
Report to the Congress:

INCREASED PENALTIES UNDER THE SARBANES-OXLEY ACT OF 2002

(As required by section 1104(a)(3) of the Sarbanes-Oxley Act of 2002,
Public Law 107-204)



UNITED STATES SENTENCING COMMISSION

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EXECUTIVE SUMMARY

This report is submitted by the United States Sentencing Commission (the “Commission”) pursuant to section 1104(a)(3) of the Sarbanes-Oxley Act of 2002, Pub. L. 107–204 (the “Act”). Sections 805, 905, and 1104 contain several emergency directives to the Commission generally pertaining to fraud and obstruction of justice offenses that required implementation by January 25, 2003. On January 8, 2003, the Commission unanimously approved an emergency amendment that implements the various congressional directives and will significantly increase future penalties for convicted criminals who commit corporate crime and serious fraud and obstruction of justice offenses. The effective date of the emergency amendment is January 25, 2003. This temporary amendment will expire on November 1, 2003, when a permanent amendment becomes effective. The Commission plans to submit the permanent amendment for congressional review on or before May 1, 2003.

The Commission worked diligently in the abbreviated 180 day period to implement these emergency directives and significantly increased guideline penalties as directed by the Act. These penalty increases were incorporated into the existing sentencing guideline structure under §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), §2J1.2 (Obstruction of Justice), and §2E5.3 (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act).

In response to the congressional directives, the Commission modified §2B1.1 to account more adequately for the significant impact such offenses have on victims. The emergency amendment expands the existing sentencing enhancement at §2B1.1(b)(2) to provide a six level enhancement for offenses involving 250 or more victims, an approximate 25 percent increase over the penalty which was previously provided. This six level enhancement will double the guideline sentence for any fraud, theft, or property destruction offense that impacts 250 or more victims, compared to the sentence for a comparable offender who impacts less than ten victims.

To further account for the adverse victim impact of these offenses, the Commission added a new sentencing enhancement applicable to offenses that endanger the solvency or financial security of a substantial number of victims. The amendment expands the existing guideline enhancement at §2B1.1(b)(12)(B) to apply to offenses that endanger the solvency or financial security of (1) a publicly traded corporation, (2) an organization that employs 1,000 or more employees, or (3) 100 or more individual victims. Accordingly, offenders who cause this acute harm will receive a four level enhancement and a minimum offense level of 24, which will increase the guideline sentence by approximately 50 percent, compared to a comparable offender who does not cause such financial jeopardy.

The impact of these victim related enhancements is substantial. As a result of the amendment, offenders can be subjected to an increase of ten offense levels – approximately tripling the guideline sentence in many cases – based solely on these victim related harms.

The emergency amendment also targets offenses committed by officers or directors of publicly traded companies for especially severe penalties because of statutory fiduciary duties imposed upon such individuals. The amendment adds a new four level enhancement for officers or directors of publicly traded companies who commit securities violations. Based solely on this enhancement, such officers or directors will receive an approximate 50 percent increase in sentence length. If the securities violation also substantially endangered the financial security of the publicly traded company and/or caused an economic loss for 250 or more victims, the new enhancements that account for these factors will apply as well, resulting in a further increase in the guideline sentence.

The emergency amendment also addresses offenses that cause catastrophic economic losses of magnitudes previously not anticipated, such as the serious corporate scandals that gave rise to several portions of the Act. The amendment adds two new loss categories to the loss table under §2B1.1(b)(1) for offenses that involved more than \$200 million, or more than \$400 million, in loss. The amended loss table provides a 28 level enhancement for offenses involving more than \$200 million in loss, and 30 levels for offenses involving more than \$400 million. The addition of these new categories raises the maximum offense level based solely on the guideline base offense level and loss amount enhancement from level 32 (121-151 months) to level 36 (188 - 235 months), which corresponds to a penalty increase of more than five years imprisonment. The amendment also made similar changes to the tax loss table at §2T4.1 (Tax Table).

In addition to the impact these modifications will have on individual defendants, the modifications to §2B1.1 will significantly increase fines for many organizations sentenced under Chapter Eight of the guidelines. As explained in Part III, the offense level calculated under §2B1.1 provides one way of determining the base fine for organizational defendants convicted of fraud offenses. Therefore, the fine for an organizational defendant convicted of committing a fraud offense involving the aggravating conduct accounted for by the new enhancements in §2B1.1 may be significantly increased. For example, a publicly traded company convicted of securities fraud which caused \$1.2 million in loss to more than 250 victims will receive a minimum base fine of \$17.5 million under §8C2.4 (Base Fine), compared to \$3.7 million previously required by the guidelines.

The Commission also significantly modified §2J1.2 (Obstruction of Justice) to reflect congressional concern regarding obstructive conduct, particularly document destruction. The emergency amendment increases the base offense level in §2J1.2 by two levels, from level 12 to 14, and adds a new two level enhancement for offenses involving the destruction, alteration, or fabrication of documents, records, or other tangible objects, or that are otherwise extensive in scope, planning, or preparation. The combined effect of these modifications for a defendant who substantially interferes with the administration of justice by

shredding a substantial amount of documents or particularly probative documents is to approximately double the guideline sentence to about three years imprisonment (30 to 37 months).

I. INTRODUCTION

This report is submitted pursuant to section 1104(a)(3) of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204 (the “Act”), which requires the United States Sentencing Commission (the “Commission”) to submit to Congress:

- A. An explanation of actions taken by the Commission pursuant to section 1104(a)(2) of the Act to “expeditiously consider the promulgation of new sentencing guidelines or amendments to existing sentencing guidelines to provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses.”
- B. Any additional policy recommendations the Commission may have for combating securities and accounting fraud and related offenses.

In addition to the above reporting requirement, sections 805, 905, and 1104 of the Act contain several directives to the Commission generally pertaining to fraud and obstruction of justice offenses. The directives, which are set forth in their entirety in Appendix A, require the Commission to promulgate emergency amendments addressing, among other things, officers and directors of publicly traded companies who commit fraud and related offenses, fraud offenses that endanger the solvency or financial security of a substantial number of victims, fraud offenses that involve significantly greater than 50 victims, and obstruction of justice offenses that involve the destruction of evidence. The Act requires the Commission to promulgate emergency amendments implementing these directives not later than January 25, 2003.

In developing its response to the Act, the Commission analyzed available sentencing data¹, reviewed pertinent case law and legislative history, held a public meeting and solicited and considered public comment from members of the federal criminal justice system, including prosecutors, defense attorneys, federal judges, probation officers, academics, and other experts in the field.

On January 8, 2003, the Commission unanimously approved an emergency amendment implementing the congressional directives by making several modifications to the sentencing guidelines for these categories of offenses, as follows: §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), §2J1.2 (Obstruction of Justice), and §2E5.3 (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income

¹ The Commission’s analysis of sentencing data included, due to time constraints, a limited review of court sentencing documents for certain fraud and obstruction of justice offenders. The methodology used is set forth in Appendix C.

Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act). The effective date of the emergency amendment is January 25, 2003.

II. EMERGENCY AMENDMENT EFFECTIVE JANUARY 25, 2003

This section summarizes and explains the actions taken by the Commission in response to the Act. The text of the emergency amendment promulgated by the Commission to implement the Act is set forth in Appendix B.

A. Modifications to §2B1.1 (Fraud, Theft, Property Destruction)

The Commission made several modifications to guideline 2B1.1 in response to the Act. These changes build on a comprehensive economic crime package that was promulgated by the Commission effective November 1, 2001.

Among other things, the economic crime package consolidated three separate guidelines covering theft, property destruction, and fraud into one guideline, §2B1.1. As a result, the consolidated §2B1.1 applies annually to almost 9,500 defendants – representing about 16 percent of the federal criminal caseload – and covers a wide range of criminal conduct proscribed in over 260 federal criminal statutes, including securities fraud (18 U.S.C. § 1348), bank fraud (18 U.S.C. § 1344), importation of stolen motor vehicles (18 U.S.C. § 533(a)(1)), theft or receipt of stolen mail (18 U.S.C. § 1708), and removal, disturbance, or obstruction of ruins (18 U.S.C. § 114). The modifications made by the emergency amendment will apply to all of these types of offenses that are sentenced using the consolidated guideline for economic crimes.

1. Expansion of “Victims Table” at §2B1.1(b)(2)

First, the emergency amendment addresses the directive contained in section 1104(b)(5) of the Act to “ensure that the guideline offense levels and enhancements under United States Sentencing Guideline 2B1.1 (as in effect on the date of enactment of this Act) are sufficient for a fraud offense when the number of victims adversely involved is significantly greater than 50.” The amendment implements this directive by expanding the existing enhancement at §2B1.1(b)(2) based on the number of victims involved in the offense.

Prior to the amendment, §2B1.1(b)(2) provided a two level enhancement if the offense involved more than 10, but less than 50, victims (or was committed through mass-marketing), and a four level enhancement if the offense involved 50 or more victims. The amendment provides an additional two level increase, for a total of six levels, if the offense involved 250 or more victims.

The Commission’s analysis of a sample of fraud offenders sentenced in fiscal year 2001 indicates that the overwhelming majority – 95.6 percent – of fraud offenses involved fewer than 50

individual victims. Cases involving securities fraud in particular, however, often involved a substantial number of victims. Almost one half (42.5 percent) of securities fraud cases involved 50 or more victims, and over one quarter (25.7%) involved 250 or more victims and would receive the new six level enhancement.

For those offenders who receive the new six level enhancement at §2B1.1(b)(2), the sentencing impact is expected to be significant. A six level enhancement approximately doubles the term of imprisonment required by the sentencing guidelines. The Commission determined that an enhancement of this magnitude appropriately responds to the pertinent directive and reflects both the extensive nature of such offenses and the large scale victimization caused by them.

2. New Enhancement for Endangering the Solvency or Financial Security of Victims

Second, the emergency amendment addresses the directive contained at section 805(a)(4) to ensure that “a specific offense characteristic enhancing sentencing is provided under United States Sentencing Guideline 2B1.1 (as in effect on the date of enactment of this Act) for a fraud offense that endangers the solvency or financial security of a substantial number of victims.” The amendment implements this directive by expanding the scope of the existing enhancement at §2B1.1(b)(12)(B).

Prior to the amendment, §2B1.1(b)(12)(B) provided a four level enhancement and a minimum offense level of 24 if the offense substantially jeopardized the safety and soundness of a financial institution. The amendment expands the scope of this enhancement by providing two additional prongs that would trigger application of this enhancement.

The first new prong applies to offenses that substantially endanger the solvency or financial security of an organization that, at any time during the offense, was a publicly traded company or had 1,000 or more employees. A corresponding application note for §2B1.1(b)(12)(B) sets forth a non-exhaustive list of factors that the court shall consider in determining whether the offense “endangered the solvency or financial security” of such an entity. The list of factors that the court shall consider when applying the new enhancement includes, among others, consideration of insolvency, filing for bankruptcy, substantially reducing the value of the company’s stock, and substantially reducing the company’s workforce. Other factors not enumerated in the application note also could be considered by the court as appropriate.

The addition of this new prong reflects the Commission’s determination that such an offense undermines the public’s confidence in the securities and investment markets much in the same manner as an offense that jeopardizes the safety and soundness of a financial institution undermines the public’s confidence in the banking system. It also reflects the likelihood that an offense that endangers the solvency or financial security of an employer of this size will similarly affect a substantial number of individual victims, which is a specific congressional concern set forth in section 805(a)(4) of the Act.

Under this prong, however, the court is not required to determine whether the solvency or financial security of each individual victim was substantially endangered, which may involve complicated factfinding in some cases.

The second new prong added to §2B1.1(b)(12)(B) by the amendment applies to offenses that substantially endanger the solvency or financial security of 100 or more victims. The Commission concluded that the specificity of the directive in section 805(a)(4) of the Act required promulgation of a sentencing enhancement that focuses on the financial endangerment of individual victims and does not rely on an indirect organizational proxy, such as the endangerment of a publicly traded company or other large organization. Consequently, this prong of the enhancement will apply in cases in which there is sufficient evidence for the court to determine that the amount of loss suffered by a substantial number of individual victims substantially endangered the solvency or financial security of those victims, regardless of whether a publicly traded company or organization was affected by the offense.

The Commission determined that the enhancement provided in §2B1.1(b)(12)(B) will apply cumulatively with the enhancement at §2B1.1(b)(2), which is based solely on the number of victims involved in the offense, to reflect the particularly acute harm suffered by victims of offenses for which the new prongs of subsection (b)(12)(B) apply.²

3. New Enhancement for Officers or Directors of Publicly Traded Companies

Third, the emergency amendment addresses the directive at section 1104(a)(2) of the Act to “consider the promulgation of new sentencing guidelines or amendments to existing sentencing guidelines to provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses.”

The amendment implements this directive by providing a new four level enhancement at §2B1.1(b)(13) that applies if the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or director of a publicly traded company. The Commission concluded that a four level enhancement – an approximate 50 percent increase in the sentence length required by the sentencing guidelines – appropriately reflects certain heightened fiduciary duties imposed by securities law upon officers and directors of publicly traded companies. Accordingly, the court is not required to make a factual determination that the defendant abused the defendant’s position of trust as an officer or director of a publicly traded company in order for the new enhancement to

² Reliable data regarding how often the new prongs of §2B1.1(b)(12)(B) will apply is unavailable. The impacts of an offense on the solvency or financial security of victims and an agency’s trading status were not routinely documented in previously sentenced cases because those factors were not required sentencing factors at the time.

apply. A corresponding application note provides that in cases in which the new four level enhancement applies, the existing two level enhancement for abuse of position of trust at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) shall not apply.³

The Commission is unable to determine with precision how many offenders may qualify for the new four level enhancement at §2B1.1(b)(13). As part of its data analysis, the Commission identified 121 offenders who were convicted of specific securities fraud statutes in fiscal year 2001. Of these 121 securities fraud offenders, 35 – almost one third – were officers or directors of an organization (as defined in Chapter 8 of the guidelines). The Commission, however, has not determined how many of these 35 offenses involved publicly traded companies.

