
Report to the Congress:

**INCREASED PENALTIES FOR CAMPAIGN
FINANCE OFFENSES AND LEGISLATIVE
RECOMMENDATIONS**

(As required by section 314 of the Bipartisan Campaign Reform Act of 2002,
Public Law 107-155)



UNITED STATES SENTENCING COMMISSION
May 2003

INCREASED PENALTIES FOR CAMPAIGN FINANCE OFFENSES AND LEGISLATIVE RECOMMENDATIONS



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**REPORT TO CONGRESS:
BIPARTISAN CAMPAIGN REFORM ACT OF 2002**

I. Overview

This report is submitted pursuant to section 314 of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155 (the “Act”). Section 314 required the United States Sentencing Commission (the “Commission”) to promulgate a guideline “for penalties for violations of the Federal Election Campaign Act of 1971.” The Commission, acting under emergency authority conferred by the Act, promulgated an amendment, effective January 25, 2003, which created an temporary guideline for campaign finance offenses. That guideline was repromulgated without change as a permanent amendment in March 2003 and, subject to congressional review, will become effective on November 1, 2003. The new guideline created by the Commission was crafted to carefully calibrate sentences in accord with factors identified in the directive.

The Act also directed the Commission to “submit to Congress an explanation of any guidelines promulgated . . . and any legislative or administrative recommendations regarding enforcement of the Federal Election Campaign Act of 1971 and related election laws.”

In developing its response to the Act, the Commission analyzed sentencing data, reviewed relevant case law and legislative history, met with representatives of the Public Integrity Division of the Department of Justice and of the Federal Election Commission, and solicited comment from the Department of Justice, defense bar, federal probation officers, and other interested parties. The Commission specifically considered the five factors identified by Congress in the directive, set forth in its entirety below, in determining both the type and severity of sentencing enhancements included in the newly created guideline.

II. The Directive

The Act provides specific instructions to the Commission in section 314, which states:

“(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.”

III. The Amendment

This amendment to the federal sentencing guidelines implements the directive from Congress contained in the Act. The Act significantly increased statutory penalties for campaign finance crimes, formerly misdemeanors under the Federal Election Campaign Act of 1971 (FECA). The new statutory maximum term of imprisonment for even the least serious of these offenses is now two years, and for more serious offenses, the maximum term of imprisonment is five years.

To effectively punish these offenses, the Commission chose to create 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 Commission opted against simply amending an existing guideline because it determined after review that the characteristics of election-violation cases did not bear sufficient similarity to cases sentenced under any existing guideline. 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 (2 U.S.C. § 441a); contributions by foreign nationals (2 U.S.C. § 441e); restrictions on "electioneering communications" (as defined in 2 U.S.C. § 434(f)(3)(C)); certain fraudulent misrepresentations (2 U.S.C. § 441h); and "conduit contributions" (2 U.S.C. § 441f).

The new guideline (see attachment) has a base offense level of level 8, which reflects the fact that these offenses, while they are somewhat similar to fraud offenses, sentenced under §2B1.1 (Theft, Property Destruction, and Fraud) at a base offense level of level 6, nevertheless are generally more serious due to the additional harm, or the potential harm, of corrupting the election process.

The new guideline provides five specific offense characteristics to ensure appropriate penalty enhancements for aggravating conduct that may occur during the commission of certain campaign finance offenses. First, the new guideline provides a specific offense characteristic, at §2C1.8(b)(1), that uses the fraud loss table in §2B1.1 to incrementally increase the offense level in proportion to the monetary amounts involved in the illegal transactions. This both assures proportionality with penalties for fraud offenses and responds to Congress' directive to provide an enhancement for "a large aggregate amount of illegal contributions."

Second, the new guideline provides alternative enhancements, at §2C1.8(b)(2), if the offense involved a foreign national (two levels—an approximate 25% increase in sentence length) or a foreign government (four levels—an approximate 50% increase in sentence length). These enhancements respond to another specific directive in the Act and reflect the seriousness of foreign entities attempting to tamper with our nation's election processes.

Third, the new guideline provides alternative enhancements of two levels each, at §2C1.8(b)(3), when the offense involves either "governmental funds," defined broadly to include federal, state, or local funds, or an intent to derive "a specific, identifiable non-monetary Federal benefit" (e.g., a presidential pardon). Each of these enhancements also responds to specific directives of the Act.

Fourth, the new guideline provides a two level enhancement, at subsection (b)(4), when the offender engages in "30 or more illegal transactions." After a review of all campaign finance cases in the Commission's datafile, the Commission chose 30 transactions as the number best illustrative of a "large number" in that context. This enhancement also responds to a specific directive in the Act to the effect that the Commission should provide enhanced sentencing for cases involving "a large number of illegal transactions."

Fifth, the new 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." This enhancement responds to information, received from the Federal Election Commission and the Public Integrity Section of the Department of Justice, that characterizes offenses of this type as some of the most aggravated offenses committed under the FECA.

The new guideline also provides a cross reference, at subsection (c), which directs the sentencing 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.

Section 3D1.2 (Groups of Closely Related Counts) has been amended, consistent with the principles underlying the rules for grouping multiple counts of conviction, to include §2C1.8 offenses among those in which the offense level is determined largely on the basis of the total amount of harm or loss or some other measure of aggregate harm. (See §3D1.2(d)).

