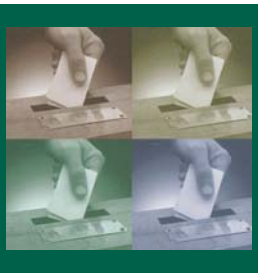
March 2003

Election Law News

A Publication of the WRF Election Law Practice Group



Sentencing Guidelines Impose Tough New Criminal Penalties

In response to a mandate in the Bipartisan Campaign Reform Act of 2002 (BCRA), the U.S. Sentencing Commission (Sentencing Commission) recently issued new sentencing guidelines for campaign finance violations. Together with the BCRA, the new guidelines dramatically toughen the criminal penalties available under campaign finance law.

Prior to amendment by the BCRA, the Justice Department rarely initiated criminal prosecutions under the Federal Election Campaign Act of 1971. Accordingly, most enforcement actions occurred under the Federal Election Commission's (FEC) civil authority to seek fines.

The BCRA increases the number of campaign finance violations that may be charged as felonies and boosts maximum penalties to two years of incarceration for even the least serious offenses and five years for more serious offenses. The BCRA's broad sweep offers criminal penalties to prosecutors for violations involving the making, receiving or reporting of any prohibited contribution, donation or expenditure. The BCRA sets the maximum penalty for aggregate violations exceeding $25,000 during a calendar year at five years of imprisonment. Campaign finance violations aggregating between $2,000 and $25,000 during a calendar year carry a maximum penalty of one year in jail. These penalties of imprisonment may also include significant fines.

Under the BCRA, the major campaign finance violations that may incur criminal penalties include:

- Violations of the soft money ban
- Violations of the limits on hard money contributions
- Violations of the ban on contributions and donations by foreign nationals
- Violations of the restrictions on electioneering communications
- Violations of the ban on coercing contributions to political funds

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Practical Tips

Disclaimers for Printed Matter

The FEC has new requirements regarding disclaimers on communications to the general public by candidates, PACs, and other entities. One section of the new regulations specifically applies to printed communications, which are described in more detail below.

As an initial matter, it is important to note that the new FEC regulations do ***not*** affect PAC or corporate communications to, or websites available only to, the restricted class of a corporation or of a trade association. Therefore, for corporate and trade association PACs, the new disclaimer rules only apply to independent communications and to coordinated communications (which constitute contributions).

Other than the exception for corporate and trade association PACs highlighted above, the disclaimers apply to all communications by political committees (including candidate committees and non-connected PACs) to the general public and to all communications paid for by the committees including websites accessible by the general public. The disclaimers need only be included in mailings or emails if they are part of a mass mailing of 500 substantially similar communications. For persons other than political committees, the disclaimers apply to public communications that expressly advocate the election or defeat of a clearly identified candidate, to electioneering communications and to solicitations for contributions.

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News in the States

Pennsylvania

On December 9, 2002, Pennsylvania enacted a new law prohibiting "lobbying for compensation contingent in whole or in part upon the passage, defeat, approval or veto of legislation." Pa. Act 2002-172 (Dec. 9, 2002) (to be codified at 18 Pa. Cons. Stat. Ann. § 7515). Lobbying for this prohibition is defined as "an effort to influence State legislative action for economic consideration."

In addition, on January 7, 2003, the Pennsylvania State Senate enacted a rule that provides for the registration and reporting of lobbyists before the State Senate. The rule states that it governs lobbying for the 187th and 188th Regular Session of the Senate or until amended, repealed, or otherwise altered, changed or superceded.

Under this new rule, a person who lobbies the State Senate must register with the Secretary-Parliamentarian of the Senate within 10 days of acting in any capacity as a lobbyist before the Senate. Lobbyists also must file quarterly reports with the Secretary-Parliamentarian of the Senate no later than 30 days following the end of a calendar quarter. The requisite forms are available by contacting the Secretary of the Senate at (717) 787-5920. Finally, lobbyists must provide written notice to each member or employee of the Senate referenced in the report within seven days of filing the report.

