1. Corporate Fraud

Synopsis of Proposed Amendment: *This proposed amendment implements the Sarbanes-Oxley Act of 2002, Pub. L. 107–204 (the "Act"). The Act requires the Commission to promulgate guideline amendments under emergency amendment authority not later than January 25, 2003. In addition to several general directives regarding fraud and obstruction of justice offenses, the Act also sets forth specific directives that require the Commission to promulgate amendments addressing, among other things, officers and directors of publicly traded companies who commit fraud and related offenses, offenses that endanger the solvency or financial security of a substantial number of victims, fraud offenses that involve significantly greater than 50 victims, and obstruction of justice offenses that involve the destruction of evidence.*

First, the proposed amendment sets forth two options for amending §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) to address the directive contained in section 1104 of the Act pertaining to fraud offenses involving significantly greater than 50 victims. Option One expands the victims table in §2B1.1(b)(2). Currently, subsection (b)(2) provides a two level enhancement if the offense involved more than 10, but less than 50, victims or was committed through mass-marketing, or a four level enhancement if the offense involved 50 or more victims. Option One provides an additional two levels, for a total of six levels, if the offense involved 250 victims or more. Alternatively, Option Two provides an encouraged upward departure provision if the offense involved substantially more than 50 victims.

Second, the proposed amendment modifies subsection §2B1.1(b)(12)(B) to address directives contained in sections 805 and 1104 of the Act pertaining to securities and accounting fraud offenses and fraud offenses that endanger the solvency or financial security of a substantial number of victims. Subsection (b)(12)(B) currently provides a four level enhancement and a minimum offense level of 24 if the offense substantially jeopardized the safety and soundness of a financial institution. The proposed amendment expands the scope of this enhancement to apply to offenses that substantially endanger the solvency or financial security of a publicly traded company. The enhancement does not require the court to determine whether the offense endangered the solvency or financial security of each individual victim. Such a determination likely would unduly complicate the sentencing process. Instead the enhancement is based on a presumption that if the offense conduct endangered the solvency or financial security of a publicly traded company, the offense similarly affected a substantial number of individual victims. The proposed amendment also contains options for extending the scope of the enhancement to include other organizations with a substantial number of employees. This extension might be appropriate because offenses that endanger other large organizations may, like offenses that endanger publicly traded companies, affect the solvency or

financial security of a substantial number of victims.

The corresponding application note to the new enhancement sets forth situations in which an offense shall be considered to have endangered the solvency or financial security of a publicly traded company. The note, which is modeled after an analogous note for the financial institutions prong of the enhancement, includes references to insolvency, filing for bankruptcy, substantially reducing the value of the company's stock, and substantially reducing the company's workforce among the list of situations that would trigger application of the new enhancement.

An issue for comment follows the proposed amendment regarding whether the list of situations should be a non-exhaustive list that the court may consider in determining whether to apply the enhancement.

Third, the proposed amendment addresses the directive contained in section 1104 of the Act pertaining to fraud offenses committed by officers or directors of publicly traded corporations by providing a new two level enhancement at §2B1.1(b)(13). This enhancement would apply if the offense involved a violation of any provision of securities law and, at the time of the offense, the defendant was an officer or director of a publicly traded company. This enhancement would apply regardless of whether the defendant was convicted under a specific securities fraud statute (e.g., 18 U.S.C. § 1348, a new offense created by the Act specifically prohibiting securities fraud) or under a general fraud statute (e.g., 18 U.S.C. § 1341, prohibiting wire fraud), provided that the offense involved a violation of securities law. The corresponding application note provides that in cases in which the new enhancement applies, the current enhancement for abuse of position of trust at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply. Although the directive only specifically addresses officers and directors of publicly traded companies, the proposed amendment provides an option to include registered brokers or dealers because they also are subject to certain requirements under securities law and as such may be considered to hold a heightened position of trust to investors.

Pursuant to the corresponding application note, "securities law" (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in section 3(a)(47).

