

## PROPOSED AMENDMENT: UNAUTHORIZED COMPENSATION

**Synopsis of Amendment:** *This proposed amendment addresses the issue of whether, and to what extent, the guideline offense levels should be increased in §2C1.4, the guideline for offenses under 18 U.S.C. § 209 involving the unlawful supplementation of the salary of various federal employees. The proposed amendment (1) adds a cross reference to the bribery and gratuity guidelines, in order to account for aggravating conduct; and (2) consolidates the unauthorized guideline with the conflict of interest guideline and the guideline covering payments to obtain public office, to promote ease of application.*

*The Commission began to focus on this issue in 1998 when it promulgated an amendment to §2C1.4 to delete outdated, erroneous background commentary that had come to the Commission's attention. That commentary, first written in 1987, described the offenses covered by the guideline as misdemeanors punishable by imprisonment for not more than one year. In fact, however, the penalties for 18 U.S.C. § 209 offenses were changed in 1989. The applicable penalties, under 18 U.S.C. § 216, became (1) imprisonment for not more than one year, or (2) imprisonment for not more than five years, if the defendant willfully engaged in the conduct constituting the offense.*

*The increased statutory penalties under 18 U.S.C. § 216 implicate the question whether guideline penalties under §§2C1.3 and 2C1.4 should be increased correspondingly, particularly if the current guideline penalty structure inadequately takes into account aggravating conduct associated with these offense.*

*The guideline covering offenses under 18 U.S.C. § 209, §2C1.4, has a base offense level of level 6 and no additional enhancements that take into account aggravating conduct. From FY91 through FY99, a total of 73 cases have been sentenced under §2C1.4. Because of the low offense levels associated with this guideline, all of the defendants sentenced under §2C1.4 received probation.*

*Moreover, the increased statutory penalty in 18 U.S.C. § 216 (namely, the five-year statutory maximum for willful conduct) applies not only to offenses under 18 U.S.C. § 209 but also to bribery, graft, and conflict of interest offenses under 18 U.S.C. §§ 203, 204, 205, 207, and 208, all of which are covered by the conflict of interest guideline, §2C1.3. That guideline has a base offense level of level 6 and a four-level enhancement if the offense involved actual or planned harm to the government. From FY91 through FY99, a total of 71 cases have been sentenced under §2C1.3, and only 10 of those cases received the enhancement for actual or planned harm to the government.*

*Commission staff review of the cases sentenced under §§2C1.3 and 2C1.4 revealed that many involved a conflict of interest, or the payment of unauthorized compensation, that actually involved a bribe or a gratuity. In other words, many of these defendants likely could have been charged under a bribery or gratuity statute (most likely 18 U.S.C. § 201) and sentenced under the more serious bribery (§2C1.1) or gratuity (§2C1.2) guideline<sup>1</sup>. The defendants most likely were*

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<sup>1</sup>The bribery guideline, §2C1.1, has a base offense level of level 10. It also has a two-level enhancement for multiple bribes, and an enhancement based on the greater of the value of the bribe (which is referenced to the fraud loss table), and an eight-level enhancement for bribing an official in a high-level position. It also contains three cross references (if the offense level is greater) to: (1) the guideline covering an offense the commission of which was facilitated by the bribe; (2) the accessory after the fact guideline or obstruction guideline, if the offense was committed to conceal or obstruct justice with respect to another

convicted under the less serious statutes and sentenced under the less onerous guidelines (*i.e.*, §§2C1.3 and 2C1.4) as a result of plea bargaining.

The following proposed amendment is intended to address these issues by (1) adding a cross reference to the bribery and gratuity guidelines, in order to account for aggravating conduct; and (2) consolidating the unauthorized guideline with the conflict of interest guideline and the guideline covering payments to obtain public office, to promote ease of application. First, in order to more adequately account for aggravating conduct prevalent in these cases (*i.e.*, the presence of a bribe or a gratuity), the proposed amendment provides a cross reference to §2C1.1 (in the case of a bribe) or §2C1.2 (in the case of a gratuity), which will apply on the basis of the underlying conduct; *i.e.*, as a sentencing factor rather than a count of conviction factor. Because the enhancement, in the conflict of interest guideline, for actual or planned harm to the government has been applied only ten times in the last eight years, the proposed amendment deletes it as an enhancement and replaces it with an upward departure provision.