Furthermore, these figures likely underestimate the impact of the new enhancement. Because of data collection constraints, the Commission could only identify offenders who were actually convicted of a specific securities fraud violation. The new enhancement, however, will apply more broadly. A corresponding application note expressly provides that a conviction under a specific securities fraud statute is *not* required in order for the enhancement under §2B1.1(b)(13) to apply. Thus, the new enhancement would apply to an officer or director of a publicly traded company convicted under a general fraud statute, for example 18 U.S.C. § 1341 (prohibiting mail fraud), provided that the offense involved a violation of “securities law” as defined in the application note. Therefore, the pool of offenders who are potentially eligible for this enhancement may be significantly greater than the 121 identified securities fraud convictions in fiscal year 2001 suggests.

While developing its response to the Act, the Commission identified other individuals and entities also subject to fiduciary or similar statutory duties of trust and confidence to investors who often play pivotal roles in securities fraud or other investment related offenses. Consequently, the Commission is considering whether it should expand the scope of the new enhancement at §2B1.1(b)(13) beyond the reach specifically required by the directive when it submits the permanent amendment to Congress on or before May 1, 2003. On January 8, 2003, the Commission voted to publish an issue for comment specifically requesting input regarding whether the scope of this new enhancement should be expanded to include, for example, a registered broker or dealer (*see* 15 U.S.C. § 78c(a)(47)), an associated person of a registered broker or dealer (*see* 15 U.S.C. § 78c(18)), an

³ The Commission could have achieved the same sentencing outcome for such offenders by setting the magnitude of the enhancement at §2B1.1(b)(13) at two levels and permitting application of the existing two level enhancement for abuse of position of trust. The Commission’s data analysis indicated, however, that the abuse of position of trust enhancement has been applied less often than expected in such cases. In fact, only 11 of the 35 officers or directors convicted of securities fraud violations in fiscal year 2001 received the abuse of trust enhancement. Therefore, the Commission adopted an approach that avoids difficult factfinding as well as any potential application problems in §3B1.3.

investment advisor (*see* 15 U.S.C. § 80b-2(a)(11)), a person associated with an investment advisor (*see* 15 U.S.C. § 80b-2(a)(17)), or other individuals or entities that offer and manage securities, commodities, and futures but who are not regulated under securities law (as defined by the Commission in the application note corresponding to the new enhancement at §2B1.1(b)(13)).

4. Addition of Loss Categories

Fourth, the emergency amendment expands the loss table at §2B1.1(b)(1) to punish more severely offenses that cause catastrophic losses of magnitudes greater than those previously anticipated, such as the serious corporate scandals that gave rise to several portions of the Act. Prior to the amendment, the loss table at §2B1.1(b)(1) provided sentencing enhancements in two level increments up to a maximum of 26 levels for offenses in which the loss exceeded \$100,000,000. The amendment adds two additional loss amount categories to the table: an increase of 28 levels for offenses in which the loss exceeded \$200,000,000, and an increase of 30 levels for offenses in which the loss exceeded \$400,000,000.⁴ The amendment also modifies the tax table in §2T4.1 (Tax Table) in a similar manner to maintain the longstanding proportional relationship between the loss table in §2B1.1 and the tax loss table.

Although these new loss categories are expected to apply in relatively few cases, these sentencing increases address congressional concern regarding particularly extensive and serious fraud offenses, and more fully effectuate increases in statutory maximum penalties provided by the Act (*e.g.*, the increase in the statutory maximum penalties for wire fraud and mail fraud offenses from five to 20 years effectuated by section 903 of the Act). Furthermore, in those cases in which the new loss categories apply, the impact on the defendant's sentence will be significant. For example, the guideline sentence for a defendant who causes more than \$400,000,000 in loss previously was 121 to 151 months (assuming no other sentencing adjustments apply). With the additional loss categories, the guideline sentence will be 188 to 235 months, an increase of more than five years.

The Commission is continuing to consider whether further modifications to the loss table or the base offense level in §2B1.1 are appropriate. On January 8, 2003, the Commission also voted to publish for comment a number of proposals currently being studied. As explained above, §2B1.1 applies to a broad spectrum of offense conduct as a result of its consolidation of the theft, property

⁴ The amendment also adds a new factor to the general enumerated factors that the court may consider in determining the amount of loss under §2B1.1(b)(1). Specifically, the amendment adds the reduction in the value of equity securities or other corporate assets that resulted from the offense to the list of general factors set forth in Application Note 2(C) of §2B1.1. This factor was added to provide courts additional guidance in determining loss in certain cases, particularly in complex white collar cases.

destruction, and fraud guidelines effective November 1, 2001. The breadth of offenses now sentenced under §2B1.1 makes the impact of any change to the loss table at subsection (b)(1) significantly more far reaching than it would have been prior to the consolidation. The difficulty of assessing the impact and desirability of changes to the loss table is further compounded by the fact that the same amendment that consolidated the theft, property destruction, and fraud guidelines also made significant changes to the loss table effective November 1, 2001, and the Commission currently does not have available sentencing data reflecting the impact of those changes.

The November 1, 2001 amendment itself provided significantly increased penalties for offenses involving relatively moderate and higher loss amounts (generally exceeding \$120,000) in order to better reflect the seriousness of these offenses. That amendment also provided somewhat lower penalties for offenses involving lower loss amounts (generally less than \$70,000) in order to expand the availability of alternative sentences and to increase the likelihood that restitution would be paid in such cases. Because of *ex post facto* concerns and the significant lag time between the commission of these types of offenses and the sentencing of such offenders, the Commission has just begun to receive court documents for defendants sentenced under the loss table effective November 1, 2001, and cannot yet determine the impact or the effectiveness of these changes.

Further complicating the Commission's analysis of the monetary table at §2B1.1(b)(1) is the fact that 22 other guidelines incorporate by reference that monetary table. These 22 "referring guidelines" cover a wide range of offenses, many of which are wholly unrelated to fraud. For example, certain child pornography offenses (§2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor)), fish and wildlife offenses (§2Q2.1 (Offenses Involving Fish, Wildlife, and Plants)), counterfeiting (§2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States)), and campaign finance violations (§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)) incorporate by reference the monetary table at §2B1.1(b)(2).

Significantly, more than 2,600 defendants were sentenced under these 22 referring guidelines in fiscal year 2001. Although the monetary table at §2B1.1(b)(2) may not apply to all defendants sentenced under a referring guideline, the Commission concluded that the magnitude of the number of defendants potentially affected by a change in that table necessitates a more thorough prison impact analysis that was not possible during the abbreviated emergency amendment period.

5. Increase in Fines for Organizational Defendants

The sentencing enhancements added to §2B1.1 by the emergency amendment will result in significantly increased fines for many corporate and other organizational defendants. As explained in Part III of this report, the offense level (including the base offense level and any applicable sentencing enhancements) calculated under §2B1.1 provides one measurement of the base fine for organizational

defendants convicted of fraud offenses. Therefore, the fine for an organizational defendant convicted of committing a fraud offense involving the aggravating conduct accounted for by the new enhancements in §2B1.1 will be significantly increased. Prior to the amendment, for example, a publicly traded company convicted of securities fraud which involved more than 250 victims and \$1.2 million in loss, and which was committed by an officer or director of the company, would receive a base fine under §8C2.4 (Base Fine) of at least \$3.7 million. Under the amendment, the base fine will be increased to at least \$17.5 million.⁵

6. Additions to Appendix A (Statutory Index)

The emergency amendment also incorporates into the guidelines certain new white collar offenses established by the Act by listing those offenses in Appendix A (Statutory Index). As a result, violations of 18 U.S.C. § 1350 (relating to failure of corporate officers to certify financial reports) and 18 U.S.C. § 1348 (securities fraud), will be sentenced under the fraud guideline, § 2B1.1, and subject to the various new enhancements provided by the amendment.

