

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Phlx consents, the Commission will:

(A) By order approve such proposed rule change, or,

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR-Phlx-2002-61 and should be submitted by February 12, 2003.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland,

Deputy Secretary.

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UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of promulgation of temporary, emergency amendments to the sentencing guidelines and commentary.

SUMMARY: The Commission has promulgated two temporary, emergency amendments to the sentencing guidelines as follows: (1) pursuant to sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, and its general authority under 28 U.S.C. 994, the Commission has promulgated amendments to §§ 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), 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), 2J1.2 (Obstruction of Justice), and 2T4.1 (Tax Table), and Appendix A (Statutory Index); and (2) pursuant to section 314 of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, and its general authority under 28 U.S.C. 994, the Commission has promulgated a new guideline in chapter two, part C (Offenses Involving Public Officials), and amendments to §§ 3D1.2 (Groups of Closely Related Counts), and 5E1.2 (Fines for Individual Defendants), and Appendix A (Statutory Index). The Commission also has requested public comment, to be submitted to the Commission not later than March 17, 2003, regarding repromulgation of these two temporary, emergency amendments as permanent amendments (see the issue of the **Federal Register** published on January 17, 2003).

DATES: The Commission has specified an effective date of January 25, 2003, for the temporary, emergency amendments set forth in this notice.

ADDRESSES: Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2-500, Washington, DC 20002-8002, Attention: Public Affairs.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502-4590.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May of each year pursuant to 28 U.S.C. 994(p). The Commission also may promulgate emergency amendments prior to the first day of May if required to do so by specific congressional legislation.

The Commission has promulgated two temporary, emergency guidelines in response to specific congressional legislation. First, in response to the Sarbanes-Oxley Act, the Commission has promulgated an amendment that increases the penalties for corporate fraud and offenses involving the obstruction of justice. Second, in response to the Bipartisan Campaign Reform Act of 2002, the Commission has promulgated an amendment that provides a new guideline and increased penalties for offenses involving a violation of Federal election campaign laws. The Commission has specified an effective date of January 25, 2003, for both amendments.

Additional information pertaining to the amendments described in this notice may be accessed through the Commission's website at www.ussc.gov.

Authority: Sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204; section 314 of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155; 28 U.S.C. 994(a), (o), (p), (x); USSC rules of practice and procedure, rule 4.4.

Diana E. Murphy,
Chair.

1. Corporate Fraud

Amendment: Section 2B1.1(b)(1) is amended by striking the period; and by adding at the end the following:

“(O) More than \$200,000,000 add 28
(P) More than \$400,000,000 add 30.”

Section 2B1.1 is amended by striking subsection (b)(2) as follows:

“(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.”,
and inserting the following:

¹² 17 CFR 200.30-3(a)(12).

“(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.”.

Section 2B1.1 is amended by striking subsection (b)(12)(B) as follows:

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

and inserting the following:

“(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.”.

Section 2B1.1(b) is amended by adding at the end the following:

“(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.”.

The Commentary to § 2B1.1 captioned “Statutory Provisions” is amended by inserting “1348, 1350,” after “1341–1344.”.

The Commentary to § 2B1.1 captioned “Application Notes” is amended in Note 1 by adding after “Resources.” the following new paragraph:

“‘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)).”;

by inserting after “Secretary of the Interior.” the following new paragraph:

“‘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).”;

and by adding at the end the following:

“‘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.”.

The Commentary to § 2B1.1 captioned “Application Notes” is amended in Note 2(C) by redesignating subdivision (iv) as (v); and by adding after subdivision (iii) the following new subdivision:

“(iv) The reduction that resulted from the offense in the value of equity securities or other corporate assets.”.

