

Commission contained in sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002 (the "Act"), Public Law 107-204. 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.

Under emergency amendment authority, the Commission promulgated guideline amendments, effective January 25, 2003, to implement these directives and now seeks comment on the following proposed permanent amendment.

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 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.

Second, 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) 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 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. 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" (1) 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 (2) includes the rules, regulations, and orders issued by the Securities and Exchange Commission 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 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).

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