B. Modifications to §2J1.2 (Obstruction of Justice)

The emergency amendment also makes two significant modifications to §2J1.2 (Obstruction of Justice) to address the directives pertaining to obstruction of justice offenses contained in sections 805 and 1104 of the Act. Specifically, section 805(a) of the Act directs the Commission to ensure that the base offense level and existing enhancements in §2J1.2 are sufficient to deter and punish obstruction of justice offenses generally, and that these guideline penalties are adequate specifically in cases involving: the destruction, alteration, or fabrication of a large amount of evidence; a large number of participants; the selection of evidence that is particularly probative or essential to the investigation; more than minimal planning; or abuse of a special skill or a position of trust. Section 1104(b) of the Act further directs the Commission to ensure that the “guideline offense levels and enhancements for an obstruction of justice offense are adequate in cases where documents or other physical evidence are actually destroyed or fabricated.”

1. Increase in Base Offense Level

First, the emergency amendment increases the base offense level applicable to all defendants sentenced under §2J1.2 by two levels, from level 12 to 14. The Commission concluded that, based on the directives and the several new obstruction of justice offenses created by the Act that carry higher

⁵ A more thorough explanation of the fine calculation for organizations is provided in Section III of this Report.

statutory maximum penalties,⁶ an increase in the base offense level applying to all obstruction of justice offenders was warranted.⁷

Commission sentencing data indicate that in fiscal year 2001 nearly two thirds (65.4 percent) of the 101 offenders sentenced under §2J1.2 received a sentence of imprisonment, and the term of incarceration for those receiving a sentence of imprisonment averaged 28 months. The two level increase in the base offense level provided by the amendment will result in an approximate 25 percent increase in sentence length for this category of offenders.⁸

2. New Enhancement for Destruction of Evidence

Second, the amendment adds a new two level enhancement to §2J1.2. This enhancement applies if the offense (i) involved the destruction, alteration, or fabrication of a substantial number of records, documents or tangible objects; (ii) involved the selection of any essential or especially probative record, document, or tangible object to destroy or alter; or (iii) was otherwise extensive in scope, planning, or preparation.⁹

⁶ *E.g.*, 18 U.S.C. § 1519 (relating to destruction, alteration, or falsification of records in Federal investigations and bankruptcy, which provides a maximum term of imprisonment of 20 years); 18 U.S.C. § 1512(c) (relating to tampering with a record or otherwise impeding an official proceeding, which provides a maximum term of imprisonment of 20 years); 18 U.S.C. § 1513 (relating to retaliation against informants, which provides a maximum term of imprisonment of ten years).

⁷ The Commission also was aware that in section 3001 of the 21st Century Department of Justice Appropriations Act, Pub. L. 107-273, Congress made further modifications to 18 U.S.C. § 1512, which also increased certain statutory maximum penalties. On January 8, 2003, the Commission voted to publish an issue for comment regarding whether offense levels in §2J1.2 should be modified further in response to those changes.

⁸ The Commission is considering whether the base offense level in the guideline covering perjury offenses, §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), also should be increased by two levels from level 12 to 14 when the permanent amendment is submitted to Congress on May 1, 2003. Prior to the emergency amendment, defendants sentenced under §2J1.2 and §2J1.3 were sentenced in a similar manner because the two guidelines had the same base offense level and the same sentencing enhancements.

⁹ The Commission determined that existing adjustments in Chapter Three for aggravating role, §3B1.1, and abuse of position of trust or use of special skill, §3B1.3, adequately account for factors relating to large numbers of participants and abuse of position of trust, as discussed in sections 805(a)(2)(A)(I) and (a)(2)(B) of the Act.

The Commission reviewed all 101 cases sentenced under §2J1.2 in fiscal year 2001 and found that obstruction of justice offenses typically involve relatively spontaneous conduct, such as threatening a witness, and are usually committed by few participants. Destruction of evidence, which the legislative history of the Act suggests was a primary congressional concern, occurred in approximately 11 percent of obstruction of justice offenses sentenced in fiscal year 2001. Selection of essential or especially probative records occurred in approximately four percent of obstruction of justice offenses. Therefore, approximately 15 percent of obstruction offenders are expected to receive the new two level sentencing enhancement. For these offenders, the combined effect of the increase in the base offense level and the new sentencing enhancement will be an approximate 50 percent increase in sentence length.

C. Modifications to §2E5.3

In response to the Act, the emergency amendment also makes a number of modifications to §2E5.3 (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act).

Section 802 of the Act created a new offense, 18 U.S.C. § 1520, relating to the destruction of corporate audit records. Section 1520(a) directs the Securities and Exchange Commission to promulgate rules and regulations relating to retention of relevant audit records and requires accountants who conduct an audit of an issuer of securities to which section 10A of the Securities Exchange Act of 1934 applies to maintain all audit workpapers for a period of five years. Section 1520(b) prescribes a maximum term of imprisonment of ten years for knowing and willful violations of this section. Because of the regulatory nature of this offense, the guideline amendment references 18 U.S.C. § 1520 to §2E5.3 and revises the title of the guideline to include destruction and failure to maintain corporate audit records. The Commission determined, however, that the base offense level of 6 provided by §2E5.3 is insufficient in cases in which the document destruction was intended to facilitate an obstruction of justice offense. The Commission concluded that in such a case the obstruction of justice guideline, §2J1.2, which provides significantly greater penalties, should apply. The amendment, therefore, also amends the base offense level in §2E5.3 to provide a cross reference to §2J1.2, as applicable.

Section 904 of the Act also significantly increased the statutory maximum penalty for criminal violations of the Employee Retirement Income Security Act of 1974 (ERISA) from one year to ten years imprisonment. This offense, which also is regulatory in nature, is referenced to §2E5.3. The Commission concluded, however, that criminal violations of ERISA that are committed to facilitate a fraud are more appropriately sentenced under §2B1.1, which provides significantly greater penalties. The amendment, therefore, also amends the base offense level in §2E5.3 to provide a cross reference to §2B1.1 if the offense was committed to facilitate or conceal a fraud. The cross reference also was expanded to address cases involving a bribe or gratuity by including §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or

Labor Organizations).

III. THE ORGANIZATIONAL GUIDELINES (CHAPTER EIGHT)

Section 805 of the Act directed the Commission to “review and amend, as appropriate, the Federal Sentencing Guidelines and related policy statements to ensure that . . . the guidelines that apply to organizations in United States Sentencing Guidelines, chapter 8, are sufficient to deter and punish organizational criminal misconduct.” The Commission has an established and respected history for developing approaches to deterring and punishing offenses committed by corporations and other organizations, and recently has been particularly active in promoting the crime prevention features of these guidelines.