The Commentary to § 2B1.1 captioned “Application Notes” is amended in Note 3 by striking “Victim and Mass-Marketing Enhancement under” in the heading and inserting “Application of”; by striking subdivision (A) as follows:

“(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.”,

and inserting the following:

“(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.”;

in subdivision (B)(i)(I) by striking “described in subdivision (A)(ii) of this note;” and inserting “any victim as defined in Application Note 1;”; in subdivision (B)(ii)(IV) by inserting “at least” after “to have involved”; and in subdivision (C) by inserting “or (C)” after “(B)”.

The Commentary to § 2B1.1 captioned “Application Notes” is amended by redesignating Notes 11 through 15 as Notes 12 through 16, respectively.

The Commentary to § 2B1.1 captioned “Application Notes” is amended by striking Note 10 as follows:

“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.”,

and inserting the following:

“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.”

The Commentary to § 2B1.1 captioned “Application Notes” is amended in Note 16, as redesignated by this amendment, by striking subdivision (v) as follows:

“(v) The offense endangered the solvency or financial security of one or more victims.”;

and by redesignating subdivisions (vi) and (vii) as subdivisions (v) and (vi), respectively.

The Commentary to § 2B1.1 captioned “Background” is amended in the last paragraph by inserting “(i)” after “(B)”.

Section 2E5.3 is amended in the heading by adding at the end “; Destruction and Failure to Maintain Corporate Audit Records”.

Section 2E5.3 is amended by striking subsection (a)(2) as follows:

“(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.”;

and inserting the following:

“(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.”.

The Commentary to § 2E5.3 captioned “Statutory Provisions” is amended by inserting “§” before “1027”; and by inserting “, 1520” after “1027”.

Section 2J1.2(a) is amended by striking “12” and inserting “14”.

Section 2J1.2(b) is amended by adding at the end the following:

“(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.”.

The Commentary to § 2J1.2 captioned “Statutory Provisions” is amended by inserting “, 1519” after “1516”.

Section 2T4.1 is amended in the table by striking the period and adding at the end the following:

“(O) More than \$200,000,000 34
(P) More than \$400,000,000 36.”.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 1347 the following new lines:

“18 U.S.C. 1348 2B1.1
18 U.S.C. 1349 2X1.1
18 U.S.C. 1350 2B1.1”.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1512(c) by striking “(c)” and inserting “(d)”.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 1512(b) the following new line:

“18 U.S.C. 1512(c) 2J1.2”.

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 1518 the following new lines:

“18 U.S.C. 1519 2J1.2
18 U.S.C. 1520 2E5.3”.

Reason for Amendment: This 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”), by making several modifications to § 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) and § 2J1.2 (Obstruction of Justice). The directives pertain to serious fraud and related offenses and obstruction of justice offenses. The directives require the Commission under emergency amendment authority to promulgate 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.

First, the 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, subsection (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 determined that an enhancement of this magnitude appropriately responds to the pertinent directive and reflects the extensive nature of, and the large scale victimization caused by, such offenses.

Second, the amendment addresses 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. Specifically, section 805(a)(4) directs the Commission 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." In addition, section 1104(b)(1) directs the Commission to "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." The amendment implements these directives 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. 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. The addition of this prong reflects the Commission's determination that such an offense undermines the public's confidence in the securities and investment market 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. This prong 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, without requiring the court to determine whether the solvency or financial security of each individual victim was substantially endangered.

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 a publicly traded company or an organization with 1,000 or more employees. The list of factors 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, and other factors not enumerated in the application note could be considered by the court as appropriate.

The amendment also modifies the application note of the previously existing prong of § 2B1.1(b)(12)(B), the

financial institutions enhancement, to be consistent structurally with the new prongs of the enhancement. Prior to the amendment, the presence of any one of the factors enumerated in the application note would trigger the financial institutions enhancement under § 2B1.1(b)(12)(B). Under the 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 list of factors that the court shall consider when applying this enhancement includes references to insolvency, substantially reducing benefits to pensioners and insureds, and an inability to refund fully any deposit, payment, or investment on demand.

