

**REVISED PROPOSED AMENDMENT: CAMPAIGN FINANCE
(Proposed Amendment 2 of User Friendly)**

Synopsis of Proposed Amendment: *This proposed amendment responds to the Bipartisan Campaign Reform Act of 2002, Pub. L. 107–155 (the “Act”). The most pertinent provision for the Commission is section 314. Section 314 gives the Commission emergency authority to promulgate amendments to implement the Act not later than February 3, 2003. Specifically, section 314(a) and (b) state:*

“(a) IN GENERAL.—The United States Sentencing Commission shall—

(1) promulgate a guideline, or amend an existing guideline under section 994 of title 28, United States Code, in accordance with paragraph (2), for penalties for violations of the Federal Campaign Act of 1971 and related election laws; and

(2) submit to Congress an explanation of any guidelines promulgated under paragraph (1) and any legislative or administrative recommendations regarding enforcement of the Federal Campaign Act of 1971 and related election laws.

(b) CONSIDERATIONS.—The Commission shall provide guidelines under subsection (a) taking into account the following considerations:

(1) Ensure that the sentencing guidelines and policy statements reflect the serious nature of such violations and the need for aggressive and appropriate law enforcement action to prevent such violations.

(2) Provide a sentencing enhancement for any person convicted of such violation if such violation involves—

(A) a contribution, donation, or expenditure from a foreign source;

(B) a large number of illegal transactions;

(C) a large aggregate amount of illegal contributions, donations, or expenditures;

(D) the receipt or disbursement of governmental funds; and

(E) an intent to achieve a benefit from the Federal Government.

(3) Assure reasonable consistency with other relevant directives and guidelines of the Commission.

(4) Account for aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements.

(5) Assure the guidelines adequately meet the purposes of sentencing under section 3553(a)(2) of title 18, United States Code.”.

Since section 314 directed the Commission to provide a guideline for violations of the Federal Election Campaign Act of 1971 (the “FECA”) and related elections laws, examination of the FECA’s criminal penalty provisions (and related criminal penalty provisions) is necessary. Section 309(d)(1) of the FECA sets forth the Act’s criminal penalty provisions as follows:

(1) *Violations of the FECA as penalized under section 309(d)(1)(A)*

Section 309(d)(1)(A) is the main penalty provision of the FECA (2 U.S.C. §437g(d)(1)(A)). As amended by section 312 of the Act, it states that “[a]ny person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure (i) aggregating \$25,000 or more during a calendar year shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both; or (ii) aggregating \$2,000 or more (but less than \$25,000) during a calendar year shall be fined under such title, imprisoned for not more than 1 year, or both.” (Before amendment by the Act, section 309(d)(1)(A) of the FECA provided for a maximum term of imprisonment of one year, or a fine, or both.)

The major violations of the FECA to which section 309(d)(1)(A) applies are:

(A) *The Ban on Soft Money*

Section 323 of the FECA (2 U.S.C. § 441i) prohibits national political party committees (including senatorial and congressional campaign committees) from accepting soft money from any person (including an individual) after November 6, 2002.

(B) *Restrictions on Hard Money Contributions*

The FECA limits the amount of hard money that may be contributed to a Federal campaign. The FECA limits the amount of hard money that persons other than multicandidate political committees may contribute as follows:

- (i) *The contribution to a candidate for Federal office may not exceed \$2,000 per election. (The limit used to be \$1,000; see section 315(a)(1)(A) of the FECA, as amended by section 307(a)(1) of the Act.)*
- (ii) *The contribution to a national party committee may not exceed \$25,000 per calendar year. (The limit used to be \$20,000; see section 315(a)(1)(B) of the FECA, as amended by section 307(a)(2) of the Act.)*
- (iii) *The contribution to any other political committee, including a political action committee (PAC), may not exceed \$5,000 per calendar year. (No change in the former law; see section 315(a)(1)(C) of the FECA.)*
- (iv) *The contribution to a State or local political party may not exceed \$10,000 per calendar year. (The limit used to be \$5,000; see section 315(a)(1)(D) of the FECA, as amended by section 102(3) of the Act.)*

The FECA limits the amount of hard money that multicandidate political committees may contribute as follows:

