

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.

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 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.

Proposed 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(b)(2) is amended to read as follows:

“(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(b)(12)(B) is amended to read as follows:

“(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) 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 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 1000 employees was substantially endangered: