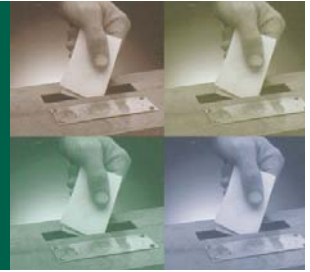




September 2004

# Election Law News

A Publication of the WRF Election Law Practice Group



## Millionaires' Amendment: Six Steps to More Money

The Millionaires' Amendment, inserted into the Federal Election Campaign Act by the Bipartisan Campaign Reform Act of 2002, allows a candidate to receive contributions from individuals exceeding the regular \$2,000 per election contribution limit if the candidate's opponent spends a threshold amount of his or her own personal money on the opponent's campaign. Unfortunately, the Millionaires' Amendment has been implemented by a complicated set of Federal Election Commission (FEC) regulations that differ slightly for House and Senate candidates. Below is our 'plain language' attempt to cut through the regulations and to describe the rules to the regulated community.

The Millionaires' Amendment is, in effect, an equilibrium formula. Congress and the FEC will allow a candidate to receive increased contributions only if the non-millionaire candidate does not have a large fundraising advantage over the millionaire opponent. (This, in theory, prevents an incumbent with a large war chest from accepting increased contributions merely because his or her challenger uses large amounts of personal funds.)

### Step 1: Triggering Event

The Millionaires' Amendment is triggered by large personal contributions or expenditures by a candidate's opponent to, or for, the opponent's campaign. To start, the amount of the personal contributions or expenditures by the opponent must at least exceed the Effective Threshold Amount of \$350,000 for the House and \$300,000 + (\$0.08 x Voting Age Population (VAP) of the state) for the Senate. A candidate will know when his or her opponent has hit this triggering event because the opponent (as well as all candidates) is required to notify the FEC and each opposing candidate within 24 hours of making personal contributions to, or expenditures for, his or her campaign that aggregate in excess of the Effective Threshold Amount (reported on FEC Form 10).

### Step 2: Determining the Opposition Personal Funds Amount

After a candidate's opponent makes the large contribution to his or her own campaign, the FEC regulations then

require a second calculation of something called the Opposition Personal Funds Amount before increased contribution limits set in. This calculation is determined by using various formulas depending on the time before the election and relative fundraising circumstances. Only if the Opposition Personal Funds Amount exceeds the Effective Threshold Amount (same as above) may the candidate accept increased contributions (for Senate candidates, the more the Opposition Personal Funds Amount exceeds the Effective Threshold Amount, the greater the increased contributions).

In order to determine the amount of Opposition Personal Funds Amount, a candidate must decide what formula is to be used. In order to decide what formula is to be used, the date of the analysis is important. A different formula may be used if the analysis takes place before February 1 of the election year and, again, a different formula may be used if the analysis takes place before July 16 of the year preceding the candidate's election year. However, because we are in the time period subsequent to the filing deadline for the 2003 Year-End Report (*i.e.*, after February 1, 2004), we will proceed solely with the formulas and analysis applicable in the Fall of 2004.

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# Summaries of Recent FEC Advisory Opinions

## FEC ALLOWS CAR DEALERSHIP TO RUN ADS

By a vote of 4-0 (with Commissioners Toner and McDonald absent), the FEC on September 9, 2004, allowed the Russ Darrow Group, Inc., a group of auto dealerships, to run television and radio ads in Wisconsin within 60 days of the general election. In Advisory Opinion 2004-31, the FEC concluded that the Group's uncoordinated ads were excepted from the electioneering communications blackout period. The car dealership group asked the question of the FEC because the Group shares a common name with Russ Darrow, Jr., a candidate for the U.S. Senate from Wisconsin. The candidate also is the founder, CEO and Chairman of the Group, although his son and namesake, Russ Darrow III, serves as President and COO and runs the day-to-day business of the Group.