A. Background/Historical Context

The Organizational Sentencing Guidelines in Chapter Eight have been in effect since November 1, 1991, and were promulgated after several years of extensive analysis, public hearings, and public comment provided by the business community, academics, prosecutors, and other government officials.

Chapter Eight is designed so that “sanctions imposed upon organizations and their agents, taken together, provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.”¹⁰ Toward this end, and specifically to encourage good corporate citizenship and internal self-policing, the Commission introduced the concept of providing mitigation at sentencing for organizations that have implemented “effective compliance programs.” *See* §8C2.5(f)

The organizational guidelines enumerate seven broad criteria for an “effective compliance program,” and further identify factors that may be relevant to the precise actions of an organization in order to achieve this goal. The seven criteria are:

- 1) compliance standards and procedures reasonably capable of reducing the prospect of criminal conduct;
- 2) oversight by high-level personnel;

¹⁰ USSG. Ch. 8, intro. comment. Based upon the statutory definition of an “organization” in 18 U.S.C. § 18, Chapter Eight extends to corporations, partnerships, labor unions, non-profit organizations, and subdivisions of state and local governments that have been convicted of violations of federal law. §8A1.1, comment. (n.1).

- 3) due care in delegating substantial discretionary authority;
- 4) effective communication to employees;
- 5) reasonable steps to achieve compliance that include monitoring and auditing systems as well as a system for reporting suspected wrongdoing without fear of reprisal;
- 6) consistent enforcement of compliance standards, including disciplinary mechanisms; and
- 7) upon detection of a violation, reasonable steps to respond and prevent further similar offenses.

See §8A1.2, comment. (n.3(k)(1-7)).

Although organizational defendants comprise less than one percent of the cases sentenced in federal courts, the impact of the Commission’s approach to sentencing mitigation has reached well beyond the courtroom to broadly affecting corporate and organizational behavior. As the Delaware Chancery Court observed some years ago, “the Guidelines offer powerful incentives for corporations today to have in place compliance programs to detect violations of law promptly and to report violations to appropriate public officials when discovered, and to take voluntary remedial efforts.”¹¹ This court further suggested that, “any rational person attempting in good faith to meet an organizational governance responsibility would be bound to take into account . . . the enhanced penalties and the opportunities for reduced sanction that [the Organizational Sentencing Guidelines] offer[.]”

A number of federal regulatory agencies also rely on the organizational guidelines’ seven criteria to affect agency enforcement outcomes. Most notably, the Department of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have incorporated the seven criteria, either specifically or implicitly, into the foundation of their own particular compliance evaluation criteria. Several of the factors identified by the Department of Justice in its memorandum setting forth key considerations to weigh in deciding whether to prosecute corporations also are based on the structure and operation of Chapter Eight.¹²

¹¹ *In re Caremark International Inc. Derivative Litigation*, Del. Chancery C.A. 13670, 698 A.2d 959, 970 (September 25, 1996).

¹² See “Federal Prosecution of Corporations,” Department of Justice Memorandum to Component Heads and United States Attorneys, June 16, 1999, available at www.usdoj.gov/criminal/fraud/policy/chargingcorps.html.

Due to the significant time lag between the commission of offenses and the sentencing of convicted organizations,¹³ sentencing data for organizations sentenced under Chapter Eight was not available until fiscal year 1993. The number of cases received by the Commission in which organizations were sentenced under Chapter Eight has ranged from 50 to 296.¹⁴ Fraud offenses consistently comprise the majority of organizational offense conduct, approximately 35 percent, with environmental offenses and antitrust offenses comprising an average of 23 percent and seven percent, respectively.

The majority of organizations sentenced under Chapter Eight are relatively small, as measured by the number of employees. Over three quarters (76 percent) of the 534 organizations sentenced in fiscal years 2000 and 2001 for which the Commission received the relevant sentencing information had fewer than 100 employees. Furthermore, the vast majority of organizations for which the Commission received relevant sentencing information on the nature of their ownership were closely held, not publicly traded, companies. Significantly, employees or officers of organizations were charged with individual offenses related to an organization's criminal misconduct in at least three quarters of the organizational cases sentenced in the past two fiscal years.¹⁵

B. Punishment Under Chapter Eight

Substantial fine penalties comprise an important component of the punishment of organizational misconduct under Chapter Eight. The modifications to the Chapter Two guidelines described above are expected to result in significantly increased fines for organizational misconduct because of the longstanding operational relationship between Chapter Two and the Chapter Eight fine calculations.

Under Chapter Eight, base fines are determined by using the greatest of the amount derived from the fine table at §8C2.4(d) (Base Fine), pecuniary gain to the organization from the offense, or pecuniary loss caused by the offense. The fine table is used significantly more often than either

¹³ The Chapter Eight guidelines were not applied to organizations unless the illegal conduct occurred after their November 1991 effective date. See November 7, 1991 Memo to All Federal Prosecutors from Robert S. Mueller, III, Assistant Attorney General re *Organizational Sentencing Guidelines*.

¹⁴ The Commission's data on organizational guidelines is available from its Annual Reports or on the Commission's website at <http://www.ussc.gov/corp/organizsp.html>.

¹⁵ The Commission's datafiles include individual defendants charged or convicted by the date of the organization's sentencing date only. Accordingly, charges brought against individuals after the organization's sentencing are not reflected in these percentages.

pecuniary gain or pecuniary loss individually.¹⁶

The amendment increasing penalties in the Chapter Two guidelines described in Part II of this report will result in significantly increased fines for many organizational defendants convicted of fraud and related offenses because of the interaction between Chapter Two and Chapter Eight. For those cases using the fine table at §8C2.4(d), the offense level calculated under the applicable Chapter Two guideline (including the base offense level and any applicable sentencing enhancements) determines the base fine amount.¹⁷ The base fine is then multiplied by a culpability score calculated under §8C2.5 (Culpability Score) to determine the ultimate guideline fine range for organizations.¹⁸ As a result of this calculation, the new enhancements provided by the amendment will significantly increase the fines for organizations which commit such conduct.¹⁹ As described in Part I of this report, prior to the amendment a publicly traded company convicted of securities fraud which involved more than 250 victims and \$1.2 million in loss, and which was committed by an officer or director of the company, would receive a base fine under §8C2.4 (Base Fine) of at least \$3.7 million. Under the amendment, the base fine would be increased to at least \$17.5 million.

At the time of the initial promulgation of the organizational guidelines, the fine table and culpability score were mathematically calibrated to the generally applicable statutory maximum fine. The general governing statute for criminal fines, 18 U.S.C. § 3571, provides that the maximum fine for organizations is \$500,000, or twice the gross gain or gross loss resulting from the offense, unless a greater fine is specified by the particular statute of conviction.²⁰

The statutory maximum fine provided by 18 U.S.C. § 3571 has remained unchanged since

¹⁶ Commission sentencing data for fiscal year 2001 indicate that 51.6 percent of fines were based on the fine table, 29.2 percent on pecuniary gain, and 19.2 percent on pecuniary loss, for those cases for which the relevant sentencing information was available.

