
***Amendments to the
Federal Sentencing Guidelines
(Effective January 25, 2003)***

Highlights of Key Points



Prepared by the Office of Education & Sentencing Practice

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SENTENCING GUIDELINES HIGHLIGHTS
EMERGENCY AMENDMENTS - 2003

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- I. **Campaign Finance** - This amendment responds to the directive from Congress contained in the Bipartisan Campaign Reform Act of 2002 (BCRA). The Commission created a new guideline at §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). The offenses that will be sentenced under §2C1.8 include: violations of the statutory prohibitions against “soft money” (2 U.S.C. §441i); restrictions on “hard money” contributions (see sections 307 and 315 of the FECA); contributions by foreign nationals (2 U.S.C. §441e); restrictions on “electioneering communications” as defined at 2 U.S.C. §434(f)(3)(C); certain fraudulent misrepresentations (2 U.S.C. §441(h); and “conduit contributions” (2 U.S.C. §441(f)).

The new guideline has a base offense level of 8 and provides five specific offense characteristics that ensure appropriate enhancements for aggravating conduct which may occur during the commission of these offenses. These specific offense characteristics respond to specific directives from Congress contained in the BCRA.

First, responding to the directive to provide for an enhancement for “a large aggregate amount of illegal contributions”, the guideline provides a specific offense characteristic at §2C1.8(b)(1), that uses the loss table at §2B1.1 to incrementally increase the offense level in proportion to the monetary amounts involved in the illegal transactions.

Second, reflecting the seriousness of foreign entities attempting to tamper with the United States’ election processes, the guidelines provide alternative enhancements at 2C1.8(b)(2). If the offense involved a foreign national, two levels are added and, if the offense involved a foreign government, four levels are added.

Third, the guideline provides alternative two level enhancements, at §2C1.8(b)(3), when the offense involves either “governmental funds,” or an intent to derive “a specific, identifiable non-monetary Federal benefit” (e.g., to further a particular cause).

Fourth, responding to a directive to provide enhanced sentencing for cases involving “a large number of illegal transactions,” the guideline provides a two level enhancement at §2C1.8(b)(4) if the offender engages in “30 or more illegal transactions.”

Fifth, the guideline provides a four level enhancement at §2C1.8(b)(5), if the offense involves the use of “intimidation, threat of pecuniary or other harm, or coercion.”

Finally, the Commission has added a cross-reference at §2C1.8(c)(1), which instructs the court to apply either §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 offense involved a bribe or a gratuity and the resulting offense level would be greater than that

determined under §2C1.8.

- II. **Corporate Fraud** - This amendment implements directives to the Commission contained in sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002 by making several modifications to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) and §2J1.2 (Obstruction of Justice). The directives pertain generally to serious fraud and related offenses and to obstruction of justice offenses.

First, the amendment expands the scope of the existing enhancement at §2B1.1(b)(2) based on the number of victims involved in the offense, providing an additional two level increase, for a total of six levels, if the offense involved 250 or more victims. This amendment reflects the extensive nature of such offenses and the large scale victimization caused by such offenses.

Second, the amendment expands the scope of the existing enhancement at §2B1.1(b)(12)(B) by providing two additional prongs. The first prong applies to offenses that substantially endanger the solvency or financial security of an organization that, at any time during the offense, was a publicly traded company or had 1,000 or more employees. The Commission has determined that such an offense undermines the public's confidence in the securities and investment market much in the same manner as an offense that jeopardizes the safety and soundness of a financial institution undermines the public's confidence in the banking system. The corresponding application note sets forth a non-exhaustive list of factors that the court shall consider in applying this enhancement.

The second prong added to §2B1.1(b)(12)(B) applies to offenses that substantially endanger the solvency or financial security of 100 or more victims, whether or not a publicly traded company or other organization was affected by the offense. This enhancement would be appropriate if the court found that the amount of loss suffered by individual victims of the offense substantially endangered the solvency or financial security of the victims.

Third, the amendment implements the directive to "provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses." A new four level enhancement at §2B1.1(b)(13) that applies if the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or director of a publicly traded company. The corresponding application note states that in cases in which the new four level enhancement applies, the existing two level enhancement for abuse of position of trust at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) shall not apply.

Fourth, the amendment expands the loss table at §2B1.1(b)(1) to punish adequately, offenses that cause catastrophic losses of magnitudes previously unforeseen. It adds two additional loss amount categories to the table; an increase of 28 levels for offenses in which the loss exceeded

\$200,000,000, and an increase of 30 levels for offenses in which the loss exceeded \$400,000,000. The amendment also modifies the tax table at §2T4.1 in a similar manner to maintain the longstanding proportional relationship between the loss table in §2B1.1 and the tax table in §2T4.1.

Fifth, the amendment modifies §2J1.2 (Obstruction of Justice) to address the directives in sections 805 and 1104 of the Sarbanes-Oxley Act by first, increasing the base offense level in §2J1.2 from level 12 to level 14. Second, it adds a new two level enhancement that applies if the offense (i) involved the destruction, alteration, or fabrication of a substantial number of records, documents or tangible objects; (ii) involved the selection of any essential or especially probative record, document, or tangible object to destroy or alter; or (iii) was otherwise extensive in scope, planning, or preparation.

Sixth, the amendment addresses new offenses created by the Act. Offenses related to destruction of corporate audit records (18 U.S.C. §1520) is referenced to §2E5.3 (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act; Destruction and Failure to Maintain Corporate Audit Records). The amendment also expands the existing cross reference in §2E5.3(a)(2) specifically to cover fraud and obstruction of justice offenses. Accordingly, if a defendant who is convicted under 18 U.S.C. §1520 certified the financial report of a publicly traded company in order to facilitate a fraud, the cross reference requires the court to apply §2B1.1 rather than §2E5.3.