

## SECOND REVISED PROPOSED AMENDMENT: CORPORATE FRAUD

### Part A:

**Synopsis of Proposed Amendment:** *This proposed amendment implements directives to the Commission contained in sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204 (the "Act"). The directives pertain generally 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. The Act requires the Commission to promulgate guideline amendments under emergency amendment authority not later than January 25, 2003.*

*First, 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). Currently, subsection (b)(2) provides a two level enhancement if the offense involved 10 or more 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 victims or more.*

*Second, the proposed amendment modifies subsection (b)(12)(B) of §2B1.1 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) currently 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 jeopardized 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. Currently, the presence of any one of the enumerated factors automatically triggers application of the financial institutions enhancement. Under the proposed amendment, the application note to the financial institutions enhancement sets forth a non-exhaustive list of factors that the court shall consider in determining whether the offense substantially jeopardized the safety and soundness of a financial institution. The note includes references to insolvency, substantially reducing benefits to pensioners and insureds, and inability on demand to refund fully any deposit, payment, or investment, among the factors that the court shall consider when applying this enhancement.*

*Third, 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). 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. 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) 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. 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.*

*Pursuant to the corresponding application note, "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 ("SEC") pursuant to the provisions of law referred to in section 3(a)(47).*

*Fourth, the proposed amendment expands the loss table at subsection (b)(1). Currently, the loss table provides sentencing enhancements in two level increments up to a maximum of 26 levels for offenses in which the loss exceeded \$100,000,000. The proposed amendment provides two additional levels 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.*

*These proposed additions to the loss table would address congressional concern expressed in the Act regarding particularly extensive and serious fraud offenses, and would more fully effectuate increases in statutory maximum penalties, for example the increase in the statutory maximum penalties for wire fraud and mail fraud offenses from five to 20 years (section 903 of the Act). The proposed amendment also amends the tax table in §2T4.1 to conform to the proposed changes made to the loss table in §2B1.1.*

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

*Fifth, 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 (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.*

*Sixth, 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 SEC requirements (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.*

**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**

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(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 <b>2</b>
(C) More than \$10,000	add <b>4</b>
(D) More than \$30,000	add <b>6</b>
(E) More than \$70,000	add <b>8</b>
(F) More than \$120,000	add <b>10</b>
(G) More than \$200,000	add <b>12</b>
(H) More than \$400,000	add <b>14</b>
(I) More than \$1,000,000	add <b>16</b>
(J) More than \$2,500,000	add <b>18</b>
(K) More than \$7,000,000	add <b>20</b>
(L) More than \$20,000,000	add <b>22</b>
(M) More than \$50,000,000	add <b>24</b>
(N) More than \$100,000,000	add <b>26</b> ;
(O) <b>More than \$200,000,000</b>	<b>add 28</b>
(P) <b>More than \$400,000,000</b>	<b>add 30.</b>

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

- (A) (i) involved ~~more than 10 or more, 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; ~~or~~
- (C) **involved 250 or more victims, increase by 6 levels.**

\* \* \*

(12) (Apply the greater) If—

- (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels; or
- ~~(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 jeopardized 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:

\* \* \*

*"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)).*

*"Financial institution" includes any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical, or hospital insurance association; brokers and dealers registered, or required to be registered, with the*

Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," primarily include large pension funds that serve many persons (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

\* \* \*

"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).

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

\* \* \*

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

- (i) The fair market value of the property unlawfully taken or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.
- (ii) The cost of repairs to damaged property.
- (iii) The approximate number of victims multiplied by the average loss to each victim.
- (iv) The reduction in the value of equity securities or other corporate assets that resulted from the offense.
- ~~(iv)~~(v) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

9. Gross Receipts Enhancement under Subsection (b)(12)(A).—

- (A) *In General.*—For purposes of subsection (b)(12)(A), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.
- (B) *Definition.*—"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

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

~~*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.~~

(A) *Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under 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) *Enhancement for Endangering the Solvency or Financial Security of a Publicly Held Company or An Organization with More than 1,000 Employees under Subsection (b)(12)(B)(ii).*—

- (i) *Definitions.*—For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight). "Victim" has the meaning given that term in Application Note 3(A)(ii).

- (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 of the 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 jeopardized. 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) *Definitions.*—*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.*

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

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**§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) an offense involving a theft, ~~or fraud~~, or an embezzlement; (B) ~~or~~ an offense involving a bribe or a gratuity; or (C) an obstruction of justice offense, apply §2B1.1 (Theft, Fraud, and Property Destruction), ~~or~~ §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 (Perjury or Subornation of Perjury; Bribery of a Witness), 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: ~~12~~**14**
- (b) Specific Offense Characteristics
- (1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by **8** levels.
  - (2) If the offense resulted in substantial interference with the administration of justice, increase by **3** levels.

- (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.