¹⁷ §8C2.3(a); §8C2.4(a) and (d).

¹⁸ The culpability scores take into account the involvement of high level personnel, the pervasiveness of the misconduct, the size of the organization, prior history of organizational misconduct, and any efforts to obstruct justice. *See* USSG. §8C2.5 and corresponding application notes.

¹⁹ The modifications to §2J1.2, however, will not have this automatic effect because the Chapter Eight fine table does not apply to obstruction of justice offenses. Rather, such conduct is considered in determining an organization's culpability score.

²⁰ *See* United States Sentencing Commission, *Supplemental Report on Sentencing Guidelines for Organizations* (August 30, 1991) at pp. 11-15 for a more detailed explanation of the mathematical calibration.

Chapter Eight was initially promulgated in 1991. Significantly, although Congress increased a number of statutory maximum penalties and fines applicable to white collar defendants in the Act, it did not increase the maximum fines applicable to organizations. As a result, the Commission is reluctant at the present time to amend the guideline fine provisions for organizations beyond the increases provided by the operation of the underlying Chapter Two guideline. To do so at this time would jeopardize the organizational guidelines' inherent proportionality by disturbing the calibrated relationships among the fine table, the culpability score, and the statutory maximum fines. Should Congress in its judgement decide to increase the statutory maximum fine in 18 U.S.C. § 3571, however, the Commission would be in a better position to reconsider whether adjustments to the fine calculation are warranted.

In addition to fines, other punishments provided for under Chapter Eight include disgorgement of gains not included in restitution or other court-ordered remedial measures, divestiture of the assets of organizations found to exist solely for criminal purposes, community service, public notice and apologies, and probation. *See* §§8B1.1 (Restitution - Organizations), 8B1.2 (Remedial Orders - Organizations), 8B1.3 (Community Service - Organizations), 8C2.9 (Disgorgement).

Probation of organizations may extend to five years for felonies, is mandatory in certain designated circumstances, and may include periodic inspections and audits by officials responsible to the court (with the costs of such inspections or audits to be paid by the convicted organization). Organizations sentenced to probation are required to advise the court of any material adverse change in their business or financial condition, as well as of the prospects of, or commencement of, any bankruptcy proceeding, major civil litigation, criminal prosecution, administrative proceedings, and formal inquiries by governmental authorities. In addition, the sentencing guidelines require that any organization with 50 or more employees that has not implemented a compliance program prior to sentencing must be placed on probation to ensure the development and implementation of such a program. *See* §§8D1.1 (Imposition of Probation - Organizations), 8D1.2 (Term of Probation - Organizations), 8D1.3 (Conditions of Probation).

C. Deterrence

In order to build upon the many positive developments in the area of deterring organizational misconduct, in February 2002 the Commission established an *ad hoc* advisory committee on the organizational guidelines. The advisory committee comprises nationally recognized experts drawn from government, private business, and academia, and is chaired by a former United States Attorney. The Commission has requested this expert committee to review the general effectiveness of the federal sentencing guidelines for organizations, with a particular emphasis on examining the criteria for an effective compliance program.

Since its formation, the advisory committee has actively engaged in conducting research and soliciting public comment on the effectiveness of the organizational guidelines, particularly in the area of deterrence. This effort has included a well attended, day-long public hearing on November 14, 2002.

The hearing covered many issues that bear directly on organizations' abilities and incentives to detect and report wrongdoing before it becomes widespread and institutionalized.²¹

The Commission originally established the advisory committee as part of the agency's ongoing monitoring of the effectiveness of the guidelines, as required by the Sentencing Reform Act, and to coincide with the ten year anniversary of the organizational guidelines. The serious corporate scandals that were the impetus for many of the provisions contained in the Act, of course, have dramatically underscored the importance of the work that has been undertaken by this group of experts. The advisory committee will report its findings and recommendations to the Commission in October 2003. At that time the Commission expects to have a sound foundation from which to consider appropriate modifications to Chapter Eight.

IV. CONCLUSION

The Commission strongly supports Congress's efforts to punish more appropriately and prevent corporate crime and serious fraud offenses, as underscored by the recently issued emergency guideline amendment implementing the Sarbanes-Oxley Act. As a result of this amendment, the Commission hopes that many serious fraud and related offenses will be deterred, and those individuals, companies, and other organizations who nevertheless choose to commit those serious crimes will receive appropriately severe punishment. The Act required the Commission to promulgate the emergency amendment within an abbreviated time period of 180 days from the enactment of the Act, but that emergency amendment by statute is temporary and expires on November 1, 2003. A superceding permanent amendment will be submitted to Congress on or before May 1, 2003. The Commission will continue to monitor the effectiveness of the relevant guidelines and study whether further modifications are appropriate in the future.

²¹ The issues, public comment, written testimony, and transcripts of the public hearing are available on the Commission's website at <http://www.ussc.gov/orgguide.html>.

APPENDIX A

SEC. 805. REVIEW OF FEDERAL SENTENCING GUIDELINES FOR OBSTRUCTION OF JUSTICE AND EXTENSIVE CRIMINAL FRAUD.

1. (a) ENHANCEMENT OF FRAUD AND OBSTRUCTION OF JUSTICE SENTENCES- Pursuant to section 994 of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and amend, as appropriate, the Federal Sentencing Guidelines and related policy statements to ensure that--

(1) the base offense level and existing enhancements contained in United States Sentencing Guideline 2J1.2 relating to obstruction of justice are sufficient to deter and punish that activity;

(2) the enhancements and specific offense characteristics relating to obstruction of justice are adequate in cases where--

(A) the destruction, alteration, or fabrication of evidence involves--

(i) a large amount of evidence, a large number of participants, or is otherwise extensive;

(ii) the selection of evidence that is particularly probative or essential to the investigation; or

(iii) more than minimal planning; or

(B) the offense involved abuse of a special skill or a position of trust;

(3) the guideline offense levels and enhancements for violations of section 1519 or 1520 of title 18, United States Code, as added by this title, are sufficient to deter and punish that activity;

(4) a specific offense characteristic enhancing sentencing is provided under United States Sentencing Guideline 2B1.1 (as in effect on the date of enactment of this Act) for a fraud offense that endangers the solvency or financial security of a substantial number of victims; and

(5) the guidelines that apply to organizations in United States Sentencing Guidelines, chapter 8, are sufficient to deter and punish organizational criminal misconduct.

(b) EMERGENCY AUTHORITY AND DEADLINE FOR COMMISSION ACTION- The United States Sentencing Commission is requested to promulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than 180 days after the date of enactment of this Act, in accordance with the procedures set forth in section 219(a) of the Sentencing Reform Act of 1987, as though the authority under that Act had not expired.

SEC. 905. AMENDMENT TO SENTENCING GUIDELINES RELATING TO CERTAIN WHITE-COLLAR OFFENSES.

1. (a) **DIRECTIVE TO THE UNITED STATES SENTENCING COMMISSION-** Pursuant to its authority under section 994(p) of title 18, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, as appropriate, amend the Federal Sentencing Guidelines and related policy statements to implement the provisions of this Act.

