPRM.

C. 11 CFR 100.19(b)(3)

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

\(^5\) As discussed below, the new definition of “postmark” includes a USPS postmark and the verifiable date of deposit with an overnight delivery service.
New paragraph (b)(3)(ii) defines “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 treat the date of deposit with an overnight delivery service as the date of filing. One comment specifically supported this definition of “postmark.”

II. 11 CFR 104.5. Filing Dates.

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

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

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

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9 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 . . .”).
B. 11 CFR 104.5(e)

Amended paragraph 104.5(e), which specifies the date the Commission considers

to be the filing date for certain designations, reports, and statements required under

section 104.5, now treats documents sent by Priority Mail or Express Mail with a delivery

confirmation, or sent with an overnight delivery service and scheduled to be delivered the

next business day in the same manner as documents sent by registered or certified mail.

Specifically, all such documents are considered filed on the date of the postmark. Pre-

election reports filed by these methods must be postmarked no later than the fifteenth day

before the election. Additionally, amended 11 CFR 104.5(e) contains changes to clarify

to which documents the final rules apply.

The Commission is also correcting one typographical error in paragraph 104.5(e)

to clarify that designations, reports, and statements sent by first class mail or by any

means other than registered or certified mail, Priority Mail, Express Mail, or an overnight

delivery service must be received by the close of business on, rather than of, the

prescribed filing date. This correction is technical and nonsubstantive and does not

require a notice and comment period under the Administrative Procedure Act, 5 U.S.C.

553.

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

The Commission certifies that the attached rules will 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 rules may affect small entities, expanding options

for delivering statutorily required documents provides more flexibility to filers in
choosing the method of fulfilling their filing requirements. In addition, these new filing methods are permissive, not required. Therefore, the rules do not increase costs of compliance and may decrease such costs.

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.
For the reasons set forth in the preamble, the Federal Election Commission is
amending 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 continues to read as follows:
   Authority: 2 U.S.C. 431, 434, and 438(a)(8).

2. In section 100.19, paragraph (b) is revised 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 upon 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 the next business day after the date of deposit and
recorded in the overnight delivery service’s on-line
tracking system; and
(ii) The postmarked 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 so mailed must have a be postmarked 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) of this section and in 11 CFR 104.5,

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

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

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

3. The authority citation for Part 104 continues 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. In section 104.5, paragraphs (a)(2)(i)(A), (c)(1)(ii)(A), and (e) are revised 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 with an overnight delivery service and scheduled to be delivered the next business day after the date of 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
registered or certified mail, Priority Mail or Express Mail
with a delivery confirmation, or with an overnight delivery
service and scheduled to be delivered the next business day
after the date of deposit and recorded in the overnight
delivery service's on-line tracking system, the postmark on
the report shall be mailed 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 (i) of this section, sent by registered or certified mail, Priority
Mail or Express Mail with a delivery confirmation, or with an overnight delivery service
and scheduled to be delivered the next business day after the date of deposit and recorded
in the overnight delivery service's on-line tracking system, shall be considered filed on
the date of the U.S. post mark postmark except that a twelve day pre-election report sent
by such mail or overnight delivery service certified or registered mail shall be mailed
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 (i) of this
section, sent by first class mail, or by any means other than those listed in this paragraph
(e), must be received by the close of business on 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.

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Scott E. Thomas
Chairman
Federal Election Commission

DATED: ______________________

BILLING CODE: 6715-01-U