

REVISED PROPOSED AMENDMENT: CORPORATE FRAUD

Synopsis of Proposed Amendment: *This proposed amendment (1) repromulgates as a permanent amendment the temporary, emergency amendment (effective January 25, 2003) implementing directives to the Commission contained in sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002 (the "Act"), Pub. L. 107-204; and (2) makes other related changes to several guidelines. The directives pertain to fraud and obstruction of justice offenses and require the Commission to promulgate amendments addressing, among other things, officers and directors of publicly traded companies who commit fraud and related offenses, 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.*

First, the proposed amendment provides options to modify §2B1.1 to provide alternative base offense levels of (A) level 7, if the offense of conviction carries a statutory maximum term of imprisonment of 20 years or more; or (B) 6, otherwise.

Second, the proposed amendment presents four options for revising the loss table in §2B1.1(b)(1). The proposed amendment also would make changes to the tax table in §2T4.1 that conform to any changes made to the loss table in §2B1.1.

Also with respect to loss, the proposed amendment includes the reduction that resulted from the offense in the value of equity securities or other corporate assets among the factors the court may consider in estimating loss under subsection (b)(1).

Third, the proposed amendment addresses the directive contained in section 1104 of the Act regarding fraud offenses involving significantly greater than 50 victims by expanding the victims table in §2B1.1(b)(2). Subsection (b)(2) provides a two level enhancement if the offense involved more than 10 but less than 50 victims, or was committed through mass-marketing, or a four level enhancement if the offense involved 50 or more victims. The proposed amendment provides an additional two levels, for a total of six levels, if the offense involved 250 or more victims.

Fourth, the proposed amendment modifies §2B1.1(b)(12)(B) to address directives contained in sections 805 and 1104 of the Act pertaining to securities and accounting fraud offenses and fraud offenses that endanger the solvency or financial security of a substantial number of victims. Subsection (b)(12)(B) provides 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 proposed amendment expands the scope of this enhancement by providing two additional prongs in response to the directive. The first 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. This prong of the enhancement is based on a presumption that if the offense endangered the solvency or financial security of an organization that was a publicly traded company or had 1,000 or more employees, the offense similarly affected a substantial number of individual victims. As a result, the court is not required to determine whether the offense endangered the solvency or financial security of each individual victim. The second prong applies to offenses that substantially endangered the solvency or financial security of 100 or more victims, regardless of whether a publicly traded company or other organization was affected by the offense. The court could apply this prong as an alternative to the first prong in cases in which there is sufficient evidence to determine that the amount of loss suffered by individual victims of the offense substantially endangered the solvency or financial security of the victims.

The corresponding application note to the new enhancement 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 a publicly traded company or an organization with 1,000 or more employees. The note includes references to insolvency, filing for bankruptcy, substantially reducing the value of the company's stock, and substantially reducing the company's workforce among the list of factors that the court shall consider when applying the new enhancement. The proposed amendment also modifies application of the other prong of subsection (b)(12), the financial institutions enhancement, to be consistent structurally with the new enhancement.

The proposed amendment differs from the temporary, emergency amendment by providing that the cumulative adjustment from application of both subsections (b)(2) and (b)(12)(B) shall not exceed 8 levels, except for application of the minimum offense level of 24, which applies to all subsection (b)(12) cases. This limitation is provided to account for the overlapping nature of these factors in some cases.

Fifth, the proposed amendment addresses the directive contained in section 1104 of the Act pertaining to fraud offenses committed by officers or directors of publicly traded corporations by providing a new four level enhancement at §2B1.1(b)(13). Under the emergency amendment version, the enhancement 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. This proposed amendment expands the scope of the enhancement to cover registered brokers and dealers and associated persons of a registered broker or dealer, and investment advisers and associated persons of an investment adviser. The proposed amendment also expands the enhancement to apply if the case involves a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or director of a futures commission merchant or introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator. The enhancement would apply regardless of whether the defendant was convicted under a specific securities fraud statute (e.g., 18 U.S.C. § 1348, a new offense created by the Act specifically prohibiting securities fraud), a specific commodities fraud statute, or under a general fraud statute (e.g., 18 U.S.C. § 1341 prohibiting wire fraud), provided that the offense involved a violation of securities law or commodities law. The corresponding application note provides that in cases in which the new enhancement applies, the current enhancement for abuse of position of trust at §3B1.3 (Abuse of Position of Trust or Use of Special Skill) does not apply.

