

“Loss” and “Public Official” Enhancements

Under the current structure of § 2C1.1, an enhancement exists that provides for the application of the greater of either (A) the number of offense levels from the fraud/theft loss table corresponding to the value of the payment, the benefit received or to be received in return for the payment, and the loss to the government from the offense, whichever is greatest; and (B) 8 levels if the offense involved a payment to influence an elected official or an official holding a high-level decision-making or sensitive position. Similar enhancements exist in §§ 2C1.2 and 2C1.7. The proposed amendment makes two major changes to this enhancement in both proposed consolidated guidelines. First, it makes the enhancement cumulative so that the court would apply the appropriate number of levels from the loss table and also the revised public official enhancements, if applicable. Second, the proposed amendment proposes two new enhancements that focus on public officials. The first new enhancement modifies the current “high-level or sensitive position” enhancement. This enhancement provides [two] [four] levels, and in §§ 2C1.1 and 2C1.2, a minimum offense level of 18 and 15, respectively, if the offense involved an unlawful payment for the purpose of influencing an official act of a public official in a high position of public trust. Although the concept is the same as the current enhancement, the proposed amendment draws on case law interpreting the current enhancement and on the notion of “public trust” from § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) to give more guidance with respect to the type of case to which the enhancement applies. The proposed minimum offense level of level 18 in § 2C1.1 and of level 15 in § 2C1.2 ensures that an offense involving bribery of a higher level public official receives at least as high a sentence as it currently receives (*i.e.*, that the new construct does not result in lower sentences). This enhancement will apply regardless of whether the defendant was the giver or the recipient of the bribe.

The corresponding application note also explains that public officials in high positions of public trust are distinguished from other public officials by their direct authority to make decisions for, or on behalf of, a government department or government agency, and also by their substantial influence over the decision-making process. The note also includes jurors in the scope of the enhancement’s

application in order to be consistent with case law regarding the current enhancement and with the scope of 18 U.S.C. 201, the primary bribery and gratuity statute.

The second new enhancement pertaining to public officials provides a [two] [four]-level increase if the defendant was a public official at the time of the offense. Commission data indicate that the defendant was a public official in approximately half of all public corruption cases. This enhancement recognizes that although all bribery involving public officials corrupts the public trust in government, it is the public official who violates that public trust. Currently, application notes in §§ 2C1.1, 2C1.2, 2C1.6, and 2C1.7 instruct the court not to apply the abuse of position of trust enhancement in § 3B1.3 (Abuse of Position of Trust or Use of Special Skill), suggesting that in all cases sentenced under these guidelines, there is some element of abuse of public trust. The proposed enhancement would distinguish among cases in which there is an abuse of a position of public trust on the part of the public official.

Enhancement for Obtaining Entry into United States and for Obtaining Certain Documents

The proposed amendment also provides a new [two] [four]-level enhancement if the offense involved an unlawful payment (A) to a United States Customs Border Protection Inspector to permit a person, a vehicle, or cargo to enter the United States; (B) to obtain a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) to obtain a government issued identification document. The definition of “government issued identification document” is derived from the definition of “identification document” in 18 U.S.C. 1028(d)(3). This enhancement addresses cases in which a small payment may be given to obtain such a document, but the harm that results from an individual obtaining an identification or immigration document cannot be quantified by use of the loss table. It also addresses cases, as identified by the Commission, in which a third party steers an individual to the public official in order for that individual to obtain, through bribery or a gratuity, such a document. The enhancement also recognizes the increased risk of domestic terrorism from foreign nationals who illegally enter or remain in the United States through the use of illegally obtained identification documents. Similarly, the enhancement addresses concerns

identified by the Department of Homeland Security regarding bribery of customs inspectors who have the discretion to permit individuals, vehicles, and cargo into the United States without inspection.

Miscellaneous Amendments

The proposed amendment provides a definition of “public official” that builds on the current definition provided in § 2C1.7. It modifies this definition by explicitly incorporating the notion that public officials hold positions of public trust. This definition is derived from relevant case law and statutory provisions, as well as § 3B1.3 (Abuse of Position of Trust or Use of Special Skill). One difference to note regarding the definition of “public official” in §§ 2C1.1 and 2C1.2 is that the definition in § 2C1.2 includes former public officials in order to be consistent with the scope of the primary gratuity statute, 18 U.S.C. 201(c)(1).

The proposed amendment also (A) clarifies that an unlawful payment may be anything of value, not necessarily a monetary payment; (B) adds to § 2C1.1 an application note currently found in § 2C1.2 regarding consideration of whether the public official was the instigator of the offense as an appropriate factor to determine the placement of the sentence within the applicable sentencing guideline range; and (C) updates Appendix A (Statutory Index) by deleting references to § 2C1.4, which was consolidated with § 2C1.3 (Conflict of Interest; Payment or Receipt of Unauthorized Compensation), effective November 1, 2001.

Several issues for comment follow the proposed amendment.

Proposed Amendment:

The Commentary to § 2B1.1 captioned “Application Notes” is amended in Note 14 by adding at the end the following:

“For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials).”.

Section 2C1.1 is amended in the heading by adding at the end “; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials”.

Section 2C1.1(a) is amended by striking “10” and inserting “[12]”.