The second prong added to § 2B1.1(b)(12)(B) by the amendment 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 Commission concluded that the specificity of the directive in section 805(a)(4) required an enhancement focused specifically on conduct that endangers the financial security of individual victims. Thus, use of this prong of the enhancement will be appropriate in cases in which there is sufficient evidence for the court to determine that the amount of loss suffered by individual victims of the offense substantially endangered the solvency or financial security of those victims. The Commission also determined that the enhancement provided in § 2B1.1(b)(12)(B) shall 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.

Third, the amendment addresses the directive contained 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 appropriately reflects that an officer or director of a publicly traded company who commits such an offense violates certain heightened fiduciary duties imposed by securities law upon such individuals.

Accordingly, the court is not required to determine specifically whether the defendant abused a position of trust in order for the enhancement to apply, and 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.

The corresponding application note also expressly provides that 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 mail fraud), provided that the offense involved a violation of "securities law" as defined in the application note.

Fourth, the amendment expands the loss table at § 2B1.1(b)(1) to punish adequately offenses that cause catastrophic losses of magnitudes previously unforeseen, 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. These additions to the loss table 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 set forth in section 903 of the Act). The amendment also modifies the tax table in § 2T4.1 in a similar manner to maintain the longstanding proportional relationship between the loss table in § 2B1.1 and the tax table.

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.

Fifth, the amendment modifies § 2J1.2 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 specifically are adequate 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."

The amendment implements these directives by making two modifications to § 2J1.2. First, the amendment increases the base offense level in § 2J1.2 from level 12 to level 14. 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. 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 those particular factors described in section 805(a) of the Act.

Sixth, the amendment addresses new offenses created by the Act. Section 1520 of title 18, United States Code, relating to destruction of corporate audit records, 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; Destruction and Failure to Maintain Corporate Audit Records). Section 1520 provides a statutory maximum penalty of ten years' imprisonment for knowing and willful violations of document maintenance requirements as set forth in that section or in rules or regulations to be promulgated by the Securities and Exchange Commission pursuant to that section. The amendment also expands the existing 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 committed the offense in order to obstruct justice, the amendment to the cross reference provision requires the court to apply § 2J1.2 instead of § 2E5.3. Other new offenses are listed in Appendix A (Statutory Index), as well as in the statutory provisions of the relevant guidelines.

648. Amendment: Chapter two, part C is amended in the heading by adding at the end "and violations of Federal election campaign laws".

Chapter two, part C is amended by striking the introductory commentary as follows:

Introductory Commentary

The Commission believes that pre-guidelines sentencing practice did not adequately reflect the seriousness of public corruption offenses. Therefore, these guidelines provide for sentences that are considerably higher than average pre-guidelines practice."

Chapter two, part C is amended by adding at the end the following new guideline and accompanying commentary:

§ 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

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) If the value of the illegal transactions exceeded \$5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

(2) (Apply the greater) If the offense involved, directly or indirectly, an illegal transaction made by or received from—

(A) A foreign national, increase by two levels; or

(B) A government of a foreign country, increase by four levels.

(3) If (A) the offense involved the contribution, donation, solicitation, expenditure, disbursement, or receipt of governmental funds; or (B) the defendant committed the offense for the purpose of obtaining a specific, identifiable non-monetary Federal benefit, increase by two levels.

(4) If the defendant engaged in 30 or more illegal transactions, increase by two levels.

(5) If the offense involved a contribution, donation, solicitation, or expenditure made or obtained through intimidation, threat of pecuniary or other harm, or coercion, increase by four levels.

(c) Cross Reference

(1) If the offense involved a bribe or gratuity, apply § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than the offense level determined above.

Commentary

Statutory Provisions: 2 U.S.C. 437g(d)(1), 439a, 441a, 441a-1, 441b, 441c, 441d, 441e, 441f, 441g, 441h(a), 441i, 441k; 18 U.S.C. 607. For additional provision(s), see Statutory Index (Appendix A).