## FEC LIMITS THE PRESS EXCEPTION

In Advisory Opinion 2004-30, considered at the September 9, 2004 meeting of the FEC, the FEC declined to recognize Citizens United, a 501(c)(4) advocacy organization, as a "press entity" entitled to the Federal Election Campaign Act's "press exemption" if it were to run television and radio ads within 60 days of the general election promoting a documentary film made by Citizens United about Senators John Kerry and John Edwards and mentioning the names of both candidates. The FEC also declined to allow Citizens United to use the press exception (1) to promote a book about John Kerry written by the President of Citizens United through similar television and radio advertisements or (2) to air the documentary film on television. The prohibitions issued by the FEC come from the fact that corporations, including nonprofit corporations, may not air electioneering communications within 60 days of a general election that feature or mention a federal candidate if, for Presidential candidates, the ads can be received by 50,000 or more persons nationwide. Although media corporations generally are exempt from these prohibitions, the FEC reasoned that Citizens United is in the political advocacy business rather than the business of gathering and disseminating news.

## CONGRESSMAN SEEKS ADVICE ON MARRIAGE

At its August 19, 2004, meeting, the FEC approved Advisory Opinion 2004-26, which was requested by Wiley Rein & Fielding LLP on behalf of Congressman Jerry Weller and his fiancée, Zury Rios Sosa, who is both a citizen of Guatemala and a member of its legislature. Ms. Rios Sosa wanted to support Congressman Weller

in his reelection efforts; however, federal regulations generally prohibit participation by foreign nationals in U.S. political campaigns. The FEC concluded that Ms. Rios Sosa could take part in Congressman Weller's campaign activities provided that she did not participate in any of the campaign's decision-making processes. Accordingly, the FEC explained that she may attend campaign events, solicit campaign contributions, give speeches and attend campaign meetings, as long as she is not involved in the campaign's management.

## FEC ANALYZES MEDICAL ORGANIZATION AFFILIATION

At its August 12, 2004 meeting the FEC approved an Advisory Opinion concluding that U.S. Oncology, Inc. is affiliated with the physician practices managed by its subsidiaries and, as a result, may solicit the restricted class of the practices for its Federal PAC. The factors considered by the FEC for affiliation were the entities' role in the governance of each other, the parent's control over non-medical matters, long-term financing and physician service on the boards and committees. The FEC also concluded that salaried physicians and nurses are members of the entity's restricted class and are eligible to be solicited to contribute to the PAC.

## FEC UPHOLDS LIMITS ON SALE OF INFORMATION

At its August 12, 2004 meeting, the FEC issued an Advisory Opinion to NGP Software confirming the applicability of a statutory provision that limits the sale of information contained in publicly available FEC disclosure reports to the name and address of PACs for the purpose of soliciting political contributions from them. NGP Software provides clients with software and consulting services for managing political contributions and reporting. It wanted to provide its clients with information regarding contributors that it would cull from publicly available FEC reports. The FEC concluded that the circumstances did not warrant a departure from the language of the statute that states: "information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee." ■

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# North Carolina Begins Regulating Electioneering Communications

Following the lead of the federal government, North Carolina became the latest state to implement regulations on electioneering communications. The new North Carolina law is similar to the federal law, but it is both broader and narrower in its application. The new law became effective July 20, 2004.

Like federal law, North Carolina imposes a 30-day blackout period prior to primaries and conventions and a 60-day blackout period prior to general and special elections for broadcast, cable and satellite radio and television ads that refer to candidates for statewide office or for the state legislature. The blackout applies to ads sponsored by both corporations and unions, with special 24-hour reporting requirements for individuals and

other organizations. Similar to federal law, the communications about statewide candidates must be able to

**For More Changes  
in the States,  
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be received by 50,000 or more persons in North Carolina. However, for candidates for the state legislature, the ads need only be able to be received by 7,500 persons in the relevant legislative district.

In addition, North Carolina law goes farther than federal law in that it also imposes the 30- and 60-day blackout periods on mass mailings (including faxes) and telephone banks. For statewide candidates, such communications must be able to be received by 50,000 or more persons in North Carolina. For legislative candidates, the "targeting" threshold is 5,000 persons in a legislative district.

Both types of electioneering communication restrictions have an exception for 501(c)(4) social welfare groups, but only if the communications are made from a segregated account consisting solely of funds from individuals. There also are specific exceptions for grassroots lobbying activities and communications to a company's shareholders and employees and to the members of an association or union.

