

## PROPOSED AMENDMENT: CAMPAIGN FINANCE

**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 of the Act for the Commission, is section 314 of the Act. 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 violations 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 penalties 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. §341g(d)(1)(A)). As amended by section 312 of the Act, it states that “[a]ny person who knowingly or 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 individuals 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 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 persons other than individuals 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 another 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.*

*(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, an corporation organized by authority of any Federal law, or any labor union to make a contribution or expenditure in connection with any election to any political office, including a contribution or expenditure, 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..*

*(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 (B) 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 most 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 [6 - 10]. 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 [6-10] 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 [6-10] both insures proportionality with relatively similar offenses and permits various sentencing enhancements directed to be added by the Act to operate 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 and to provide an enhancement for a large number of illegal transactions. These two directives are fundamentally interrelated because the amount of the illegal contributions necessarily tends to increase as the number of illegal transactions increases. Because of the interrelatedness of these two directives, one option is to address these two considerations by providing 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 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”.*

*Another option, provided in the proposed amendment, is to provide enhancements for both the number of illegal transactions and the dollar amount of the transactions. A separate enhancement for the number of illegal transactions takes into account the aspect of*

*sophistication and planning attendant to multiple violations.*

*Second, the proposed amendment provides an enhancement if the offense involved a contribution, donation, or expenditure from a foreign source. In implementing this enhancement, the proposed amendment adopts the expansive definition of “foreign national” provided in section 319 of the FECA, and provides for a greater enhancement if the defendant knew that the source of the funds was a foreign government.*

*Third, the proposed amendment provides an enhancement if the offense involved a donation, contribution, or expenditure of government funds. 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.*

*Fourth, the proposed amendment provides a number of options for responding to the directive to provide an enhancement for cases involving an intent to achieve a benefit from the Federal government. One option is to incorporate this factor into the base offense. Examination of available Commission data reveals that this factor is present in the majority of illegal campaign finance cases and thus lies within the heartland of these cases. Another option presented in the proposed amendment defines this factor as the intent to influence a Federal public official to perform an official act in return for the contribution, donation, or expenditure. A third option is also presented that limits the intent to achieve a Federal benefit to the intent to achieve a financial benefit.*

*The amendment also proposes to add an enhancement if the contribution, donation, or expenditure was obtained through intimidation, threat of harm, including pecuniary harm, or coercion.*

*The proposed amendment also amends the guideline on fines for individual defendants, §5E1.2, to set forth the fine provisions unique to FECA and to provide two upward departure provisions related to certain FECA fines. 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. An issue for comment is provided regarding whether, in the alternative, a downward adjustment should apply in cases involving conciliation agreements, or alternatively, whether the Commission should discourage downward departures in such cases.

The proposed amendment provides commentary that counts under this proposed guideline are groupable 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**

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*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: [6][7][8][9][10]
- (b) Specific Offense Characteristics
  - (1) If the value of the illegal transactions (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) 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 a contribution, donation, or expenditure, or an express or implied promise to make a contribution, donation, or expenditure—
  - (A) by a foreign national, increase by [2][4] levels; or
  - (B) by a foreign government, and the defendant knew that the source of the contribution, donation, or expenditure was a foreign government, increase by [4][8] levels.
- (3) If the offense involved a contribution, donation, or expenditure of governmental funds, increase by [2][4] levels.
- (4) If the offense involved an intent [Option One: to influence a Federal public official to perform an official act][Option Two: to obtain a financial Federal benefit] in return for the contribution, donation, or expenditure, increase by [2][4] levels.
- [5] If the offense involved more than five illegal transactions in a 12-month period, increase as follows:

<u>Number of Illegal Transactions</u>	<u>Increase in Level</u>
(A) 6-15	add [1]
(B) 16-30	add [2]
(C) 31 or more	add [3].]

- (5) If the offense involved a donation or contribution obtained through intimidation, threat of pecuniary or other harm, or coercion, increase by [2][4] levels.
- (c) Cross Reference
  - (1) If the offense involved the fraudulent misrepresentation of authority to speak or otherwise act for a candidate, political party, or employee or agent thereof for the purpose of soliciting a donation or contribution, apply §2B1.1 (Theft, Fraud, and Property Destruction), if the resulting offense level is greater than the offense level determined under this guideline.

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 government” means the government of a foreign country, regardless of whether the United States formally has recognized that country.

“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).

“Governmental funds” means money, assets, or property of a Federal, State, or local government[, including a governmental branch, subdivision, department, agency, or other component.]

“Illegal transaction” means (A) any contribution, donation, solicitation, or expenditure of money or anything of value made in excess of the amount of such contribution, solicitation, or expenditure that may be made under the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 et seq; and (B) 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 Abuse of Position of Trust Adjustment.—If the defendant is an elected official, a candidate for elected office, or acting on behalf of, or employed by, an elected official or candidate for elected office, an adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.]

3. Multiple Counts.—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving offenses covered by this guideline are grouped together under subsection (d) of §3D1.2 (Groups of Closely Related Counts).

4. Departure Provisions.—In a case in which the value of the illegal transactions does not adequately reflect the seriousness of the offense, an upward departure may be warranted. For example, a relatively small contribution in violation of the Federal Election Campaign Act of 1971 may be made in exchange for favorable consideration in the award of a substantial Federal government contract. Depending on the facts of such a case, an upward departure may be warranted.

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.

Background: This guideline covers violations of the Federal Election Campaign Act of 1971 and related federal election laws, such as 18 U.S.C. § 607.

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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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4. *The Commission envisions that for most defendants, the maximum of the guideline fine range from subsection (c) will be at least twice the amount of gain or loss resulting from the offense. Where, however, two times either the amount of gain to the defendant or the amount of loss caused by the offense exceeds the maximum of the fine guideline, an upward departure from the fine guideline may be warranted.*

*Moreover, where a sentence within the applicable fine guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that otherwise would not be disgorged (e.g., by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted.*

*[If the count of conviction involves a violation of the Federal Election Campaign Act under 2 U.S.C. § 437g(d)(1)(A), an upward departure to the maximum fine permitted under 18 U.S.C. § 3571 may be warranted. If the count of conviction involves a violation of the Federal Election Campaign Act under 2 U.S.C. § 441f punishable under 2 U.S.C. § 437g(d)(1)(D), an upward departure to the maximum fine permitted under that subsection may be warranted.]*

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 may be an appropriate factor in determining at what point within the applicable fine guideline range to sentence the defendant.*

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## STATUTORY INDEX

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7 U.S.C. § 6	2B1.1

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18 U.S.C. § 597            2H2.1  
18 U.S.C. § 607            2C1.8

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**Issues for Comment:** *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. For such cases, the proposed amendment provides that such an agreement may be an appropriate factor in determining the amount of fine that might be imposed. The Commission requests comment regarding whether the existence of such a conciliation agreement between the defendant and Federal Election Commission should be the basis for a downward adjustment under the proposed guideline (and if so, what should the extent of the adjustment be), or, alternatively, should the Commission discourage downward departures in cases involving conciliation agreements so as to limit the effect such an agreement might have on the criminal penalties imposed?*

*The Commission also requests comment regarding whether, in contrast to proposed application note 2, application of the abuse of position of trust adjustment in §3B1.3 should be precluded for cases under the proposed guideline.*