- (i) The contribution to a candidate for Federal office may not exceed \$5,000 per election. (See section 315(a)(2)(A) of the FECA.)*
- (ii) The contribution to a national party committee may not exceed \$15,000 per calendar year. (See section 315(a)(2)(B) of the FECA.)*
- (iii) The contribution to any other political committee, including a political action committee (PAC), may not exceed \$5,000 per calendar year. (No change in the former law; see section 315(a)(2)(C) of the FECA.)*
- (iv) The contribution to a State or local political party may not exceed \$5,000 per calendar year. (See section 315(a)(2)(C) of the FECA.)*

(C) The Ban on Contributions and Donations by Foreign Nationals

Section 319 of the FECA (2 U.S.C. § 441e) makes it “unlawful for (1) a foreign national, directly or indirectly, to make (A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election; (B) a contribution or donation to a committee of a political party; or (C) an expenditure, independent expenditure, or disbursement for an electioneering communication (within the meaning of section 304(f)(3)); or (2) a person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or(B) of paragraph (1) from a foreign national.”.

“Foreign national” is broadly defined to mean (1) a foreign principal, as defined in the Foreign Agent Registration Act of 1938 (22 U.S.C. § 611(b)) or (2) an individual who is not a citizen or national of the United States or who is not lawfully admitted for permanent residence. The term “foreign principal” includes foreign governments and corporations.

(D) Restrictions on Electioneering Communications

Section 304(f) of the FECA, as added by section 201 of the Act, requires any person who makes a disbursement for the direct costs of producing and airing electioneering communications exceeding \$10,000 in a calendar year to file a disclosure statement to the Federal Election Commission.

Section 316 of the FECA (2 U.S.C. § 441b) makes it unlawful for any national bank, a corporation organized by authority of any Federal law, or any labor union to make a contribution or expenditure in connection with any federal election to any federal political office, or a disbursement, using non-PAC money, for an “electioneering communication”.

An electioneering communication is any broadcast, cable, or satellite communication which (A) refers to a clearly identified candidate for Federal office; (B) is made within 60 days before a general election or 30 days before a primary election. The communication must be targeted to the pertinent electorate. See 2 U.S.C. § 434(f)(3)(C).

(2) *Violations of Section 316(b)*

Section 309(d)(1)(B) of the FECA states that “[i]n the case of a knowing and willful violation of section 316(b)(3), the penalties set forth in this subsection shall apply to a violation involving an amount aggregating \$250 or more during a calendar year. Such violation of section 316(b)(3) may incorporate a violation of section 317(b), 320, or 321.

Section 316(b)(3) of the FECA (2 U.S.C. § 441b(b)(3)) makes it unlawful for a national bank, any corporation organized by authority of any law of Congress, or any labor union (A) to use a political fund to make a political contribution or expenditure from money or anything of value that was secured by physical force, job discrimination, financial reprisals (or the threat thereof), or from dues, fees, or other money required as a condition of membership in the labor organization or as a condition of employment; (B) who solicits an employee for contribution to a political fund to fail to inform the employee of the purposes of the fund at the time of the solicitation; and (C) who solicits an employee for contribution to a political fund to fail to inform the employee of his right to refuse to contribute without reprisal.

The sections which may incorporate violations of section 316(b)(3) of the FECA are section 317(b), which prohibits government contractors from making contributions of currency in excess of \$100 for any candidate for Federal office, section 320 which prohibits a person from making a contribution in the name of another or accepting a contribution so made, and section 321, which prohibits any person from making contributions of currency in excess of \$100 for any candidate for Federal office.)

(3) *Fraudulent Misrepresentations Under Section 322*

Section 309(d)(1)(C) of the FECA states that “[i]n the case of a knowing and willful violation of section 322, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of \$1,000 or more is involved.”.

Section 322(a) of the FECA (2 U.S.C. 441h) states that “[n]o person who is a candidate for Federal office or an employee or agent of such a candidate shall (1) fraudulently misrepresent himself or any committee or organization under his control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof; or (2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).”.

Section 322(b) states that “[n]o person shall (1) fraudulently misrepresent the person as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations; or (2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).”.