Tennessee

Tennessee Governor Phil Bredesen issued Executive Order No. 3 on February 2, 2003, regulating gifts that may be accepted by the governor, members of the governor's staff, members of the governor's cabinet and all executive service employees. Under this executive order, such officers and employees are prohibited from soliciting or accepting, directly or indirectly, any gift or thing of value from any person that:

- Has, or is seeking to obtain, contractual or other business or financial relations with the department or agency of the state of Tennessee in which the individual is employed
- Conducts operations or activities that are regulated by the department or agency of the State of Tennessee in which the employee is employed
- Has interests that may be substantially affected by the performance or nonperformance of the employee's official duties

Food, refreshments, foodstuffs, entertainment and beverages provided as part of a meal or other event are not covered by this prohibition if the value of such items does not exceed $50 on any one occasion. (Prohibited sources may not divide the cost of such items in order to come within this monetary threshold.)

The Executive Order also excepts from the prohibition gifts (such as a lunch or dinner) "where refusal or reimbursement…may be awkward and contrary to the larger interests of the State" if the gift is disclosed within 14 days to the Commissioner of Finance and Administration. Other exceptions are as follows:

- Informational materials
- Sample merchandise, promotional items and appreciation tokens, if they are routinely given to customers, suppliers or potential customers or suppliers in the ordinary course of business
- Unsolicited tokens or awards of appreciation, honorary degrees or *bona fide* awards in recognition of public service in the form of a plaque, trophy, desk item, wall memento and similar items, provided that they cannot be readily converted to cash
- Food, refreshments, meals, foodstuffs, entertainment, beverages or intrastate travel expenses that are provided in connection with an event where the employee is a speaker or part of panel discussion at a scheduled meeting of an established or recognized membership organization which has regular meetings

Georgia

Georgia Governor Sonny Perdue, issued an Executive Order, dated January 13, 2003, stating that "no employee, nor any person on his or her behalf, shall accept, directly or indirectly, any gift from any person with whom the employee interacts on official state business, including, without limitation, lobbyists and state vendors." The one exception to this rule is for acceptance of a gift on behalf of an agency.

Furthermore, the Executive Order stated that "no employee may accept any honoraria." However, "an employee on whose behalf actual and reasonable expenses for food, beverages, travel, lodging, and registration are paid to permit the employee's participation in a meeting related to official or professional duties of the employee shall file a report no later than 30 days after such expenses are paid." Notwithstanding this exception, the governor states that "the preferred practice is for agencies and not third parties to pay such expenses."

Finally, the Executive Order defines "gift" to mean "anything of value exceeding $25, including, but not limited to, food, lodging, transportation, personal services, gratuities, subscriptions, memberships, trips, loans, extensions of credit, forgiveness of debts, or advances or deposits of money." ✦

For more information, contact Carol A. Laham (202.719.7301 or claham@wrf.com) or Caleb P. Burns (202.719.7451 or cburns@wrf.com).

House Amends Its Gift Rules

On January 7, 2003, the House of Representatives passed a resolution that, among other things, amended the House Gift Rules in the area of meals and travel. Generally speaking, Members and staffers may only receive gifts that are less than $50 in value, with a cumulative limit of $99.99 from any one source in a calendar year.

The House Committee on Standards of Official Conduct had previously explained that food delivered to members' offices—even if intended for and consumed by staffers—counted against the members' $50 limit. The new resolution changes this calculation, stating: "The value of perishable food sent to an office shall be allocated among the individual recipients and not to the Member."

In addition, the resolution extended a preexisting exception to the $50 gift rule that allows members or their staffs to accept an offer of free attendance at a charity event. The original exception did not allow for the provision of transportation or lodging. The resolution now permits Member and staff transportation and lodging to be paid for by a 501(c)(3) organization if the proceeds of the event are for the organization's benefit.

A word of caution, these changes to the House Rules do not apply to Senators or to officers and employees of the Senate. ✦

For more information, contact Jan W. Baran (202.719.7330 or jbaran@wrf.com) or Carol A. Laham (202.719.7301 or claham@wrf.com).

Electronic Reporting with the IRS

All nonfederal PACs and all state PACs that are not Qualified State or Local Political Organizations (QSLPOs) and that have received contributions or made expenditures in excess of $50,000 during the year must begin filing Form 8872 electronically with the IRS with reports due on or after June 30, 2003. This electronic filing is mandated by Public Law No. 107-276 (Nov. 2, 2002).

A QSLPO is a state or local PAC that (1) focuses solely on state and local offices, (2) reports with a state, which in turn makes the reports publicly available and (3) makes its own state reports available for public inspection per IRS rules. ✦

For more information, contact Carol A. Laham (202.719.7301 or claham@wrf.com) or Thomas W. Antonucci (202.719.7558 or tantonuc@wrf.com).