Finally, like federal law, coordinated electioneering communications are contributions to the candidate with whom they are coordinated. ■

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## WRF Attorney News

### Speeches



Jan Witold Baran, Panelist  
**Best Practices for Political Action  
Professionals**

NABPAC Post-Election Conference  
Miami, FL

For more information: [www.nabpac.org](http://www.nabpac.org)

### Appearances

Wiley Rein & Fielding partner Jan Witold Baran appeared on National Public Radio's "The Diane Rehm Show" on August 30, 2004. The show examined how 527s are affecting this year's presidential campaigns and why some, including President Bush, believe they should be subject to new restrictions.

### Appointments

Wiley Rein & Fielding attorney Lee E. Goodman has been appointed by the Speaker of the Virginia House of Delegates to serve on the Virginia General Assembly's Joint Subcommittee to Study the Economic Impact of Remote Sales Tax Collection. The General Assembly established the subcommittee to study economic impacts of the Streamlined Sales Tax Project upon the Commonwealth of Virginia's economy and technology industry.

### Events

Jan Witold Baran co-chaired the annual Practising Law Institute conference, "Corporate Political Activities: 2004, Complying with Campaign Finance, Lobbying and Ethics Laws" on September 9-10, 2004 in Washington, DC.

### Primer

Jan Witold Baran authored *The Election Law Primer for Corporations, Fourth Edition*, published by the American Bar Association Section of Business Law. The Primer provides a thorough analysis of the federal statutory and regulatory schemes affecting the political affairs of corporations, PACs, personnel and trade associations.

To receive a copy of *The Election Law Primer for Corporations*, visit [www.abanet.org/abapubs](http://www.abanet.org/abapubs). ■

# Changes in the States

## Connecticut

### New Governor Adds to State Ethics Law

Immediately upon becoming Governor of Connecticut, Jodi Rell issued Executive Order No. 1 (dated July 1, 2004), which contained a variety of ethics provisions. Most of these provisions relate to matters internal to state government, although these orders may spur future ethics changes affecting private entities.

One change, however, amends the requirements of Public Act No. 04-245 (June 1, 2004) and, therefore directly affects all persons, corporations and firms bidding on, or proposing, contracts with state agencies or quasi-public agencies if the contracts are “large state contracts.” For more information on Public Act No. 04-245, see the July 2004 issue of *Election Law News*, available at [www.wrf.com](http://www.wrf.com).

Effective immediately and per Governor Rell’s Executive Order No. 1, persons bidding on proposing contracts must, in addition to other required information, “disclose in [the required] affidavits all contributions made to campaigns of candidates for state-wide public office or the General Assembly.” Moreover, a contractor who is awarded a “large state contract” now must update the affidavit on an annual basis, including the parts required by the Public Act and the parts required by the Executive Order.

## Louisiana

### Campaign Finance and Lobbying Laws Amended

The Louisiana legislature recently amended the state’s campaign finance and lobbying laws. First, effective August 15, 2004, legislators may not accept any contributions for legislative campaigns during a regular session of the legislature. Second, and also effective August 15, 2004, the governor may not accept contributions for gubernatorial campaigns during a regular session of the legislature and for 30 days after a regular session of the legislature adjourns.

Importantly, neither of these new restrictions applies if the applicable election occurs during the regular session of the legislature or within 60 days of the adjournment of the regular sessions of the legislature. Also, by their terms, the new restrictions do not apply to special sessions of the legislature.

Third, effective August 15, 2004, Louisiana increased to \$500 per calendar year (from \$200) the threshold

expenditure safe-harbor amount applicable before a person becomes a lobbyist.

Fourth, and effective as of June 2, 2004, Louisiana requires that a lobbyist report any expenditures “by a lobbyist’s principal or employer made in the presence of the lobbyist.” Also, a lobbyist principal or employer that makes reportable expenditures must provide all of the necessary information for compliance to the lobbyist “no later than two business days after the close of each reporting period.”

Finally, the Louisiana legislature also recently enacted executive branch lobbying registration and reporting requirements. These requirements are not effective until January 1, 2005, and we will provide additional information in future issues of *Election Law News*.