The proposed amendment also includes an issue for comment regarding whether, in addition to the two level enhancement, a minimum offense level should be provided for such offenses committed by officers and directors of publicly traded companies. The issue for comment also requests comment regarding whether the scope of the enhancement should be broadened to apply to an officer or director of other large organizations.

Additional issues for comment are included regarding whether other enhancements, possibly to apply cumulatively, should be added to §2B1.1 in response to the Act, as well as whether further guidance should be provided regarding the calculation of loss in complex white collar offenses.

Fourth, the proposed amendment provides an option for expanding the loss table at §2B1.1(b)(1). Currently, the loss table provides sentencing enhancements in two level increments up to a maximum of 26 levels for offenses in which the loss exceeded $100,000,000. The proposed amendment provides two additional levels 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. This proposed addition to the loss table would address congressional concern expressed in the Act regarding particularly extensive and serious fraud offenses and would more fully effectuate increases in statutory maximum penalties, for example, the increase in the statutory maximum penalties for wire fraud and mail fraud offenses from five to 20 years (section 903 of the Act). An issue for comment follows the proposed amendment regarding whether more extensive modifications to the loss table should be made in response to the Act, particularly for offenses involving significantly lower loss amounts.

Fifth, the proposed amendment implements the directives pertaining to obstruction of justice offenses contained in sections 805 and 1104 of the Act. The proposed amendment adds a new two level enhancement to §2J1.2 (Obstruction of Justice) that applies if the offense (i) involved the destruction, alteration, or fabrication of a substantial amount of evidence; (ii) involved the selection of especially probative or essential evidence to destroy or alter; or (iii) was otherwise extensive in scope, planning, or preparation. An issue for comment follows the proposed amendment regarding whether the base offense level in §2J1.2 should be increased and whether an enhancement for the use of sophisticated means should be included in §2J1.2. There is an additional issue for comment regarding whether modifications also should be made to the guideline covering perjury offenses, §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness) in light of the proposed amendment to the obstruction of justice guideline, in order to maintain sentencing proportionality between the two types of offenses.

Finally, the proposed amendment addresses new offenses created by the Act. Section 1520 of title 18, United States Code, 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). This offense provides a statutory maximum of 10 years' imprisonment if the defendant certifies the publicly traded company's periodic financial report knowing that the statement does not comply with all requirements of the Securities and Exchange Commission (and 20 years' imprisonment if that certification is done willfully). The proposed amendment also expands the current 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 proposed change to the cross reference provision would require the court to apply §2B1.1 instead of §2E5.3. Other new offenses are proposed to be included in Appendix A (Statutory Index) as well as the statutory provisions of the relevant guidelines.

Proposed Amendment:

§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**

* * *

(b) Specific Offense Characteristics

(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss (Apply the Greatest)		Increase in Level
(A)	$5,000 or less	no increase
(B)	More than $5,000	add **2**
(C)	More than $10,000	add **4**
(D)	More than $30,000	add **6**
(E)	More than $70,000	add **8**
(F)	More than $120,000	add **10**
(G)	More than $200,000	add **12**
(H)	More than $400,000	add **14**
(I)	More than $1,000,000	add **16**
(J)	More than $2,500,000	add **18**
(K)	More than $7,000,000	add **20**
(L)	More than $20,000,000	add **22**
(M)	More than $50,000,000	add **24**
(N)	More than $100,000,000	add **26**~~.~~
(O)	More than $200,000,000	add **28**
(P)	More than $400,000,000	add **30**.

Option 1 for Substantial Number of Victims:

~~(2) (Apply the greater) If the offense—~~

~~(A) (i) involved more than 10, but less than 50, victims; or (ii) was committed through mass-marketing, increase by **2** levels; or~~

~~(B) involved 50 or more victims, increase by **4** levels~~.

(2) (Apply the greatest) If the offense—

(A) (i) involved more than 10, but less than 50, victims; or (ii) was committed through mass-marketing, increase by **2** levels;

(B) involved at least 50, but less than 250, victims, increase by **4** levels; or

(C) involved 250 or more victims, increase by **6** levels.