FEC to Use New Forms

On January 30, 2003, the Federal Election Commission approved new and revised forms for use by candidates, PACs, parties and other filers with the Commission. These forms implement the various rulemakings undertaken by the Commission in regard to the Bipartisan Campaign Reform Act of 2002 (BCRA). The Commission also approved new and revised instructions for these forms.

The FEC Staff Director and General Counsel, in a memo to the Commission, indicated that the new forms would be printed and ready for distribution in time for the March 20 monthly reports and the April 15 quarterly reports. They also indicted that new software formats for FEC File, the Commission's free filing software, would be available by early March.

Some of the new forms and some of the changes made to old forms are noted below:

- ✦ Revisions to FEC Form 1, Statement of Organization.
- ✦ New FEC Form 9, 24-hour Notice of Disbursements/Obligations for Electioneering Communications.
- ✦ Revisions to FEC Form 3X, Report of Receipts and Disbursements.
- ✦ Revisions to Schedule E of FEC Form 3X, Itemized Independent Expenditures.
- ✦ Revisions to FEC Form 5, Report of Independent Expenditures Made and Contributions Received.
- ✦ New Candidate Form for the Millionaires' Amendment.
- ✦ New Party Schedules for Levin Funds ✦

For more information, contact D. Mark Renaud (202.719.7405 or mrenaud@wrf.com) or Caleb P. Burns (202.719.7451 or cburns@wrf.com).

Contribution Limits—Effective January 1, 2003

To Candidate Committees & PACs

Donors	Recipients	
	Candidate Committee	PAC[1]
Individual	$2,000* per election[4]	$5,000 per year
State, District and Local Party Committee[2]	$5,000 per election combined limit	$5,000 per year combined limit
National Party Committee[3]	$5,000 per election	$5,000 per year
PAC (Multi-candidate)[7]	$5,000 per election	$5,000 per year
PAC (Not Multi-candidate)[7]	$2,000* per election	$5,000 per year

* These limits will be indexed for inflation.

[1] These limits apply to both separate segregated funds (SSFs) and political action committees (PACs). Affiliated committees share the same set of limits on contributions made and received.

[2] A state party committee shares its limits with local and district party committees in that state unless a local or district committee's independence can be demonstrated. These limits apply to multi-candidate committees only.

[3] A party's national committee, Senate campaign committee and House campaign committee are each considered national party committees, and each have separate limits, except with respect to Senate candidates—see Special Limits column (see chart on page 5).

[4] Each of the following is considered a separate election with a separate limit: primary election, caucus or convention with the authority to nominate, general election, runoff election and special election.

[5] No more than $37,500 of this amount may be contributed to state and local parties and PACs.

[6] This limit is shared by the national committee and the Senate campaign committee.

[7] A multi-candidate committee is a political committee that has been registered for at least six months, has received contributions from more than 50 contributors and—with the exception of a state party committee—has made contributions to at least five federal candidates. ✦

Chart is from the January 2003 Federal Election Commission RECORD.

If you have any questions or would like any additional information, please contact a member of Wiley Rein & Fielding's Election Law & Government Ethics Group at 202.719.7000 or visit the website at www.wrf.com. We welcome the opportunity to discuss any matter of specific concern to you or to tell you more about our practice and our capabilities.

Contribution Limits—Effective January 1, 2003

To State, District, Local and National Party Committees

Donors	Recipients		
	State, District and Local Party Committee	National Party Committee	Special Limits
Individual	$10,000 per year combined limit	$25,000* per year	Biennial limit of $95,000* ($37,500 to all candidates and $57,500[5] to all PACs and parties)
State, District and Local Party Committee[2]	Unlimited transfers to other party committees		
National Party Committee[3]	Unlimited transfers to other party committees		$35,000* to Senate candidate per campaign[6]
PAC (Multi-candidate)[7]	$5,000 per year combined limit	$15,000 per year	
PAC (Not Multi-candidate)[7]	$10,000 per year combined limit	$25,000* per year	

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Sentencing Guidelines Impose Tough New Criminal Penalties

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- Violations of the restrictions on contributions in currency
- Certain types of fraudulent misrepresentation
- Violations of the ban on contributions in the name of another
- Soliciting or receiving a donation on certain types of federal property