Application Notes:

1. Definitions.—For purposes of this guideline:

'Foreign national' has the meaning given that term in section 319(b) of the Federal Election Campaign Act of 1971, 2 U.S.C. 441e(b).

'Government of a foreign country' has the meaning given that term in section 1(e) of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611(e)).

'Governmental funds' means money, assets, or property, of the United States government, of a State government, or of a local government, including any branch, subdivision, department, agency, or other component of any such government. 'State' means any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, or American Samoa. 'Local government' means the government of a political subdivision of a State.

'Illegal transaction' means (A) any contribution, donation, solicitation, or expenditure of money or anything of value, or any other conduct, prohibited by the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*; (B) any contribution, donation, solicitation, or expenditure of money or anything of value made in excess of the amount of such contribution, donation,

solicitation, or expenditure that may be made under such Act; and (C) in the case of a violation of 18 U.S.C. 607, any solicitation or receipt of money or anything of value under that section. The terms 'contribution' and 'expenditure' have the meaning given those terms in section 301(8) and (9) of the Federal Election Campaign Act of 1971 (2 U.S.C. 431(8) and (9)), respectively.

2. Application of Subsection (b)(3)(B).—Subsection (b)(3)(B) provides an enhancement for a defendant who commits the offense for the purpose of achieving a specific, identifiable non-monetary Federal benefit that does not rise to the level of a bribe or a gratuity. Subsection (b)(3)(B) is not intended to apply to offenses under this guideline in which the defendant's only motivation for commission of the offense is generally to achieve increased visibility with, or heightened access to, public officials. Rather, subsection (b)(3)(B) is intended to apply to defendants who commit the offense to obtain a specific, identifiable non-monetary Federal benefit, such as a Presidential pardon or information proprietary to the government.

3. Application of Subsection (b)(4).—Subsection (b)(4) shall apply if the defendant engaged in any combination of 30 or more illegal transactions during the course of the offense, whether or not the illegal transactions resulted in a conviction for such conduct.

4. Departure Provision.—In a case in which the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted."

Section 3D1.2(d) is amended by inserting ", 2C1.8" after "2C1.7".

The Commentary to § 5E1.2 captioned "Application Notes" is amended in the second sentence of Note 5 by striking "and" after "Control Act;" and by inserting before the period at the end the following:

"; and 2 U.S.C. 437g(d)(1)(D), which authorizes, for violations of the Federal Election Campaign Act under 2 U.S.C. 441f, a fine up to the greater of \$50,000 or 1,000 percent of the amount of the violation, and which requires, in the case of such a violation, a minimum fine of not less than 300 percent of the amount of the violation.

There may be cases in which the defendant has entered into a conciliation agreement with the Federal Election Commission under section 309 of the Federal Election Campaign Act of 1971 in order to correct or prevent a

violation of such Act by the defendant. The existence of a conciliation agreement between the defendant and Federal Election Commission, and the extent of compliance with that conciliation agreement, may be appropriate factors in determining at what point within the applicable fine guideline range to sentence the defendant, unless the defendant began negotiations toward a conciliation agreement after becoming aware of a criminal investigation".

Appendix A (Statutory Index) is amended by inserting before the line referenced to 7 U.S.C. 6 the following new lines:

"2 U.S.C. 437g(d) 2C1.8
2 U.S.C. 439a 2C1.8
2 U.S.C. 441a 2C1.8
2 U.S.C. 441a-1 2C1.8
2 U.S.C. 441b 2C1.8
2 U.S.C. 441c 2C1.8
2 U.S.C. 441d 2C1.8
2 U.S.C. 441e 2C1.8
2 U.S.C. 441f 2C1.8
2 U.S.C. 441g 2C1.8
2 U.S.C. 441h(a) 2C1.8
2 U.S.C. 441i 2C1.8
2 U.S.C. 441k 2C1.8".

Appendix A (Statutory Index) is amended by inserting after the line referenced to 18 U.S.C. 597 the following new line:

"18 U.S.C. 607 2C1.8".