Sixth, the proposed amendment implements the directives pertaining to obstruction of justice offenses contained in sections 805 and 1104 of the Act. First, the proposed amendment increases the base offense level in §2J1.2 (Obstruction of Justice) from level 12 to level 14. Second, the proposed amendment adds a new two level enhancement to §2J1.2 that applies if the offense (1) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (2) involved the selection of any essential or especially probative record, document, or tangible object to destroy or alter; or (3) was otherwise extensive in scope, planning, or preparation. A corresponding application note makes clear that the enhancement applies to electronic records, documents, and communications. Third, the proposed amendment provides an application note that encourages an upward departure if an obstruction of justice case involves an act of extreme violence.

The proposed amendment also increases the base offense level in §2J1.3(Perjury) to level 14 in order to conform to the same increase provided in §2J1.2(Obstruction of Justice).

Seventh, the proposed amendment addresses new offenses created by the Act. Section 1520 of title 18, United States Code, is referenced 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). This offense provides a statutory maximum of 10 years' imprisonment if the defendant certifies the publicly traded company's periodic financial report knowing that the statement does not comply with all requirements of the Securities and Exchange Commission (and 20 years' imprisonment if that certification is done willfully). The proposed amendment also expands the current cross reference in §2E5.3(a)(2) specifically to cover fraud and obstruction of justice offenses. Accordingly, if a defendant who is convicted under 18 U.S.C. § 1520 certified the financial report of a publicly traded company in order to facilitate a fraud, the proposed change to the cross reference provision would require the court to apply §2B1.1 instead of §2E5.3. Other new offenses are proposed to be included in Appendix A (Statutory Index) as well as the statutory provisions of the relevant guidelines.

Eighth, the proposed amendment provides an application note in §2J1.1 (Contempt) regarding application of §2B1.1 as the most analogous guideline in a case involving a violation of a judicial order enjoining fraudulent behavior.

Finally, the proposed amendment makes minor changes to the Background Commentary in §2B1.1 to correct a technical error.

Proposed Amendment:

§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

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

(a) **Base Offense Level:**

- (1) **7, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction (i) has a statutory maximum term of imprisonment of 20 years or more; or**
- (2) **6, otherwise.**

(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

[Option A:

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

Loss (Apply the Greatest)	Increase in Level
(A) \$5,000 or less	no increase
(B) More than \$5,000	add 2
(C) More than \$10,000	add 4
(D) More than \$25,000	add 6
(E) More than \$60,000	add 8
(F) More than \$100,000	add 10
(G) More than \$200,000	add 12
(H) More than \$400,000	add 14
(I) More than \$700,000	add 16
(J) More than \$1,000,000	add 18
(K) More than \$2,500,000	add 20
(L) More than \$7,000,000	add 22
(M) More than \$20,000,000	add 24
(N) More than \$50,000,000	add 26
(O) More than \$100,000,000	add 28
(P) More than \$200,000,000	add 30
(Q) More than \$400,000,000	add 32 .]

[Option B:

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

Loss (Apply the Greatest)	Increase in Level
(A) \$5,000 or less	no increase
(B) More than \$5,000	add 2
(C) More than \$10,000	add 4
(D) More than \$25,000	add 6
(E) More than \$50,000	add 8
(F) More than \$100,000	add 10
(G) More than \$200,000	add 12
(H) More than \$400,000	add 14

(I)	More than \$800,000	add 16
(J)	More than \$1,600,000	add 18
(K)	More than \$3,200,000	add 20
(L)	More than \$7,000,000	add 22
(M)	More than \$20,000,000	add 24
(N)	More than \$50,000,000	add 26
(O)	More than \$100,000,000	add 28
(P)	More than \$200,000,000	add 30
(Q)	More than \$400,000,000	add 32.]

[Option C:

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

Loss (Apply the Greatest)	Increase in Level	
(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 \$100,000	add 10
(G)	More than \$200,000	add 12
(H)	More than \$400,000	add 14
(I)	More than \$600,000	add 16
(J)	More than \$800,000	add 18
(K)	More than \$1,000,000	add 20
(L)	More than \$2,500,000	add 22
(M)	More than \$7,000,000	add 24
(N)	More than \$20,000,000	add 26
(O)	More than \$50,000,000	add 28
(P)	More than \$100,000,000	add 30
(Q)	More than \$200,000,000	add 32
(R)	More than \$400,000,000	add 34.]

[Option D:

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

<u>Loss (Apply the Greatest)</u>	<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 \$60,000	add 8
(F)	More than \$100,000	add 10
(G)	More than \$200,000	add 12

- (H) More than \$400,000 add **14**
- (I) More than \$800,000 add **16**
- (J) More than \$1,600,000 add **18**
- (K) More than \$3,200,000 add **20**
- (L) More than \$7,000,000 add **22**
- (M) More than \$20,000,000 add **24**
- (N) More than \$50,000,000 add **26**
- (O) More than \$100,000,000 add **28**
- (P) More than \$200,000,000 add **30**
- (Q) More than \$400,000,000 add **32.**]

~~(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.