For these and other campaign finance violations, the BCRA directed the Sentencing Commission to promulgate sentencing guidelines. Mirroring the penalties associated with other types of public corruption crimes, the Sentencing Commission adopted a "base offense level" of "eight" for campaign finance violations. While this base level provides for a sentence of zero to six months, multiple specific offense characteristics trigger an automatic increase in the sentence. These sentencing "enhancement" factors include:

- The amount of money involved in the illegal transaction (the sentencing enhancement varies incrementally with the dollar amount involved in the offense)
- If the violation involved contributions, donations, or expenditures from foreign nationals (two-level enhancement) or foreign governments or organizations (four-level enhancement)
- If the violation involved the use of federal, state, or local funds (*e.g.*, the use of funds awarded in a government contract to make an illegal donation or contribution)—a two-level enhancement
- If the violation was committed with the purpose of achieving a specific, identifiable nonmonetary federal benefit (*e.g.*, a presidential pardon)—a two-level enhancement
- If the defendant engaged in 30 or more illegal transactions during the course of the offense—a two-level enhancement
- If the violation involved intimidation, threat of harm (physical or pecuniary), or coercion—a four-level enhancement
- Violations involving bribery or gratuities (enhancement levels vary with the amount involved in illegal transaction)

As a reference, sentencing levels of nine and above provide for some minimum period of incarceration. For example, a defendant facing sentencing for illegal contributions, donations or expenditures aggregating more than $5,000 over a calendar year would receive at least a two-level enhancement, resulting in a minimum sentencing level of 10 and the associated 6 to 12 months of incarceration. A four-level enhancement—like that for violations involving intimidation, threat of harm or coercion—puts the sentencing level at 12, which carries a penalty of 10 to 16 months of incarceration.

The BCRA also initiates an intricate and heftier scheme of monetary penalties for campaign finance violations. Notably, the Sentencing Commission carved an exception into its guidelines on maximum fines for the monetary penalty provisions unique to the BCRA. Specifically, for contributions made in the name of another that aggregate to more than $10,000 during a calendar year, the BCRA authorizes a fine up to the greater of $50,000 or 1,000 percent of the amount of the violation and imposes a minimum fine of not less than 300 percent of the violation. Again, these criminal fines may be in addition to or in lieu of imprisonment.

In weighing the seriousness of any violation and considering the appropriate penalty to be imposed, the BCRA leaves unchanged the provision that a court shall take into account the existence of a conciliation agreement between the defendant and the FEC and the extent of compliance with that agreement. However, at least in the context of determining criminal fines, the Sentencing Commission added the caveat that a conciliation agreement should not be considered if the defendant began negotiations toward it only after becoming aware of a criminal investigation.

The Sentencing Commission promulgated these guidelines as temporary, emergency amendments under the "emergency amendment authority" granted it by the BCRA. These temporary, emergency amendments took effect on January 25, 2003. However, the Sentencing Commission has proposed an amendment to repromulgate the guidelines as permanent, non-emergency amendments. Public comment on repromulgating these guidelines as permanent, non-emergency amendments is due March 17, 2003. The proposal is then subject to congressional review. ✦

For more information, contact Jan W. Baran (202.719.7330 or jbaran@wrf.com) or Barbara Van Gelder (202.719.7032 or bvangeld@wrf.com).

Disclaimers for Printed Matter

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For All Printed Disclaimers

- The disclaimer must appear in a printed box set apart from the other contents of a communication
- The disclaimer must be of a type size that is readable (12 point font is a safe harbor for letters, newspapers, and magazines)
- The disclaimer need not appear on the front or cover page of the communication as long as it appears within the communication. However, each communication that would require a disclaimer if distributed separately, but is included in a package of materials, must contain the required disclaimer

Corporate and Nonconnected PAC Disclaimers

- If the public communication is authorized by a candidate, his or her authorized committee or an agent thereof but is paid for by any other person, the disclaimer must clearly state that the communication is paid for by such other person and is authorized by the candidate, committee or agent. An example of this disclaimer, which must be in the printed box, is as follows:

> "Paid for by [name of PAC] and authorized by [name of candidate or candidate's committee]."