Reason for Amendment: This amendment implements the directive from Congress contained in the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, (the "BCRA") to the effect that the Commission "promulgate a guideline, or amend an existing guideline * * *, for penalties for violations of the Federal Election Campaign Act of 1971 (the "FECA") and related election laws * * *". The BCRA significantly increased statutory penalties for campaign finance crimes, formerly misdemeanors under the FECA. The new statutory maximum term of imprisonment for even the least serious of these offenses is now two years and for more serious offenses, the maximum term of imprisonment is five years.

To effectively punish these offenses, the Commission chose to create a new guideline at § 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). The Commission opted against simply amending an existing guideline because it determined after

review that the characteristics of election-violation cases did not bear sufficient similarity to cases sentenced under any existing guideline. The offenses which will be sentenced under § 2C1.8 include: violations of the statutory prohibitions against "soft money" (2 U.S.C. 441i); restrictions on "hard money" contributions (2 U.S.C. 441a); contributions by foreign nationals (2 U.S.C. 441e); restrictions on "electioneering communications" as defined at 2 U.S.C. 434(f)(3)(C); certain fraudulent misrepresentations (2 U.S.C. 441h); and "conduit contributions" (2 U.S.C. 441f).

The new guideline has a base offense level of level 8, which reflects the fact that these offenses, while they are somewhat similar to fraud offenses (sentenced under § 2B1.1 (Theft, Property Destruction, and Fraud) at a base offense level of level 6), generally are more serious due to the additional harm, or the potential harm, of corrupting the elective process.

The new guideline provides five specific offense characteristics to ensure appropriate penalty enhancements for aggravating conduct which may occur during the commission of certain campaign finance offenses. First, the new guideline provides a specific offense characteristic, at § 2C1.8(b)(1), that uses the fraud loss table in § 2B1.1 to incrementally increase the offense level in proportion to the monetary amounts involved in the illegal transactions. This both assures proportionality with penalties for fraud offenses and responds to Congress' directive to provide an enhancement for "a large aggregate amount of illegal contributions."

Second, the new guideline provides alternative enhancements, at § 2C1.8(b)(2), if the offense involved a foreign national (two levels) or a foreign government (four levels). These enhancements respond to another specific directive in the BCRA and reflect the seriousness of foreign entities attempting to tamper with the United States' election processes.

Third, the new guideline provides alternative two level enhancements, at § 2C1.8(b)(3), when the offense involves either "governmental funds," defined broadly to include Federal, State, or local funds, or an intent to derive "a specific, identifiable non-monetary Federal benefit" (e.g., a presidential pardon). Each of these enhancements responds to specific directives of the BCRA.

Fourth, the new guideline provides a two level enhancement, at subsection (b)(4), when the offender engages in "30 or more illegal transactions." After a

review of all campaign finance cases in the Commission's datafile, the Commission chose 30 transactions as the number best illustrative of a "large number" in that context. This enhancement also responds to a specific directive in the BCRA to the effect that the Commission provide enhanced sentencing for cases involving "a large number of illegal transactions."

Fifth, the new guideline provides a four level enhancement, at § 2C1.8(b)(5), if the offense involves the use of "intimidation, threat of pecuniary or other harm, or coercion." This enhancement responds to information received from the Federal Election Commission and the Public Integrity Section of the Department of Justice which characterizes offenses of this type as some of the most aggravated offenses committed under the FECA.

The new guideline also provides a cross reference, at subsection (c), which directs the sentencing court to apply either § 2C1.1 or § 2C1.2, as appropriate, if the offense involved a bribe or a gratuity and the resulting offense level would be greater than that determined under § 2C1.8.

Section 3D1.2 (Groups of Closely Related Counts) has been amended, consistent with the principles underlying the rules for grouping multiple counts of conviction, to include § 2C1.8 offenses among those in which the offense level is determined largely on the basis of the total amount of harm or loss or some other measure of aggregate harm. (See § 3D1.2(d)).

