

REVISED PROPOSED AMENDMENT: UNAUTHORIZED COMPENSATION (Proposed Amendment 1 of User Friendly, Volume One)

Synopsis of Proposed Amendment: *This revised amendment addresses the issue of whether, and to what extent, the guideline offense levels should be increased in §2C1.4, the guideline for offenses in 18 U.S.C. § 209 involving the unlawful supplementation of the salary of various federal employees. The revised amendment consolidates the unauthorized compensation guideline (§2C1.4) with the conflict of interest guideline (§2C1.3) and adds a cross reference in the consolidated guideline to the bribery and gratuity guidelines.*

The Commission began to focus on this issue in 1998 when it promulgated an amendment to §2C1.4 to delete outdated, erroneous background commentary.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 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 of 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 offenses.

The guideline covering offenses in 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 were sentenced under §2C1.4. There were no cases with convictions under 18 U.S.C. § 209 sentenced during FY99. Because of the low offense levels associated with this guideline, all of the defendants sentenced under §2C1.4 received probation. Any amendments relating to this offense will not impact the prison system.

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 compensation 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 were sentenced under §2C1.3, and only 10 of those cases received the enhancement for actual or planned harm to the government.

In order to simplify overall guideline operation, the proposed amendment consolidates §§2C1.3 (Conflict of Interest) and 2C1.4 (Payment or Receipt of Unauthorized Compensation). 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. However, the few cases in which these guidelines were applied usually involved a conflict of interest offense that was associated with a bribe or gratuity.

Commission review of the cases sentenced under §§2C1.3 and 2C1.4 revealed that many of those cases actually involved a bribe or 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, but were convicted under the less serious statute and sentenced under the less severe guidelines (i.e., §§2C1.3 and 2C1.4). The revised proposed amendment addresses this issue by adding a cross reference in the consolidated guideline to the bribery and gratuity guidelines, in order to account for the aggravating conduct prevalent in these cases.

This revised amendment differs from the proposal published in the Federal Register in a few key respects:

- (1) The revision does not consolidate §2C1.5 with the other two guidelines, as was originally proposed, for four reasons. First, §§2C1.3 and 2C1.4 are closely related in that they both involve improper actions of government employees and have the same base offense level. In contrast, under §2C1.5, no government employee need be the offender or even connected with the offense (see, for example, the second paragraph of 18 U.S.C. § 211). Second, because of the types of conduct covered by §2C1.5, inclusion made the consolidated guideline more complex. Third, consolidating §2C1.5 with the other two guidelines had the substantive effect of changing the offense level in at least one instance, i.e., the offense level applicable to offenses covered by the second paragraph of 18 U.S.C. § 211 (the prong of § 211 that requires no promise to use influence, but seems more a regulatory offense) was reduced from level 8 to level 6. Fourth, both offenses sentenced under §2C1.5 are one year misdemeanors.*
- (2) The two-level enhancement in subsection (b)(1)(B) (if the offense involved the payment, offer, or promise of, or the solicitation or receipt of, any money or thing of value in consideration for the use or promise to use any influence to procure a federal appointive position) has been deleted as no longer necessary in light of the fact that the proposed consolidation of §2C1.5 with §§2C1.3 and 2C1.4 has been deleted. (The two-level specific offense characteristic in subsection (b)(1)(B) was proposed to be added because it took into account elements of offenses covered by §2C1.5 and incorporated into the higher base offense level of that guideline.)*

Proposed Amendment:

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

* * *

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

Application Note:

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

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.~~