- If the communication is not authorized by a candidate, his or her committee or an agent thereof, the disclaimer must state the full name and permanent street address, telephone number or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee. An example of this disclaimer, which must be in the printed box, is as follows:

> "Paid for by [name of PAC] and not authorized by any candidate or candidate's committee. [Street address of PAC] [or] [Telephone number of PAC] [or] [World Wide Web address of PAC]."

Candidate Committee Disclaimers

- The general disclaimer, which must be in the printed box, is as follows:

> "Paid for by [name of authorized committee]."

"Best Efforts" Disclaimers

- If the communication is a solicitation, then the communication should also include the following disclaimer:

  "Federal Election Law requires [name of committee] to report the name, mailing address, occupation, and employer for each individual whose contributions aggregate in excess of $200 in a calendar year."

  This additional disclaimer does not need to be in the printed box, but must be on any response material included in the solicitation.

IRS Disclaimers

- The following language must be included on any solicitation and on the message side of any card or tear off section that a contributor returns with a contribution:

  "Contributions or gifts to [name of committee] are not tax deductible."

  This disclaimer must be the first sentence in a paragraph or itself constitute a paragraph.

Television and Radio

There are special rules for television and radio advertisements, which will be discussed in detail in future editions of *Election Law News.* ✦

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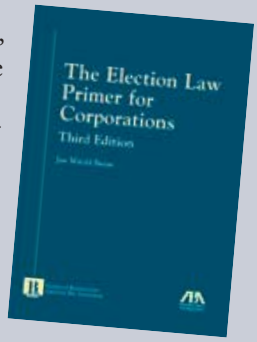
Updated Version of Election Law Primer Now Available



The Election Law Primer for Corporations, Third Edition, by Jan W. Baran is available from the American Bar Association. The Primer provides a thorough analysis of the federal statutory and regulatory schemes affecting the political affairs of corporations, their PACs and trade associations. Campaign finance, lobbying and soft money are all covered by the Primer, which has been revised to incorporate an analysis of the Bipartisan Campaign Reform Act of 2002. Included in this third edition is a new chapter explaining the tax considerations of political activity—from the deductibility of lobbying expenses to the taxation of political expenditures by 501(c) organizations to the various IRS tax filings for PACs and other political organizations. ✦

The Primer may be ordered at **http://www.abanet.org/webapp/wcs/stores/servlet/ProductDisplay?storeId=10251&productId=-17872&categoryId=-3896**.

IRS Form 1120-POL Due March 15

All federal and state PACs that are calendar-year taxpayers and that have more than $100 in taxable income (*e.g.*, interest and dividends) must file Form 1120-POL with the IRS by March 15, 2003.

Qualified State or Local Political Organizations (QSLPOs) that have gross receipts in excess of $100,000 must file Form 990 with the IRS by March 15, 2003. All nonfederal PACs and state PACs that are not QSLPOs must also file Form 990 by May 15. Federal PACs are no longer required to file Form 990—even if they filed one for tax year 2001. Please see the November 2002 *Election Law Alert*, available at **http://www.wrf.com/db30/cgi-bin/pubs/Election_Law_News_021108.pdf**, and the December *Election Law News* available at **http://www.wrf.com/db30/cgi-bin/pubs/ELN_0212.pdf**, for additional information. ✦

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Election Law Practice Group

Jan Witold Baran	202.719.7330	jbaran@wrf.com
Carol A. Laham	202.719.7301	claham@wrf.com
Thomas W. Kirby	202.719.7062	tkirby@wrf.com
Andrew G. McBride	202.719.7135	amcbride@wrf.com
Barbara Van Gelder	202.719.7032	bvangeld@wrf.com
Jason P. Cronic	202.719.7175	jcronic@wrf.com
Lee E. Goodman	202.719.7378	lgoodman@wrf.com
Caleb P. Burns	202.719.7451	cburns@wrf.com
D. Mark Renaud	202.719.7405	mrenaud@wrf.com
Thomas W. Antonucci	202.719.7558	tantonuc@wrf.com
Eric C. Lyttle *	202.719.4617	elyttle@wrf.com

** Member, Virginia Bar. District of Columbia Bar membership pending. Supervised by principals of the firm.*

1776 K Street NW ✦ Washington, DC 20006 ✦ (ph) 202.719.7000 ✦ (fax) 202.719.7049

7925 Jones Branch Drive ✦ Suite 6200 ✦ McLean, VA 22102 ✦ (ph) 703.905.2800 ✦ (fax) 703.905.2820

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