

Sentencing Guidelines Impose Tough New Criminal Penalties

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In response to a mandate in the Bipartisan Campaign Reform Act of 2002 (BCRA), the U.S. Sentencing Commission (Sentencing Commission) recently issued new sentencing guidelines for campaign finance violations. Together with the BCRA, the new guidelines dramatically toughen the criminal penalties available under campaign finance law.

Prior to amendment by the BCRA, the Justice Department rarely initiated criminal prosecutions under the Federal Election Campaign Act of 1971. Accordingly, most enforcement actions occurred under the Federal Election Commission's (FEC) civil authority to seek fines.

The BCRA increases the number of campaign finance violations that may be charged as felonies and boosts maximum penalties to two years of incarceration for even the least serious offenses and five years for more serious offenses. The BCRA's broad sweep offers criminal penalties to prosecutors for violations involving the making, receiving or reporting of any prohibited contribution, donation or expenditure. The BCRA sets the maximum penalty for aggregate violations exceeding \$25,000 during a calendar year at five years of imprisonment. Campaign finance violations aggregating between \$2,000 and \$25,000 during a calendar year carry a maximum penalty of one year in jail. These penalties of imprisonment may also include significant fines.

Under the BCRA, the major campaign finance violations that may incur criminal penalties include:

- Violations of the soft money ban
- Violations of the limits on hard money contributions
- Violations of the ban on contributions and donations by foreign nationals
- Violations of the restrictions on electioneering communications
- Violations of the ban on coercing contributions to political funds
- Violations of the restrictions on contributions in currency
- Certain types of fraudulent misrepresentation

- Violations of the ban on contributions in the name of another
- Soliciting or receiving a donation on certain types of federal property

For these and other campaign finance violations, the BCRA directed the Sentencing Commission to promulgate sentencing guidelines. Mirroring the penalties associated with other types of public corruption crimes, the Sentencing Commission adopted a "base offense level" of "eight" for campaign finance violations. While this base level provides for a sentence of zero to six months, multiple specific offense characteristics trigger an automatic increase in the sentence. These sentencing "enhancement" factors include:

- The amount of money involved in the illegal transaction (the sentencing enhancement varies incrementally with the dollar amount involved in the offense)
- If the violation involved contributions, donations, or expenditures from foreign nationals (two-level enhancement) or foreign governments or organizations (four-level enhancement)
- If the violation involved the use of federal, state, or local funds (*e.g.*, the use of funds awarded in a government contract to make an illegal donation or contribution)—a two-level enhancement
- If the violation was committed with the purpose of achieving a specific, identifiable nonmonetary federal benefit (*e.g.*, a presidential pardon)—a two-level enhancement
- If the defendant engaged in 30 or more illegal transactions during the course of the offense—a two-level enhancement
- If the violation involved intimidation, threat of harm (physical or pecuniary), or coercion—a four-level enhancement
- Violations involving bribery or gratuities (enhancement levels vary with the amount involved in illegal transaction)

As a reference, sentencing levels of nine and above provide for some minimum period of incarceration. For example, a defendant facing sentencing for illegal contributions, donations or expenditures aggregating more than \$5,000 over a calendar year would receive at least a two-level enhancement, resulting in a minimum sentencing level of 10 and the associated 6 to 12 months of incarceration. A four-level enhancement—like that for violations involving intimidation, threat of harm or coercion—puts the sentencing level at 12, which carries a penalty of 10 to 16 months of incarceration.

The BCRA also initiates an intricate and heftier scheme of monetary penalties for campaign finance violations. Notably, the Sentencing Commission carved an exception into its guidelines on maximum fines for the monetary penalty provisions unique to the BCRA. Specifically, for contributions made in the name of another that aggregate to more than \$10,000 during a calendar year, the BCRA authorizes a fine up to the greater of \$50,000 or 1,000 percent of the amount of the violation and imposes a minimum fine of not less than 300 percent of the violation. Again, these criminal fines may be in addition to or in lieu of imprisonment.

In weighing the seriousness of any violation and considering the appropriate penalty to be imposed, the BCRA leaves unchanged the provision that a court shall take into account the existence of a conciliation agreement between the defendant and the FEC and the extent of compliance with that agreement. However, at least in the context of determining criminal fines, the Sentencing Commission added the caveat that a conciliation agreement should not be considered if the defendant began negotiations toward it only after becoming aware of a criminal investigation.

The Sentencing Commission promulgated these guidelines as temporary, emergency amendments under the "emergency amendment authority" granted it by the BCRA. These temporary, emergency amendments took effect on January 25, 2003. However, the Sentencing Commission has proposed an amendment to repromulgate the guidelines as permanent, non-emergency amendments. Public comment on repromulgating these guidelines as permanent, non-emergency amendments is due March 17, 2003. The proposal is then subject to congressional review.