(C) The cumulative adjustments from application of both subsections (b)(2) and (b)(12)(B) shall not exceed 8 levels, except as

provided in subdivision (D).

- (D) 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.~~

(13) If the offense involved—

- (A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or
- (B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator;

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.

[Redesignate notes 2 through 16 as notes 3 through 17, respectively.]

2. Application of Subsection (a)(1).—

(A) "Referenced to this guideline".—For purposes of subsection (a)(1), an offense is "referenced to this guideline" if (i) this guideline is the applicable Chapter Two guideline determined under the provisions of §1B1.2 (Applicable Guidelines) for the offense of conviction; or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which §2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.

(B) Definition of "Statutory Maximum Term of Imprisonment".—For purposes of this guideline, "statutory maximum term of imprisonment" means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.

(C) Base Offense Level Determination for Cases Involving Multiple Counts.—In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.

~~2.3.~~ 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.*

* * *

3.4. 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) *any person* 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.

* * *

~~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.~~

11. 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.*

†12. 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.~~

(A) Definitions.—For purposes of this subsection:

"Commodities law" means (i) the Commodities Exchange Act (7 U.S.C. § 1 et seq.); and (ii) includes the rules, regulations, and orders issued by the Commodities Futures Trading Commission.

"Commodity pool operator" has the meaning given that term in section 1a(4) of the Commodities Exchange Act (7 U.S.C. § 1a(4)).

"Commodity trading advisor" has the meaning given that term in section 1a(5) of the Commodities Exchange Act (7 U.S.C. § 1a(5)).

"Futures commission merchant" has the meaning given that term in section 1a(20) of the Commodities Exchange Act (7 U.S.C. § 1a(20)).

"Introducing broker" has the meaning given that term in section 1a(23) of the Commodities Exchange Act (7 U.S.C. § 1a(23)).

"Investment adviser" has the meaning given that term in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(11)).

"Person associated with a broker or dealer" has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(18)).

"Person associated with an investment adviser" has the meaning given that term in section of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(17)).

"Registered broker or dealer" has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(48)).

"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 or commodities 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 or commodities 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.*

* * *

~~16.17.~~ 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: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States). It also covers offenses involving altering or removing motor vehicle identification numbers, trafficking in automobiles or automobile parts with altered or obliterated identification numbers, odometer laws and regulations, obstructing correspondence, the falsification of documents or records relating to a benefit plan covered by the Employment Retirement Income Security Act, and the failure to maintain, or falsification of, documents required by the Labor Management Reporting and Disclosure Act.

* * *

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).

* * *

§2J1.1. Contempt

Apply §2X5.1 (Other Offenses).

Commentary

Statutory Provisions: 18 U.S.C. §§ 401, 228. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. ***In General.***—Because misconduct constituting contempt varies significantly and the nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are highly context-dependent, the Commission has not provided a specific guideline for this offense. In certain cases, the offense conduct will be sufficiently analogous to §2J1.2

(Obstruction of Justice) for that guideline to apply.

2. ***Willful Failure to Pay Court-ordered Child Support.***—For offenses involving the willful failure to pay court-ordered child support (violations of 18 U.S.C. § 228), the most analogous guideline is §2B1.1 (Theft, Property Destruction, and Fraud). The amount of the loss is the amount of child support that the defendant willfully failed to pay. *Note:* This guideline applies to second and subsequent offenses under 18 U.S.C. § 228(a)(1) and to any offense under 18 U.S.C. § 228(a)(2) and (3). A first offense under 18 U.S.C. § 228(a)(1) is not covered by this guideline because it is a Class B misdemeanor.
3. ***Violation of Judicial Order Enjoining Fraudulent Behavior.***—In a case involving a violation of a judicial order enjoining fraudulent behavior, the most analogous guideline is §2B1.1. In such a case, §2B1.1(b)(7)(C) (pertaining to a violation of a prior, specific judicial order) ordinarily would apply.

§2J1.2. Obstruction of Justice

- (a) Base Offense Level: ~~12~~**14**
- (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).

Application Notes:

1. ***Definitions.***—For purposes of this guideline:

"Records, documents, or tangible objects" includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.

"Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based

upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.

* * *

4. ***Upward Departure Considerations.**—If a weapon was used, or bodily injury or significant property damage resulted, ~~an~~ upward departure may be warranted. See Chapter Five, Part K (Departures). In a case involving an act of extreme violence (for example, retaliating against a government witness by throwing acid in the witness’s face), an upward departure would be warranted.*

* * *

§2J1.3. Perjury or Subornation of Perjury; Bribery of Witness

- (a) Base Offense Level: ~~12~~**14**

* * *

(CONFORMING CHANGES TO BE MADE TO TAX TABLE IN §2T1.4)

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

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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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