(4) Conduit Contributions under Section 320

Section 309(d)(1)(D) of the FECA states that “[a]ny person who knowingly and willfully commits a violation of section 320 involving an amount aggregating more than \$10,000 during a calendar year shall be (i) imprisoned for not more than 2 years if the amount is less than \$25,000 (and subject to imprisonment under subparagraph (A) if the amount is \$25,000 or more); (ii) fined not less than 300 percent of the amount of the violation and not more than the greater of (I) \$50,000; or (II) 1,000 percent of the amount involved in the violation; or (iii) both imprisoned under clause (i) and fined under clause (ii).”.

Section 320 of the FECA (2 U.S.C. § 441f) states that “[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.”.

In addition to changes made to the FECA, section 302 of the Act amended section 607 of title 18, United States Code, to make it “unlawful for any person to solicit or receive a donation of money or other thing of value in connection with a Federal, State, or local election from a person who is located in a room or building occupied in the discharge of official duties by an officer or employee of the United States. It shall be unlawful for an individual who is an officer or employee of the Federal Government, including the President, Vice President, and Members of Congress, to solicit or receive a donation of money or other thing of value in connection with a Federal, State, or local election, while in any room or building occupied in the discharge of official duties by an officer or employee of the United States, from any person.”. The penalty is a fine of not more than \$5,000, not more than 3 years or imprisonment, or both.

In order to implement the directive in the Act, this proposed amendment expands the

scope of Chapter Two, Part C (Offenses Involving Public Officials) by providing within that Part a new guideline for offenses under the FECA and related offenses. A new guideline, rather than amendment of an existing guideline, seems more appropriate to implement the directive. Currently there exists no guideline which already incorporates the elements of the FECA and related offenses, although the fraud guideline in particular (§2B1.1) and the public corruption guidelines to a lesser degree (Chapter Two, Part C) provide some overlap in the elements of the offense and aggravating conduct. In addition, the enhancements required to be added by the directive in the Act would fit nicely into a guideline devoted solely to campaign finance offenses but would prove unwieldy if added to the fraud or public corruption guidelines, which cover so many other non-campaign finance offenses.

The proposed amendment provides for a base offense level of level 8. The statutorily authorized maximum term of imprisonment for the conduct covered by the proposed guideline was raised by the Act from one year for all such offenses to two years for some offenses and five years for others. The base offense level is set at level 8 in recognition of the relative similarity of these offenses to fraud offenses covered by §2B1.1 and public corruption offenses covered by Chapter Two, Part C. A base offense level of level 8 both insures proportionality with relatively similar offenses and permits various sentencing enhancements directed by the Act to operate as well.

The proposed amendment also creates a number of specific offense characteristics in response to the directive in section 314(b) of the Act. First, the directive requires the Commission to provide an enhancement if the offense involved a large aggregate amount of illegal contributions, donations, or expenditures. To address this consideration, the proposed amendment provides a specific offense characteristic, at subsection (b)(1), that uses the fraud loss table in §2B1.1 to incrementally increase the offense level according to the dollar amount of the illegal transactions. This approach would foster proportionality with related guidelines, notably the fraud guideline and the public corruption guidelines (which also reference the fraud loss table) and would provide incremental, rather than a flat, punishment according to the dollar amount involved in the offense.

The proposed amendment provides commentary to explain that “illegal transactions” include any conduct prohibited by the FECA and related election laws and, with respect to dollar amounts limited by the FECA, only those amounts that exceed the amount a person may legitimately contribute, solicit, or expend. The proposed amendment also provides references in the definition to the FECA’s definitions of “contribution” and “expenditure”.

Second, the proposed amendment provides a two part enhancement at subsection (b)(2), providing for the greater of a two level enhancement if the offense involved a contribution, donation, or expenditure from a foreign national and a four level enhancement if the offense involved a contribution, donation, or expenditure from a foreign government or organization.