(b) **REQUIREMENTS-** In carrying out this section, the Sentencing Commission shall--

(1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses and the penalties set forth in this Act, the growing incidence of serious fraud offenses which are identified above, and the need to modify the sentencing guidelines and policy statements to deter, prevent, and punish such offenses;

(2) consider the extent to which the guidelines and policy statements adequately address whether the guideline offense levels and enhancements for violations of the sections amended by this Act are sufficient to deter and punish such offenses, and specifically, are adequate in view of the statutory increases in penalties contained in this Act;

(3) assure reasonable consistency with other relevant directives and sentencing guidelines;

(4) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges;

(5) make any necessary conforming changes to the sentencing guidelines; and

(6) assure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.

(c) **EMERGENCY AUTHORITY AND DEADLINE FOR COMMISSION ACTION-** The United States Sentencing Commission is requested to promulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than 180 days after the date of enactment of this Act, in accordance with the procedures set forth in section 219(a) of the Sentencing Reform Act of 1987, as though the authority under that Act had not expired.

SEC. 1104. AMENDMENT TO THE FEDERAL SENTENCING GUIDELINES.

1. (a) REQUEST FOR IMMEDIATE CONSIDERATION BY THE UNITED STATES SENTENCING COMMISSION- Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission is requested to--

- (1) promptly review the sentencing guidelines applicable to securities and accounting fraud and related offenses;
- (2) expeditiously consider the promulgation of new sentencing guidelines or amendments to existing sentencing guidelines to provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses; and
- (3) submit to Congress an explanation of actions taken by the Sentencing Commission pursuant to paragraph (2) and any additional policy recommendations the Sentencing Commission may have for combating offenses described in paragraph (1).

(b) CONSIDERATIONS IN REVIEW- In carrying out this section, the Sentencing Commission is requested to--

- (1) ensure that the sentencing guidelines and policy statements reflect the serious nature of securities, pension, and accounting fraud and the need for aggressive and appropriate law enforcement action to prevent such offenses;
- (2) assure reasonable consistency with other relevant directives and with other guidelines;
- (3) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements;
- (4) ensure that guideline offense levels and enhancements for an obstruction of justice offense are adequate in cases where documents or other physical evidence are actually destroyed or fabricated;
- (5) ensure that the guideline offense levels and enhancements under United States Sentencing Guideline 2B1.1 (as in effect on the date of enactment of this Act) are sufficient for a fraud offense when the number of victims adversely involved is significantly greater than 50;
- (6) make any necessary conforming changes to the sentencing guidelines; and

(7) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553 (a)(2) of title 18, United States Code.

(c) EMERGENCY AUTHORITY AND DEADLINE FOR COMMISSION ACTION- The United States Sentencing Commission is requested to promulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than the 180 days after the date of enactment of this Act, in accordance with the procedures set forth in section 21(a) of the Sentencing Reform Act of 1987, as though the authority under that Act had not expired.

APPENDIX B

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

* * *

(b) Specific Offense Characteristics

(1) If the loss exceeded \$5,000, increase the offense level as follows:

<u>Loss</u> (Apply the Greatest)	<u>Increase in Level</u>
(A) \$5,000 or less	no increase
(B) More than \$5,000	add 2
(C) More than \$10,000	add 4
(D) More than \$30,000	add 6
(E) More than \$70,000	add 8
(F) More than \$120,000	add 10
(G) More than \$200,000	add 12
(H) More than \$400,000	add 14
(I) More than \$1,000,000	add 16
(J) More than \$2,500,000	add 18
(K) More than \$7,000,000	add 20
(L) More than \$20,000,000	add 22
(M) More than \$50,000,000	add 24
(N) More than \$100,000,000	add 26
(O) More than \$200,000,000	add 28
(P) More than \$400,000,000	add 30 .

~~(2) (Apply the greater) If the offense—~~

~~(A) (i) involved more than 10, but less than 50, victims; or (ii) was committed through mass-marketing, increase by **2** levels; or~~

~~(B) involved 50 or more victims, increase by **4** levels.~~

(2) (Apply the greatest) If the offense—

(A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by **2 levels;**

(B) involved 50 or more victims, increase by 4 levels; or

(C) involved 250 or more victims, increase by 6 levels.

* * *

(12) (Apply the greater) If—

* * *

~~(B) the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels.~~

(B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by 4 levels.

If the resulting offense level determined under subdivision (A) or (B) is less than level 24, increase to level 24.

* * *

(13) If the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or a director of a publicly traded company, increase by 4 levels.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1341-1344, 1348, 1350, 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992, 1993(a)(1), (a)(4), 2113(b), 2312-2317, 2332b(a)(1); 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Cultural heritage resource" has the meaning given that term in Application Note 1 of the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources).

"Equity securities" has the meaning given that term in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(11)).

* * *

"National cemetery" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

"Publicly traded company" means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). "Issuer" has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).

* * *

"Victim" means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. 'Person' includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

2. Loss Under Subsection (b)(1).—This application note applies to the determination of loss under subsection (b)(1).

* * *

(C) Estimation of Loss.—The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

* * *

(iii) The approximate number of victims multiplied by the average loss to each victim.

- (iv) *The reduction that resulted from the offense in the value of equity securities or other corporate assets.*
- (ivv) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*

* * *

3. Victim and Mass-Marketing Enhancement under *Application of Subsection (b)(2)*.—

(A) Definitions.—*For purposes of subsection (b)(2):*

~~(i) "Mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (I) purchase goods or services; (II) participate in a contest or sweepstakes; or (III) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.~~

~~(ii) "Victim" means (I) any person who sustained any part of the actual loss determined under subsection (b)(1); or (II) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.~~

(A) *Definition.*—*For purposes of subsection (b)(2), "mass-marketing" means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.*

(B) Undelivered United States Mail.—

(i) In General.—*In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, "victim" means any person (I) ~~described in subdivision (A)(ii) of this note~~ any victim as defined in *Application Note 1*; or (II) who was the intended recipient, or addressee, of the undelivered United States mail.*

(ii) Special Rule.—*A case described in subdivision (B)(i) of this note that*

involved a Postal Service (I) relay box; (II) collection box; (III) delivery vehicle; or (IV) satchel or cart, shall be considered to have involved *at least* 50 or more victims.

* * *

- (C) Vulnerable Victims.—If subsection (b)(2)(B) or (C) applies, an enhancement under §3A1.1(b)(2) shall not apply.

Application Notes 11 through 15 are redesignated as Notes 12 through 16, respectively.

~~10. Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under Subsection (b)(12)(B).—For purposes of subsection (b)(12)(B), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit, payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of any of subdivisions (A) through (D) of this note.~~

10. Application of Subsection (b)(12)(B).—

(A) Application of Subsection (b)(12)(B)(i).—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:

- (i) The financial institution became insolvent.
- (ii) The financial institution substantially reduced benefits to pensioners or insureds.
- (iii) The financial institution was unable on demand to refund fully any deposit, payment, or investment.
- (iv) The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.

(B) Application of Subsection (b)(12)(B)(ii).—

- (i) Definition.—For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).

