

this consideration, the proposed amendment provides a specific offense characteristic, at subsection (b)(1), that uses the fraud loss table in § 2B1.1 to incrementally increase the offense level according to the dollar amount of the illegal transactions. This approach would foster proportionality with related guidelines, notably the fraud guideline and the public corruption guidelines (which also reference the fraud loss table) and would provide incremental, rather than a flat, punishment according to the dollar amount involved in the offense.

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

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

Third, the proposed amendment provides an alternative pronged enhancement at subsection (b)(3) if (1) the offense involved a donation, contribution, or expenditure, disbursement, or receipt of government funds, or (2) the defendant committed the offense for the purpose of achieving a specific, identifiable nonmonetary Federal benefit. The proposed amendment defines “governmental funds” to mean any Federal, State, or local funds. It is anticipated that this enhancement will apply in situations such as using governmental funds awarded in a contract to make a donation or contribution. The FECA itself addresses this type of situation but in very few places. For example, section 317 of the FECA, 2 U.S.C. 441c, prohibits any person who enters into a contract with the United States for the rendition of services, the provision of materials, supplies, or equipment, or the selling of any land or property to the United States, if the payment from the United States is to be made in whole or in part from funds appropriated from Congress and before completion of or negotiation for the contract, to make or solicit a contribution of money or anything of value to a political party,

committee, or candidate for public office or to any person for a political purpose. (This provision does not prohibit, however, the establishment of a segregated account to be used for political purposes.) The concern behind this provision of the FECA, therefore, is to prevent the use of federal funds for political purposes. The same concern pertains to State and local funds as well. It is also anticipated that this enhancement will apply in situations in which a State or local elected official uses State or local resources to finance his or her campaign for Federal office.

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

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

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

Sixth, the proposed amendment provides a cross reference in the new guideline to either the bribery guideline or the gratuity guideline, if the offense involved such conduct and the resulting offense level is greater than that determined under the new guideline.

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

The proposed amendment also includes counts under this proposed guideline under the grouping provision

under § 3D1.2(d). Finally, the Statutory Index is amended to incorporate these offenses.

Proposed Amendment

Chapter Two, Part C is amended in the heading by adding at the end “AND VIOLATIONS OF FEDERAL ELECTION CAMPAIGN LAWS”.

Chapter Two, Part C is amended by striking the introductory commentary in its entirety.

Chapter Two, Part C is amended by adding at the end the following new guideline and accompanying commentary:

“§ 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.