* * *

(12) (Apply the greater) If—

~~(B) the offense substantially jeopardized the safety and soundness of a financial institution, increase by **4** levels.~~

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; or (ii) substantially endangered the solvency or financial security of an organization that, at the time of the offense [(I)] was a publicly traded company[; or (II) had [200][1,000][5,000] or more employees], increase by **4** levels.

* * *

(13) If the offense involved a violation of securities law and, at the time of the offense, the defendant was [(i)] an officer or a director of a publicly traded company[; or (ii) a registered broker or dealer], increase by **2** levels.

* * *

Commentary

Statutory Provisions: *7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1341-1344, 1348, 1350, 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992, 1993(a)(1), (a)(4), 2113(b), 2312-2317, 2332b(a)(1); 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).*

* * *

Application Notes:

1. Definitions.—For purposes of this guideline:

* * *

"National cemetery" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

"Publicly traded company" means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). "Issuer" has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).

~~*10. Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under Subsection (b)(12)(B).—For purposes of subsection (b)(12)(B), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit, payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of any of subdivisions (A) through (D) of this note.*~~

10. Application of Subsection (b)(12)(B).—

(A) Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under Subsection (b)(12)(B)(i).—For purposes of subsection (b)(12)(B)(i), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution, if, as a consequence of the offense, the institution (i) became insolvent; (ii) substantially reduced benefits to pensioners or insureds; (iii) was unable on demand to refund fully any deposit, payment, or investment; (iv) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (v) was placed in substantial jeopardy of any of subdivisions (i) through (iv) of this note.

(B) Enhancement for Endangering the Solvency or Financial Security of a Publicly Held Company [or An Organization with more than [200][1000][5000] Employees] under Subsection (b)(12)(B)(ii).—

(i) Definitions.—For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).

(ii) Application.—An offense shall be considered to have substantially endangered the solvency or financial security of an organization that was a publicly traded company[or that had more than [200][1000][5000] employees] if, as a consequence of the offense, the organization (I) became insolvent; (II) filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11 of the United States Code); (III) suffered a substantial reduction in the value of [its equity securities][a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l)] or the value of its employee retirement accounts; (IV) substantially reduced its workforce; (V) substantially reduced its employee pension benefits; (VI) was so depleted of its assets as to be forced to merge with another company in order to continue active operations; or (VII) was placed in substantial endangerment of any of subdivisions (I) through (VI) of this note. ["Equity securities" has the meaning given that term in section 3 of Securities Exchange Act of 1934 (15 U.S.C. § 78c).]

11. Application of Subsection (b)(13).—

(A) Definitions.—For purposes of this subsection:

"Registered broker or dealer" has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).

"Securities law" (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in section 3(a)(47).

(B) In General.—A conviction under securities law is not required in order for subsection (b)(13) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated securities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.

(C) Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If subsection (b)(13) applies, do not apply §3B1.3.

[Notes 11 through 15 are redesignated as Notes 12 through 16, respectively.]

[~~15~~16. Departure Considerations.— * * *

~~*(v) The offense endangered the solvency or financial security of one or more victims.*~~

Option 2 for Substantial Number of Victims:

[~~15~~16. Departure Considerations.— * * *

(v) The offense involved substantially more than 50 victims.]

§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

(a) Base Offense Level (Apply the greater):

* * *

~~(2) If the offense was committed to facilitate or conceal a theft or embezzlement, or an offense involving a bribe or a gratuity, apply §2B1.1 or §2E5.1, as applicable.~~

(2) If the offense was committed to facilitate or conceal (A) an offense involving theft, fraud, or embezzlement; (B) an offense involving a bribe or a gratuity; or (C) an obstruction of justice offense, apply §2B1.1 (Theft, Fraud and Property Destruction), §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations), or §2J1.2 (Perjury or Subornation of Perjury; Bribery of a Witness), as appropriate.

* * *

Statutory Provisions: 18 U.S.C. §§ 1027, 1520; 29 U.S.C. §§ 439, 461, 1131. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2J1.2. Obstruction of Justice

* * *

(b) Specific Offense Characteristics

* * *

(3) If the offense (A) involved the destruction, alteration, or fabrication of a substantial amount of evidence; (B) involved the selection of especially probative or essential evidence to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation, increase by [**2**] levels.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1503, 1505-1513, 1516, 1519. For additional statutory provision(s), see Appendix A (Statutory Index).