## Pennsylvania

### Philadelphia Mayor Enacts Ethics Rules

On August 12, 2004, Mayor John Street of Philadelphia issued two Executive Orders relating to ethics rules. First, in Executive Order 0001-04, Mayor Street established the Philadelphia Board of Ethics for the city and gave the Board many powers revolving around, among other things, conflicts of interest, gift and gratuity rules and financial disclosure.

In Executive Order 0002-04, Mayor Street enacted municipal gift rules for city officers and employees. With exceptions, the gift ban applies to gifts from the following:

- Persons seeking to obtain business from, or having financial relations with, the city.
- Persons whose operations or activities are regulated or inspected by any city agency.
- Persons engaged, either as principals or attorneys, in proceedings before any city agency or in court proceedings adverse to the city.
- Persons seeking legislative or administrative action by the city.
- Persons whose interests may be substantially affected by the performance or nonperformance of a city official’s or employee’s official duties. ■

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## FEC Reins in 527s

**O**n August 19, 2004, the FEC adopted two sets of rules relating to 527s and the definition of a federal “political committee.” First, the FEC adopted the Office of General Counsel’s proposal relating to funds received in response to solicitations.

This provision counts funds provided “in response to any communication...if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate” as “contributions” under federal law. According to discussions at the August 19, 2004 FEC meeting, it appears that this provision might apply even if a small part of an issue advocacy letter states that the funds given to the organization as a result of the letter would be used to stop a federal candidate, and implies that this would occur at the polls. Also during the meeting, the General Counsel

stated that the rule would be textual and would apply to solicitations that say the funds will be used in connection with elections or the act of voting.

Second, the FEC adopted the Office of General Counsel’s proposals for allocations between the federal and nonfederal accounts of political committees. The adopted regulations establish 50 percent hard money minimums for such allocation, including, per an amendment by Commissioner Toner, a 50 percent allocation minimum for overhead and salaries.

The above-described rules are not applicable until January 1, 2005. ■

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## Upcoming Dates to Remember

Date	Description
<b>September 3, 2004</b>	Commencement of 60-day nationwide pre-general election blackout period for corporate and union-funded television and radio ads featuring or mentioning President Bush or Senator Kerry
<b>September 3, 2004</b>	Commencement of 60-day pre-general election blackout period for corporate and union-funded television and radio ads featuring or mentioning candidates for federal office and aired in the relevant Congressional Districts or states.
<b>September 20, 2004</b>	September monthly FEC report due for federal PACs filing monthly
<b>September 20, 2004</b>	September monthly IRS Form 8872 due for nonfederal PACs filing monthly*
<b>October 15, 2004</b>	Third quarter FEC report due for federal PACs filing quarterly and for federal candidates
<b>October 15, 2004</b>	Third quarter IRS report due for nonfederal PACs filing quarterly*
<b>October 20, 2004</b>	October monthly FEC report due for federal PACs filing monthly
<b>October 20, 2004</b>	October monthly IRS Form 8872 due for nonfederal PACs filing monthly*
<b>October 21, 2004</b>	Pre-General FEC report due for federal PACs filing quarterly and monthly**
<b>October 21, 2004</b>	Pre-General IRS report due for nonfederal PACs filing quarterly and monthly*
<b>November 2, 2004</b>	General Election

\* Deadlines are not extended if they fall on a weekend.

\*\* If sent by registered or certified mail, the pre-general must be postmarked by October 18, 2004. Committees should keep the mailing receipt with its postmark as proof of filing. If using overnight mail, the delivery service must receive the report by October 18, 2004. “Overnight mail” means an overnight service with an online tracking system.

# Past Articles Highlight Important Changes in Election Law

With the 2004 Presidential election just around the corner, the editors of *Election Law News* have created the following index of past newsletter articles highlighting important changes in campaign finance law, lobbying regulation, ethics and the taxation of political activities.

## CORPORATE COMMUNICATIONS

### Corporate Communications Guide *(May 2004)*

Practical tips to assist corporations and trade associations that want to continue their lobbying and other forms of communications featuring federal candidates and officeholders, but want to avoid the legal pitfalls of violating election laws

### Three Cheers for Corporate Partisan Communication *(March 2004)*

Corporations and trade associations may communicate with their respective restricted classes about federal candidates, federal parties and federal elections, and may urge members of its restricted class to vote for a particular federal candidate, to vote against a particular federal candidate or to donate personal funds to selected federal candidates or committees.