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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	<b>6</b>
(B)	More than \$2,000	<b>8</b>
(C)	More than \$5,000	<b>10</b>
(D)	More than \$12,500	<b>12</b>
(E)	More than \$30,000	<b>14</b>
(F)	More than \$80,000	<b>16</b>
(G)	More than \$200,000	<b>18</b>
(H)	More than \$400,000	<b>20</b>
(I)	More than \$1,000,000	<b>22</b>
(J)	More than \$2,500,000	<b>24</b>
(K)	More than \$7,000,000	<b>26</b>
(L)	More than \$20,000,000	<b>28</b>
(M)	More than \$50,000,000	<b>30</b>
(N)	More than \$100,000,000	<b>32</b>
(O)	More than \$200,000,000	<b>34</b>
(P)	More than \$400,000,000	<b>36.</b>

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**APPENDIX A - STATUTORY INDEX**

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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**Part B:**

**Issues for Comment: Corporate Fraud**

**1. Issue for Comment:** *On January 8, 2003, the Commission promulgated a temporary, emergency amendment in response to directives contained in the Sarbanes-Oxley Act of 2002. The Commission specified an effective date of January 25, 2003, for the amendment, which will remain in effect until the Commission repromulgates the emergency amendment as a permanent amendment under the Commission's general promulgation authority at 28 U.S.C. § 994(p).*

(A) *As part of that emergency amendment, the Commission expanded the loss table in §2B1.1(b)(1). The amendment provided two additional levels 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. The Commission requests comment regarding whether, when it repromulgates the emergency amendment as a permanent amendment, the loss table should be modified more extensively to provide increased offenses levels for offenses involving lower loss amounts. The Commission requests comment specifically on the following two options and invites public comment on any other alternative loss table:*

*Section §2B1.1(b)(1) is amended to read as follows:*

*Option A:*

*"(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 \$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."

*Option B:*

*"(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 \$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."

*Additionally, the Commission requests comment regarding whether, when it repromulgates the emergency amendment as a permanent amendment, it should amend §2B1.1(a) to provide an alternative base offense level, either in conjunction with, or in lieu of, an amendment to the loss table, that would apply based on the statutory maximum term of imprisonment applicable to the offense of conviction. Specifically, the Commission requests comment on the following:*

*Section 2B1.1(a) is amended to read as follows:*

*"(a) Base Offense Level:*

- (1) 7, if the defendant was convicted of an offense referenced to this guideline for which the maximum term of imprisonment prescribed by law is [5][10][15][20] years or more; or*
- (2) 6, otherwise."*

- (B) As part of the emergency amendment, the Commission promulgated a new enhancement at §2B1.1(b)(13) that provides a four level enhancement 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 requests comment regarding whether, when it repromulgates the emergency amendment as a permanent amendment, it should expand the scope of §2B1.1(b)(13) to include other individuals or entities who may have a fiduciary or similar statutory duty of trust and confidence to the investor. For example, should the Commission include in §2B1.1(b)(13) 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 investment adviser (see 15 U.S.C. § 80b-2(a)(11)), or a person associated with*

*an investment adviser (see 15 U.S.C. § 80b-2(a)(17))? Additionally, should the Commission expand the scope of the enhancement to apply to entities or individuals that offer and manage securities, commodities, and futures but who are not regulated under securities law (as defined by the Commission in Application Note 11 of §2B1.1, effective January 25, 2003)? For example, should the enhancement apply in cases involving violations of the Commodities Exchange Act (7 U.S.C. § 1 et seq.) or other federal laws that govern the regulation of securities, commodities, and futures?*

*The Commission additionally requests comment regarding whether, when it repromulgates the emergency amendment as a permanent amendment, it should maintain the magnitude of the enhancement in §2B1.1(b)(13) at four levels. If not, what should be the magnitude of the enhancement?*

- 2. The Commission requests comment regarding whether it should provide separate guidelines for theft, fraud, and property destruction offenses that currently are referenced to §2B1.1. If the Commission provided separate guidelines for these offenses, what components of current §2B1.1 would be appropriate for each of the separate guidelines? Would the definition of "loss" need to be modified in any fashion as a result of providing separating guidelines? Should the Commission, in conjunction with or in lieu of separate guidelines, amend §2B1.1 to provide separate loss tables for theft and fraud offenses? If so, how should the Commission determine which table would be applicable to the offenses referenced to §2B1.1? For example, should the Commission use the pre-consolidation Appendix A references to determine which table would be applicable to an offense?*
- 3. The Commission has received information suggesting that in certain cases involving fraud-related contempt, courts have not applied the appropriate guideline. The relevant guideline, 2J1.1 (Contempt), directs the court to apply §2X1.5 (Other Offenses), which in turn instructs the court to apply the "most analogous guideline." Specifically, in certain cases in which the misconduct constituting contempt is a violation of a court order enjoining fraudulent behavior, courts inappropriately may have applied the obstruction of justice guideline, §2J1.2, instead of the guideline relating to fraud, §2B1.1 (Theft, Property Destruction, and Fraud). The Commission requests comment regarding whether this issue should be addressed and, if so, in what manner. For example, should the Commission add an application note to §2J1.1 that clarifies that for offenses in which the misconduct constituting contempt is a violation of a judicial order enjoining fraudulent behavior, the most analogous guideline is §2B1.1? Should the application note more generally state that for offenses in which the misconduct constituting contempt is fraud, the most analogous guideline is §2B1.1? In addition, the Commission has received information suggesting that the enhancement in §2B1.1(b)(7)(C) is not always applied as appropriate in cases involving fraud-related contempt. Should the Commission clarify, possibly in the same application note discussed above, that in contempt cases involving violations of court orders enjoining fraudulent behavior, the enhancement in §2B1.1(b)(7)(C) should apply?*