APPENDIX A - STATUTORY INDEX

18 U.S.C. § 1347	2B1.1
18 U.S.C. § 1348	2B1.1
18 U.S.C. § 1349	2X1.1
18 U.S.C. § 1350	2B1.1

* * *

18 U.S.C. § 1512(c)	2J1.2
18 U.S.C. § 1512~~(c)~~(d)	2J1.2
18 U.S.C. § 1518	2J1.2
18 U.S.C. § 1519	2J1.2
18 U.S.C. § 1520	2E5.3

* * *

Issues for Comment*:*

1. *The Sarbanes-Oxley Act of 2002 requires the Commission to consider providing an enhancement for officers or directors of publicly traded companies who commit fraud and related offenses. The Act also requires the Commission to ensure that the enhancements relating to obstruction of justice are adequate in cases in which the offense involved an abuse of position of trust or use of a special skill. In response to these directives, the proposed amendment provides an enhancement in §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) specifically targeting officers and directors who violate securities law, including violations of the rules and regulations issues by the Securities and Exchange Commission. The Commission requests comment regarding whether it also should provide a minimum offense level for this proposed enhancement, and if so, what an appropriate offense level would be. Additionally, should this proposed enhancement apply to cases in which an officer or*

director of a large, non-public organization violates any provision of security law? Such a case may cause similar harm to the organization, its shareholders, and employees even though the organization is not a publicly traded company and the offense typically would not undermine public confidence in the securities market. The Commission further requests comment regarding whether, as an alternative to the proposed enhancement, it should provide a series of enhancements, possibly to apply cumulatively, to address separate aspects of these directives. Specifically, should the Commission provide enhancements in §2B1.1 that would apply if (A) the defendant used his or her position as officer or director of a publicly traded company in furtherance of a fraud or some other corporate crime; (B) the officer or director of a publicly traded company worked to defeat or compromise internal corporate controls, independent audits, or the oversight by a corporate governing board; or (C) an officer or director derived more than $1,000,000 in personal gain from unlawful activity? If so, should the Commission also provide minimum offense levels for any such enhancements? What would be an appropriate minimum offense level for such enhancements?

2. *The proposed amendment expands the scope of §2B1.1(b)(12)(B) to apply to offenses that substantially endanger the solvency or financial security of a publicly traded company. This proposed enhancement is in response to directives pertaining to securities and accounting fraud offenses and fraud offenses that endanger the solvency or financial security of a substantial number of victims. The proposed corresponding application note sets forth instances of when an offense shall be considered to have endangered the solvency or financial security of a publicly traded company. The note includes references to insolvency, filing for bankruptcy, substantially reducing the value of the company's stock, and substantially reducing the company's workforce, any one of which would require application of the new enhancement upon a finding of its presence. The Commission requests comment regarding whether the note alternatively should provide that the references are a non-exhaustive list that the court may consider in determining whether to apply §2B1.1(b)(12)(B). The Commission also requests comment regarding whether additional factors should be included in the list of instances that could trigger application of the enhancement.*

3. *The Commission requests comment regarding whether the loss definition in §2B1.1 should be amended to provide further guidance as to how to calculate loss in complex white collar crime cases. For example, should loss in such cases be based on a change in the market capitalization of a corporation, a change in the value of corporate assets, or some other economic effect?*