Third, the proposed amendment provides an alternative pronged enhancement at subsection (b)(3) if (1) the offense involved a donation, contribution, or expenditure, disbursement, or receipt of government funds, or (2) the defendant committed the offense for the purpose of achieving a specific, identifiable nonmonetary Federal benefit. The proposed amendment defines “governmental funds” to mean any Federal, State, or local funds. It is anticipated that this enhancement will apply in situations such as using governmental funds awarded in a contract to make a donation or contribution. The FECA itself addresses this type of situation but in very few places. For example, section 317 of the FECA, 2 U.S.C. § 441c, prohibits any person who enters into a contract with the United States for the rendition of services, the provision of materials, supplies, or equipment, or the selling of any land or property to the United States, if the payment from the United States is to be made in whole or in part from funds appropriated from Congress and before completion of or negotiation for the contract, to make or solicit a contribution of money or anything of value to a political party, committee, or candidate for public office or to any person for a political purpose. (This provision does not prohibit, however, the establishment of a segregated account to be used for political purposes.) The concern behind this provision of the FECA, therefore, is to prevent the use of federal funds for political purposes. The same concern pertains to State and local funds as well. It is also anticipated that this enhancement will apply in situations in which a State or local elected official uses State or local resources to finance his or her campaign for Federal office.

Commentary is provided for the alternative prong in subsection (b)(3)(B) on the intent to achieve a specific, identifiable nonmonetary Federal benefit to make clear that the intent of this prong is not to enhance the sentence for seeking heightened access to public officials generally; rather, the enhancement provides greater punishment for defendants who seeking some specific benefit such as a Presidential pardon.

Fourth, the amendment proposes to add an enhancement at subsection (b)(4) if the defendant engaged in thirty or more illegal transactions during the course of the offense, whether or not the defendant was convicted of the conduct. This enhancement is added in response to the directive to provide an enhancement if the offense involved a large number of illegal transactions.

Fifth, the amendment proposes to add an enhancement at subsection (b)(5) if the contribution, donation, or expenditure was obtained through, or a solicitation was made by, intimidation, threat of harm, including pecuniary harm, or coercion.

Sixth, in response to the directive to provide an enhancement for cases involving an intent to achieve a benefit from the Federal government, the proposed amendment provides a cross reference in the new guideline to either the bribery guideline or the gratuity guideline, if the offense involved such conduct and the resulting offense level is greater than that determined

under the new guideline.

The proposed amendment also amends the guideline on fines for individual defendants, §5E1.2, to set forth the fine provisions unique to FECA. This part of the amendment also provides that the defendant's participation in a conciliation agreement with the Federal Election Commission pursuant to section 309 of the FECA may be a potentially legitimate factor for the court to consider in evaluating where to sentence an offender within the presumptive fine guideline range.

The proposed amendment also includes counts under this proposed guideline under the grouping provision under §3D1.2(d). Finally, the Statutory Index is amended to incorporate these offenses.

Proposed Amendment:

PART C - OFFENSES INVOLVING PUBLIC OFFICIALS AND VIOLATIONS OF FEDERAL ELECTION CAMPAIGN LAWS

Introductory Commentary

~~The Commission believes that pre-guidelines sentencing practice did not adequately reflect the seriousness of public corruption offenses. Therefore, these guidelines provide for sentences that are considerably higher than average pre-guidelines practice.~~

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§2C1.8. Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
 - (1) If the value of the illegal transactions exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
 - (2) (Apply the greater) If the offense involved, directly or indirectly, an illegal transaction made by or received from—
 - (A) a foreign national, increase by **2** levels; or

- (B) a government of a foreign country, increase by **4** levels.
- (3) If (A) the offense involved the contribution, donation, solicitation, expenditure, disbursement, or receipt of governmental funds; or (B) the defendant committed the offense for the purpose of obtaining a specific, identifiable non-monetary Federal benefit, increase by **2** levels.
- (4) If the defendant engaged in 30 or more illegal transactions, increase by **2** levels.
- (5) If the offense involved a contribution, donation, solicitation, or expenditure made or obtained through intimidation, threat of pecuniary or other harm, or coercion, increase by **4** levels.
- (c) Cross Reference
- (1) If the offense involved a bribe or gratuity, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than the offense level determined above.