Second, in order to simplify overall guideline operation, the proposed amendment consolidates §§2C1.3 (Conflict of Interest), 2C1.4 (Payment or Receipt of Unauthorized Compensation), 2C1.5 (Payments to Obtain Public Office). Although the elements of the offenses of conflict of interest (currently covered by §2C1.3) and unauthorized compensation (currently covered by §2C1.4) differ in some ways, the gravamen of the offenses is similar - unauthorized receipt of a payment in respect to an official act. The base offense levels for both guidelines are identical. The few cases in which these guidelines were applied usually involved a conflict of interest offense that was associated with a bribe or gratuity; *i.e.*, the conflict of interest statute was used as a plea bargaining statute.

The guideline covering payments to obtain public office, §2C1.5, is also consolidated under the proposed amendment. Offenses involving payment to obtain public office generally, but not always, involve the promised use of influence to obtain public appointive office. Also, such offenses need not involve a public official (see, for example, the second paragraph of 18 U.S.C. § 211). The current offense level for all such offenses is level 8. The two statutes to which §2C1.5 applies (18 U.S.C. §§ 210 and 211) are both Class A misdemeanors. Under the proposed consolidation, the base offense level would be level 6, but the higher base offense level of §2C1.5 would be taken into account by a 2-level enhancement in subsection (b)(1) covering conduct under 18 U.S.C. § 210 and the first paragraph of 18 U.S.C. § 211. There is one circumstance in which a lower offense level may result and one circumstance in which a higher offense level may result. The offense level for conduct under the second paragraph of 18 U.S.C. § 211 (the prong of § 211 that does not pertain to the promise or use of influence) is reduced from level 8 to level 6. On the other hand, conduct that involves a bribe of a government official will result in an increased offense level (level 10 or greater, compared to level 8) under the proposed cross reference.

**Proposed Amendment:**

**§2C1.3. Conflict of Interest; Payment or Receipt of Unauthorized Compensation; Payments**

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offense; and (3) the extortion guideline, if the offense involved a threat.

The gratuity guideline, §2C1.2, has a base offense level of level 7. It also has a two-level enhancement for multiple gratuities, and an enhancement based on the greater of the value of the gratuity (which is referenced to the fraud loss table), and an eight-level enhancement for giving a gratuity to an official in a high-level position.

**to Obtain Public Office**

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristic
  - ~~(1) If the offense involved actual or planned harm to the government, increase by 4 levels.~~
  - (1) If the offense involved (A) the payment, offer, or promise of any money or thing of value in consideration for the use of, or promise to use, any influence to procure an appointive federal position for any person; or (B) the solicitation or receipt of any money or thing or value in consideration of the promise of support, or use of influence, in obtaining an appointive federal position for any person, increase by **2** 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 determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 203, 205, 207, 208, 209, 210, 211, 1909. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Abuse of Position of Trust.—Do not apply the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
2. Upward Departure Provision.—If the offense involved actual or planned harm to the government, an upward departure may be warranted.

Background: This section applies to financial and non-financial conflicts of interest by present and former federal officers and employees. The maximum term of imprisonment authorized by statute is two years.

~~§2C1.4. Payment or Receipt of Unauthorized Compensation~~

- ~~(a) Base Offense Level: **6**~~

Commentary

Statutory Provisions: 18 U.S.C. §§ 209, 1909.

Application Note:

1. Do not apply the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: Violations of 18 U.S.C. § 209 involve the unlawful supplementation of salary of various federal employees. 18 U.S.C. § 1909 prohibits bank examiners from performing any service for

~~compensation for banks or bank officials. Both offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year.~~

~~§2C1.5. **Payments to Obtain Public Office**~~

~~\_\_\_\_\_ (a) \_\_\_\_\_ Base Offense Level: **8**~~

~~\_\_\_\_\_ Commentary~~

~~Statutory Provisions: 18 U.S.C. §§ 210, 211.~~

~~Application Note:~~

~~1. \_\_\_\_\_ Do not apply the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill).~~

~~Background: Under 18 U.S.C. § 210, it is unlawful to pay, offer, or promise anything of value to a person, firm, or corporation in consideration of procuring appointive office. Under 18 U.S.C. § 211, it is unlawful to solicit or accept anything of value in consideration of a promise of the use of influence in obtaining appointive federal office. Both offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year.~~