4. *The current loss table in §2B1.1 provides sentencing enhancements in two level increments up to a maximum of 26 levels for offenses in which the loss exceeded $100,000,000. The proposed amendment provides two additional increases to the table: an enhancement of 28 levels for offenses in which the loss exceeded $200,000,000, and an enhancement of 30 levels for offenses in which the loss exceeded $400,000,000. This proposed addition to the loss table would address congressional concern expressed in sections 805, 905, and 1104 of the Sarbanes-Oxley Act regarding particularly extensive and serious fraud offenses and would more fully effectuate increases in statutory maximum penalties, for example, the*

increase in the statutory maximum penalties for wire fraud and mail fraud offenses from five to 20 years (section 903 of the Act). Should the Commission modify the loss table more extensively to provide increased offenses levels at lower loss amounts? Commission data indicate that approximately one-third of fraud offenses involve loss amounts less than $20,000, approximately one-third involve loss amounts between $20,000 and $120,000, and approximately one-third involve loss amounts greater than $120,000. For instance, should the Commission modify the loss table to result in a Zone D offense level (assuming a two level reduction for acceptance of responsibility) for offenses involving more than $50,000? Similarly, should the Commission modify the loss table to restrict Zone A offense levels (which provide sentences of straight probation) to offenses involving loss amounts of $10,000 or less (assuming a two level reduction for acceptance of responsibility)? If any changes are made to the loss table in §2B1.1, should the Commission also make similar changes to the tax loss table in §2T4.1 (Tax Table) in order to maintain the long standing relationship between the two loss tables? In addition, the Commission requests comment regarding whether the base offense level in §2B1.1 should be increased from level 6.

5. *In response to the directives in the Sarbanes-Oxley Act pertaining to obstruction of justice offenses, the proposed amendment sets forth a new two level enhancement in §2J1.2 (Obstruction of Justice) that applies if the offense (A) involved the destruction, alteration, or fabrication of a substantial amount of evidence; (B) involved the selection of especially probative or essential evidence to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation. The Commission requests comment regarding whether, in addition to this enhancement, it should provide an enhancement that is based on the number of participants recruited to commit the obstruction of justice offense. Additionally, should the Commission provide an enhancement for obstruction of justice offenses committed through the use of sophisticated means, perhaps in lieu of the proposed subdivision (C) prong, and if so, what characteristics would be common to such an offense? Finally, given congressional concern with obstruction of justice offenses, should the Commission increase the base offense level in §2J1.2 from level 12 to level 14?*

6. *Part Three of the proposed amendment addresses the emergency amendment directives in the Sarbanes-Oxley Act pertaining to the Chapter Two guidelines for obstruction of justice offenses. Specifically, the proposed amendment would provide a new enhancement in §2J1.2 addressing the directive relating to the destruction of evidence and offenses that are otherwise extensive in scope, planning, or preparation. Currently, defendants sentenced under §2J1.2 or §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness) are sentenced proportionately because these guidelines have the same base offense level and provide substantially parallel enhancements. The Commission requests comment regarding whether, in light of the proposed changes to §2J1.2, modifications also should be made to §2J1.3 in order to maintain proportionate sentencing between these two guidelines. For example, should the Commission increase the base offense level in §2J1.3 or increase the magnitude of the enhancement of the current specific offense characteristics? Any such amendment to §2J1.3 would be made when the Commission re-promulgates as a permanent amendment any emergency amendment made to §2J1.2.*

2. 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, which 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.".*

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 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 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.

(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, any 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. (<u>See</u> 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 (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 could 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 governmental 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 level. 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 subsection (d) of §3D1.2 (Groups of Closely Related Counts). 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.*~~

* * *

§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:

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

(6) 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.

§3D1.2. Groups of Closely Related Counts

* * *

§§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

* * *

Commentary

Application Notes:

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4. * * *

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.

APPENDIX A - STATUTORY INDEX

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2 U.S.C. § 437g(d)(1)	2C1.8		
2 U.S.C. § 439a	2C1.8		
2 U.S.C. § 441a	2C1.8		
2 U.S.C. § 441a-1	2C1.8		
2 U.S.C. § 441b	2C1.8		
2 U.S.C. § 441c	2C1.8		
2 U.S.C. § 441d	2C1.8		
2 U.S.C. § 441e	2C1.8		
2 U.S.C. § 441f		2C1.8	
2 U.S.C. § 441g	2C1.8		
2 U.S.C. § 441h(a)	2C1.8		
2 U.S.C. § 441i		2C1.8	
2 U.S.C. § 441k	2C1.8		
7 U.S.C. § 6	2B1.1		

* * *

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

* * *

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.