Commentary

Statutory Provisions: 2 U.S.C. §§ 437g(d)(1), 439a, 441a, 441a-1, 441b, 441c, 441d, 441e, 441f, 441g, 441h(a), 441i, 441k; 18 U.S.C. § 607. For additional provision(s), see Statutory Index (Appendix A).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Foreign national" has the meaning given that term in section 319(b) of the Federal Election Campaign Act of 1971, 2 U.S.C. § 441e(b).

"Government of a foreign country" has the meaning given that term in section 1(e) of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611(e)).

"Governmental funds" means money, assets, or property, of the United States government, of a State government, or of a local government, including any branch, subdivision, department, agency, or other component of any such government. "State" means any of the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, or American Samoa. "Local government" means the government of a political subdivision of a State.

"Illegal transaction" means (A) any contribution, donation, solicitation, or expenditure of money or anything of value, or any other conduct, prohibited by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 et seq; (B) any contribution, donation, solicitation, or expenditure of money or anything of value made in excess of the amount of such contribution, donation, solicitation, or expenditure that may be made under such Act; and (C) in the case of a violation of 18 U.S.C. § 607, any solicitation or receipt of money or anything of value under that section. The terms "contribution" and "expenditure" have the meaning given those terms in section 301(8) and (9) of the Federal Election Campaign Act of 1971 (2 U.S.C. § 431(8) and (9)), respectively.

2. *Application of Subsection (b)(3)(B).—Subsection (b)(3)(B) provides an enhancement for a defendant who commits the offense for the purpose of achieving a specific, identifiable nonmonetary Federal benefit that does not rise to the level of a bribe or a gratuity. Subsection (b)(3)(B) is not intended to apply to offenses under this guideline in which the defendant's only motivation for commission of the offense is generally to achieve increased visibility with, or heightened access to, public officials. Rather, subsection (b)(3)(B) is intended to apply to defendants who commit the offense to obtain a specific, identifiable non-monetary Federal benefit, such as a Presidential pardon or information proprietary to the government.*
3. *Application of Subsection (b)(4).—Subsection (b)(4) shall apply if the defendant engaged in any combination of 30 or more illegal transactions during the course of the offense, whether or not the illegal transactions resulted in a conviction for such conduct.*
4. *Departure Provision.—In a case in which the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted.*

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§3D1.2. Groups of Closely Related Counts

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- (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.7; 2C1.8

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§5E1.2. Fines for Individual Defendants

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Commentary

Application Notes:

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- 5. *Subsection (c)(4) applies to statutes that contain special provisions permitting larger fines; the guidelines do not limit maximum fines in such cases. These statutes include, among others: 21 U.S.C. §§ 841(b) and 960(b), which authorize fines up to \$8 million in offenses involving the manufacture, distribution, or importation of certain controlled substances; 21 U.S.C. § 848(a), which authorizes fines up to \$4 million in offenses involving the manufacture or distribution of controlled substances by a continuing criminal enterprise; 18 U.S.C. § 1956(a), which authorizes a fine equal to the greater of \$500,000 or two times the value of the monetary instruments or funds involved in offenses involving money laundering of financial instruments; 18 U.S.C. § 1957(b)(2), which authorizes a fine equal to two times the amount of any criminally derived property involved in a money laundering transaction; 33 U.S.C. § 1319(c), which authorizes a fine of up to \$50,000 per day for violations of the Water Pollution Control Act; ~~and~~ 42 U.S.C. § 6928(d), which authorizes a fine of up to \$50,000 per day for violations of the Resource Conservation Act; and 2 U.S.C. § 437g(d)(1)(D), which authorizes, for violations of the Federal Election Campaign Act under 2 U.S.C. § 441f, a fine up to the greater of \$50,000 or 1,000 percent of the amount of the violation, and which requires, in the case of such a violation, a minimum fine of not less than 300 percent of the amount of the violation.*

There may be cases in which the defendant has entered into a conciliation agreement with the Federal Election Commission under section 309 of the Federal Election Campaign Act of 1971 in order to correct or prevent a violation of such Act by the defendant. The existence of a conciliation agreement between the defendant and Federal Election Commission, and the extent of compliance with that conciliation agreement, may be appropriate factors in determining at what point within the applicable fine guideline range to sentence the defendant, unless the defendant began negotiations toward a conciliation agreement after becoming aware of a criminal investigation.

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STATUTORY INDEX

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