Finally, § 5E1.2 (Fines for Individual Defendants) has been amended to specifically reflect fine provisions unique to the FECA. This part of the amendment also provides that the defendant's participation in a conciliation agreement with the Federal Election Commission may be an appropriate factor for use in determining the specific fine within the applicable fine guideline range unless the defendant began negotiations with the Federal Election Commission after the defendant became aware that he or it was the subject of a criminal investigation.

[FR Doc. 03-1297 Filed 1-21-03; 8:45 am]

BILLING CODE 2211-01-P

SMALL BUSINESS ADMINISTRATION

Data Collection Available for Public Comments and Recommendations

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intentions to request approval on a new, and/or currently approved information collection.

DATES: Submit comments on or before March 24, 2003.

ADDRESSES: Send all comments regarding whether this information collections is necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collections, to Radwan Saade, Economist, Office of Advocacy, Small Business Administration, 409 3rd Street, SW., Suite 7800, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Radwan Saade, Economist, (202) 205-6878 or Curtis B. Rich, Management Analyst, (202) 205-7030.

SUPPLEMENTARY INFORMATION:
Title: Small Business Use of Telecommunication Services.

Form No: N/A.

Description of Respondents: Small Businesses.

Annual Responses: 5,000.

Annual Burden: 416.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. 03-1299 Filed 1-21-03; 8:45 am]

BILLING CODE 8025-01-P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. WTO/DS-264]

WTO Dispute Settlement Proceeding Regarding the U.S. Department of Commerce Final Antidumping Determination Concerning Certain Softwood Lumber From Canada

AGENCY: Office of the United States Trade Representative.

ACTION: Notice; request for comments.

SUMMARY: The Office of the United States Trade Representative ("USTR") is providing notice of the request by the Government of Canada for the establishment of a dispute settlement panel under the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement") to examine the U.S. Department of Commerce ("DOC") final determination of sales at less than fair value with respect to certain softwood lumber from Canada. The panel request alleges that the initiation of the investigation, the conduct of the investigation, and the

final determination are inconsistent with various provisions of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Implementation of Article VI of GATT 1994. USTR invites written comments from the public concerning the issues raised in this dispute.

DATES: Although USTR will accept any comments received during the course of the dispute settlement proceedings, comments should be submitted on or before February 21, 2003 to be assured of timely consideration by USTR.

ADDRESSES: Comments should be submitted (i) electronically, to FR0064@ustr.gov, Attn: "DS264 Dispute" in the subject line, or (ii) by fax, to Sandy McKinzy at 202-395-3640, with a confirmation copy sent electronically to the email address above.

FOR FURTHER INFORMATION CONTACT: Theodore R. Posner, Assistant General Counsel, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20508 (202) 395-3582.

SUPPLEMENTARY INFORMATION: Pursuant to section 127(b) of the Uruguay Round Agreements Act ("URAA") (19 U.S.C. 3537(b)(1)), the USTR is providing notice that on December 6, 2002, the Government of Canada submitted a request for establishment of a dispute settlement panel to examine the U.S. Department of Commerce ("DOC") final determination of sales at less than fair value with respect to certain softwood lumber from Canada.

Major Issues Raised and Legal Basis of the Complaint

The notice of the DOC final determination of sales at less than fair value with respect to certain softwood lumber from Canada was published in the **Federal Register** on April 2, 2002, and the notice of the DOC amended final determination was published on May 22, 2002. The notices explain the basis for the DOC's final determination that certain softwood lumber from Canada is being sold, or is likely to be sold, in the United States at less than fair value.

In its request for establishment of a dispute settlement panel, Canada describes its claims in the following manner:

The measures at issue include the initiation of the investigation, the conduct of the investigation, the Final Determination and the resulting Anti-dumping Order on Softwood Lumber from Canada. The Government of Canada considers these measures and, in particular, the determinations made and methodologies