Finally, §5E1.2 (Fines for Individual Defendants) has been amended to specifically reflect fine provisions unique to the FECA. This part of the amendment also provides that the defendant's participation in a conciliation agreement with the Federal Election Commission may be an appropriate factor for use in determining the specific fine within the applicable fine guideline range, unless the defendant began negotiations with the Federal Election Commission only after the defendant became aware that he or it was the subject of a criminal investigation.

IV. Legislative Recommendations for Increased Statutory Penalties

The Commission has a continuing responsibility to recommend the modification of statutory penalties "of those offenses for which such an adjustment appears appropriate." See 28 U.S.C. § 994(r). The Commission has made such recommendations from time to time when it seemed advisable. The Act specifically directed the Commission to make such recommendations in this context. Pursuant to 28 U.S.C. § 994(r) and the congressional directive, the Commission identified several issues that it believes warrant further congressional attention. After receiving input from various sources, pursuant to solicitations for public comment in November 2002 and January 2003, the Commission believes that the current penalty distinction between two year offenses (for those offenses which involve more than \$10,000) and five year offenses (for those offenses which involve \$25,000 or more), as prescribed by 2 U.S.C. § 437g(d), overemphasizes the differences in culpability between these groups of offenders.

Given the serious nature of all FECA offenses, as recognized by Congress in its directives to the Commission, the Commission believes that all FECA offenses that involve more than \$10,000 should be subject to the five year statutory maximum. Indeed, several of the aggravating factors (the involvement of a foreign source, the use of governmental funds, and an intent to achieve a benefit from the Federal Government) identified by Congress in its directive to the Commission may be present in FECA offenses involving less than \$25,000. Thus, in order to permit aggravating factors identified by Congress and included by the Commission in the new guideline to operate more fully, the Commission recommends a five year statutory maximum for all FECA offenses involving more than \$10,000. This result would better equip sentencing courts to calibrate penalties commensurate with the seriousness of the offense—a fundamental objective of the federal sentencing guidelines.

The Commission also believes two types of violations punishable under criminal provisions of the FECA, even as augmented by the Act, will not receive sentences commensurate with their seriousness under the new guideline because their statutory maximum penalties constrain the operation of the guideline. The first type of offenses for which the Commission recommends an increased statutory maximum sentence are those committed under section 316(b)(3) of the Federal Election Campaign Act of 1971. Section 316(b)(3) states:

(3) It shall be unlawful—

(A) for such a fund [national banks, corporations, or labor organizations] to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or

financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such a fund at the time of such a solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

The Commission believes that violations of section 316(b)(3), which currently must be sentenced as misdemeanors unless \$25,000 or more in illicit solicitations are involved, should constitute felonies. These crimes involve threat and intimidation as well as the unwilling involvement of numerous coparticipants. Although these aggravating factors constitute sentencing enhancements in the new guideline, the low statutory maximum prescribed for this serious criminal conduct essentially precludes operation of these enhancements. For these reasons, the Commission recommends that Congress amend the penalty provisions which govern section 316(b)(3) offenses to provide a potential statutory maximum term of imprisonment of five years, irrespective of the amount of money involved in such offenses.

The second area in which the Commission believes the available statutory maximum punishment constrains imposition of appropriate sentences is for violations under section 322(a)(1) of the Federal Election Campaign Act of 1971. Section 322(a)(1) states:

(a) In General. No 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 . . .

The typical §322(a)(1) violation is a situation in which one candidate, or someone under his or her control, generates a campaign communication which purports to be from his or her opponent and which attributes to that opponent a view not held by that opponent. Such communications are especially malicious in that they are designed to confuse the electorate to the opponent's detriment. Staff at the Federal Election Commission have informed the Commission that such offenses, even when less than \$25,000 is expended, can have great impact on the outcome of an election. This is particularly true in congressional elections or, to a lesser extent, senatorial elections in less populous states. Accordingly, the Commission recommends that Congress increase the statutory maximum sentence applicable to §322(a)(1) offenses to five years' imprisonment, irrespective of the amount of money involved.

Finally, in the interest of proportionate sentencing, the Commission recommends that Congress act to harmonize the current system whereby "conduit" offenses under section 320 of

the FECA are subject to more onerous fines than those provided for all other FECA offenses. The Commission respectfully suggests that fines for all FECA offenses be calculated with respect to the formula currently prescribed for “conduit” offenses in order to more effectively deter these serious offenses.

V. Conclusion

The Commission believes that federal sentencing policies should be established with a goal of controlling campaign finance crimes. The amendment promulgated by the Commission reflects the seriousness of these offenses that strike at the heart of the election process. The Commission hopes that the increased statutory maximum sentences provided by Congress, as complemented by the significant penalties indicated by the new guideline, will work to deter such offenses.

The Commission believes that operation of the new guideline will be enhanced by the additional recommendations for statutory changes the Commission has made. The Commission stands ready to provide any additional information or assistance Congress may need with regard to any of the matters encompassed in this report.

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

Historical Note: Effective November 1, 1987. Amended effective January 25, 2003 (see Appendix C, amendment 648). Introductory Commentary to Part C, effective November 1, 1987, was deleted effective January 25, 2003 (see Appendix C, amendment 648).

§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 non-monetary 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.

Historical Note: Effective January 25, 2003 (*see* Appendix C, amendment 648).