### The Corporation As Political Host: When Corporations Sponsor Appearances by Federal Candidates *(July 2003)*

Corporations often have an interest in hosting appearances by candidates for federal office. The Federal Election Campaign Act and regulations issued by the FEC impose certain restrictions on corporate-sponsored forums for federal candidates.

## DISCLAIMER REQUIREMENTS

### TV and Radio Disclaimer Requirements of BCRA *(January 2004)*

Under BCRA and rules promulgated thereunder by the FEC, all electioneering communications, independent expenditures and certain other public communications by candidates, PACs, political parties and other persons must contain certain disclaimers.

### Disclaimers for Printed Matter *(March 2003)*

One section of the new FEC regulations regarding disclaimers on communications to the general public by candidates, PACs and other entities specifically applies to printed communications.

## FEC RULES

### Rules for Two-Year Individual Aggregate Limits Changed *(January 2004)*

The FEC amended its rules regarding the federal biennial aggregate contribution limits for individuals to state that contributions to federal candidates made by individuals on or after January 1, 2004 will apply against the two-year aggregate contribution limits for the two-year election cycle in which the contributions are made.

### New FEC Airplane Reimbursement Rules Effective January 2004 *(January 2004)*

The FEC amended its regulations pertaining to reimbursement by federal candidates and committees to corporations or other entities for the use of airplanes owned or leased by them.

### FEC Approves Final Coordination Rules *(December 2002)*

In its final rules, the FEC defined the parameters of coordination in light of the mandates contained in BCRA. Under the new rules, both content and conduct standards must be implicated in order for the FEC to find that a communication was impermissibly coordinated with a candidate, an authorized committee or a political party committee.

## CONTRIBUTION LIMITS

### Contribution Limits *(March 2003)*

Identification of contribution limits to candidate committees and PACs and state, district local and national party committees.

To view past newsletter articles and back issues of *Election Law News*, visit [www.wrf.com](http://www.wrf.com) or call 202.719.3157.

## Millionaires' Amendment

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If on the 2003 Year End FEC Report the amount raised by the candidate from outside sources (*i.e.*, not including personal funds) is greater than the amount raised by his or her opponent from outside sources, then the formula for calculating the Opposition Personal Funds Amount for the candidate is as follows:

- The amount of personal funds that the opponent contributed to his or her campaign minus the amount of personal funds the candidate contributed to his or her campaign minus (the amount of candidate's receipts not from personal funds, minus the amount of opponent's receipts not from personal funds divided by 2) [or, in algebraic terms,  $a-b-((c-d)/2)$ ]

Conversely, if an opponent has raised more money from outside sources than the candidate has, then the formula for calculating the candidate's Opposition Personal Funds Amount is simply as follows:

- The amount of personal funds that the opponent has contributed to his or her campaign minus the amount of personal funds that the candidate has contributed to his or her campaign.

These two formulas determine the candidate's Opposition Personal Funds Amount. Even though the candidate's gross receipts portion of the formula (which is reliant upon the FEC Report information) remains constant once calculated on July 16 and February 1, the Opposition Personal Funds Amount may still vary, depending on the total amount of personal expenditures by both candidates during the election cycle. If either the candidate or his or her opponent contributes additional funds to his or her own campaign, then the Opposition Personal Funds Amount will change.

### Step 3: Effect of Exceeding Threshold Amounts

Once a candidate's Opposition Personal Funds Amount exceeds the Effective Threshold Amount, then the increased contribution limits are triggered and, at certain levels, the party coordinated expenditure limits are lifted. For a House candidate, once a candidate's Opposition Personal Funds Amount exceeds \$350,000, the candidate's limit for individual contributions is tripled to \$6,000 and the national and state parties may make unlimited coordinated expenditures on the candidate's behalf.

Again, though, the Senate is more complicated:

- Where a Senate candidate's Opposition Personal Funds Amount exceeds the Effective Threshold Amount, the candidate's individual limits are tripled to \$6,000.