(ii) *In General.*—*The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:*

- (I) *The organization became insolvent or suffered a substantial reduction in the value of its assets.*
- (II) *The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).*
- (III) *The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.*
- (IV) *The organization substantially reduced its workforce.*
- (V) *The organization substantially reduced its employee pension benefits.*
- (VI) *The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.*

11. *Application of Subsection (b)(13).*—

- (A) *Definition.*—*For purposes of this subsection, "securities law" (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.*
- (B) *In General.*—*A conviction under a securities law is not required in order for subsection (b)(13) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.*
- (C) *Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*—*If subsection (b)(13) applies, do not apply §3B1.3.*

* * *

156 Departure Considerations.—

(A) Upward Departure Considerations.—

* * *

~~(v) — The offense endangered the solvency or financial security of one or more victims.~~

Subdivisions (vi) and (vii) are redesignated as subdivisions (v) and (vi), respectively.

* * *

Background:

* * *

Subsection (b)(12)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

* * *

§2E5.3. **False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act; Destruction and Failure to Maintain Corporate Audit Records**

* * *

(a) Base Offense Level (Apply the greater):

(1) **6**; or

~~(2) — If the offense was committed to facilitate or conceal a theft or embezzlement, or an offense involving a bribe or a gratuity, apply §2B1.1 or §2E5.1, as applicable.~~

(2) If the offense was committed to facilitate or conceal (A) an offense involving a theft, a fraud, or an embezzlement; (B) an offense involving a bribe or a gratuity; or (C) an obstruction of justice offense, apply §2B1.1 (Theft, Property Destruction, and Fraud), §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations), or §2J1.2 (Obstruction of Justice), as applicable.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1027, 1520; 29 U.S.C. §§ 439, 461, 1131. For additional statutory provision(s), see Appendix A (Statutory Index).

* * *

§2J1.2. Obstruction of Justice

- (a) Base Offense Level: **1214**
- (b) Specific Offense Characteristics

* * *

- (3) If the offense (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document, or tangible object, to destroy or alter; or (C) was otherwise extensive in scope, planning, or preparation, increase by **2** levels.

* * *

Commentary

Statutory Provisions: 18 U.S.C. §§ 1503, 1505-1513, 1516, 1519. For additional statutory provision(s), see Appendix A (Statutory Index).

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§2T4.1. Tax Table

	<u>Tax Loss</u> (Apply the Greatest)	<u>Offense Level</u>
(A)	\$2,000 or less	6
(B)	More than \$2,000	8
(C)	More than \$5,000	10
(D)	More than \$12,500	12
(E)	More than \$30,000	14
(F)	More than \$80,000	16
(G)	More than \$200,000	18
(H)	More than \$400,000	20
(I)	More than \$1,000,000	22
(J)	More than \$2,500,000	24
(K)	More than \$7,000,000	26
(L)	More than \$20,000,000	28
(M)	More than \$50,000,000	30

(N)	More than \$100,000,000	32
(O)	More than \$200,000,000	34
(P)	More than \$400,000,000	36.

APPENDIX A - STATUTORY INDEX

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18 U.S.C. § 1347	2B1.1
18 U.S.C. § 1348	2B1.1
18 U.S.C. § 1349	2X1.1
18 U.S.C. § 1350	2B1.1

* * *

18 U.S.C. § 1512(c)	2J1.2
18 U.S.C. § 1512(e)(d)	2J1.2
18 U.S.C. § 1518	2J1.2
18 U.S.C. § 1519	2J1.2
18 U.S.C. § 1520	2E5.3

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APPENDIX C DATA SOURCES AND METHODOLOGY

COMMISSION MONITORING DATAFILES

The Commission's monitoring datafiles contain information collected from court documents (*i.e.* Presentence Investigation Reports, Judgement of Conviction Orders, and Statements of Reasons) for criminal felony and class A misdemeanor cases sentenced under the federal sentencing guidelines. For each case sentenced under the guidelines, the Commission routinely collects defendant demographics, statutes of conviction, sentencing guideline application, and sentence outcomes.¹

SAMPLE CATEGORIES

The Commission selected sample cases from its most recently available datafile, fiscal year 2001. Because offenders in this datafile were sentenced prior to the November 1, 2001 effective date of the economic crimes package, they were not subject to the modifications made to §2B1.1 at that time, including the consolidation of the theft, property destruction, and fraud guidelines and the revised loss table.

The Commission targeted specific categories of cases for analysis from its monitoring datafile. Sample categories were based on specific offenses addressed by the Act, specifically securities fraud, offenses involving officers and directors, fraud, and obstruction of justice.

The Commission selected securities fraud cases according to their statutes of conviction. All cases with at least one conviction under any of a specified group of statutes were selected.² A sample of 121 offenders who were convicted under one of these statutes and sentenced in fiscal year 2001 were identified through this selection method. This sampling method, however, did not account for offenders who were convicted under more general fraud statutes (*e.g.* wire fraud or mail fraud) and whose offense conduct involved a violation of securities law. Accordingly, this sample of 121 offenders underrepresents the actual number of offenders who violated a securities law in fiscal year 2001.

The Commission's monitoring datafile for individuals does not identify whether individual

¹ For more information on the Commission's monitoring datafiles, *see* USSC 2001 Sourcebook of Federal Sentencing Statistics and 2001 Annual Report.

² 12 U.S.C. § 631, 15 U.S.C. § 50, 15 U.S.C. § 77e, 15 U.S.C. § 77q, 15 U.S.C. § 77x, 15 U.S.C. § 78j, 15 U.S.C. § 78j-1, 15 U.S.C. § 78dd-1, 15 U.S.C. § 78dd-2, 15 U.S.C. § 78ff, 15 U.S.C. § 80b-6, 15 U.S.C. § 158, 15 U.S.C. § 645, 15 U.S.C. § 645(a), 15 U.S.C. § 645(b), 15 U.S.C. § 645(c), 15 U.S.C. § 714, 15 U.S.C. § 714m(a), 15 U.S.C. § 714m(b), 15 U.S.C. § 714m(c), and 15 U.S.C. § 1681q.

defendants are officers and directors. Therefore, in order to derive a sample the Commission identified “officers or board members”³ of organizations sentenced in fiscal years 2000 and 2001 and matched those results to the Commission’s fiscal year 2001 monitoring datafile for individual offenders. This method identified 47 offenders who were officers and directors involved in organizational offenses *and* who were sentenced for individual offenses. This is not a representative sample, however, and likely undercounts the number of officers or directors sentenced for federal offenses. For example, this method does not identify officers or directors who appear in the organizational datafile but do not have an individual conviction (or who were not convicted by fiscal year 2001, and does not include officers or directors with records in the monitoring datafile only.

A sample of 69 fraud offenders was selected to provide a comparison group for the other types of fraud. A 1.5 percent random sample was selected from fraud offenders who were sentenced under the fraud (§2F1.1) guideline, who were convicted of single counts other than single counts of mail fraud (18 U.S.C. § 1341) or wire fraud (18 U.S.C. §1343), and who did not receive a sentencing enhancement for abuse of position of trust under §3B1.3. This sample consists of 69 offenders.

The Commission reviewed all 101 cases sentenced under the obstruction of justice guideline, §2J1.2, in fiscal year 2001. Therefore, the obstruction of justice analysis provides information for the actual population of obstruction of justice offenders.

³ “Officer or board member” is the designation used in the organizational datafile.