- Where a Senate candidate's Opposition Personal Funds Amount exceeds  $\$600,000 + (.16 \times \text{VAP})$  the candidate's individual limits are sextupled to \$12,000.
- Where a Senate candidate's Opposition Personal Funds Amount exceeds  $\$1,500,000 + (.40 \times \text{VAP})$  the candidate's individual limits are sextupled to \$12,000 and the national and state parties may make unlimited coordinated expenditures on behalf of the candidate.

Candidates who have become eligible for increased limits and coordinate expenditures must file FEC Form 11 (Calculation of Opposition Personal Funds Amount) within 24 hours of eligibility, informing their national and state parties and the FEC of their Opposition Personal Funds Amount. FEC Form 11 must be filed by a House candidate if his or her Opposition Personal Funds Amount exceeds \$350,000. A Senate candidate files FEC Form 11 only if his or her Opposition Personal Funds Amount exceeds the sum of \$1,500,000 and  $(\$0.40 \times \text{VAP})$ . (Please note that because Senate candidates qualify for increased contribution limits but not party coordinated expenditures at levels lower than the threshold for filing FEC Form 11, such Senate candidates may be accepting increased contributions even though they have not filed any paper with the FEC stating as much.) The party committees that then make coordinated expenditures must notify both the FEC and the candidate for whom the expenditures were made, via Schedule F, within 24 hours of each expenditure.

### Step 4: Day-to-Day Monitoring Required

Because of the constant monitoring necessary for the calculation of the personal funds amount through the election period, the FEC requires ongoing reporting and notifications. Within 15 days of a candidate's entry into a race, he or she must file a Declaration of Intent (FEC Form 2) with the FEC and each opposing candidate, disclosing those planned personal fund election expenditures that are expected to exceed the Effective Threshold Amount. During the campaign, and as stated above, in addition to the other regular FEC filings, a candidate must notify the FEC, each opposing candidate and his or her national party committees, via FEC Form 10 (Notification of Expenditures from Personal Funds), within 24 hours of exceeding the Effective Threshold Amount. A Senate candidate must also notify the Secretary of the Senate within 24 hours of such an event. After an initial breach of the Effective Threshold Amount, a candidate must notify

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## Millionaires' Amendment

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each of the above parties, again through FEC Form 10, after making any additional personal fund expenditure of more than \$10,000 in the aggregate. Each time a candidate receives an FEC Form 10, he or she must recalculate the Opposition Personal Funds Amount.

### Step 5: Period of Availability

The relaxation of these particular election law regulations and the increased contribution limits do not last for the rest of the election. The Millionaires' Amendment provisions are only available for House candidates until the aggregate amount of (1) contributions received by the candidate above the normal limit of \$2,000 per election and (2) the party coordinated expenditures equals the Opposition Personal Funds Amount as determined by, and defined in, the candidate's FEC Form 11. Senate candidates, on the other hand, may receive up to 110 percent of the Opposition Personal Funds Amount in increased contributions and in party coordinated expenditures. (Of course, if a candidate makes personal contributions to his or her campaign along the way, then his or her Opposition Personal Funds Amount is reduced unless the opponent also makes additional personal campaign contributions.)

Once that Opposition Personal Funds Amount is reached, a candidate must: inform the national and State committees within 24 hours, file FEC Form 12 (Notice of Suspension of Increased Limits) within 24 hours, and no longer accept contributions at the increased levels or party coordinated expenditures.

Also, if an opponent who is expending personal funds withdraws from the race, either by public statement or other ineligibility, the candidate for whom the increased limits applied may no longer accept donations at those increased limits and may no longer accept coordinated party expenditures. Other than public withdrawal, additional ways by which a candidate may become ineligible include failure to file by a specified date or failure to qualify for a run-off election.

### Step 6: Returning Excess Contributions

Once an election is over, either primary or general, contributions received under the increased limits that were unspent during the election must be refunded within 50 days. The contributions may not be re-designated or carried over to the candidate's next race. Any refunds must be included in the first report that the campaign is required to file after the 50 day refund window; such information must be included in the candidate's Form 3, filed with the FEC. ■

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