

Loss (apply the greatest)	Increase in level
(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."

Option C:

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

Loss (apply the greatest)	Increase in level
(A) \$5,000 or less	no increase
(B) More than \$5,000	add 2
(C) More than \$10,000	add 4
(D) More than \$30,000	add 6
(E) More than \$70,000	add 8
(F) More than \$100,000	add 10
(G) More than \$200,000	add 12
(H) More than \$400,000	add 14
(I) More than \$600,000	add 16
(J) More than \$800,000	add 18
(K) More than \$1,000,000	add 20
(L) More than \$2,500,000	add 22
(M) More than \$7,000,000	add 24
(N) More than \$20,000,000	add 26
(O) More than \$50,000,000	add 28
(P) More than \$100,000,000	add 30
(Q) More than \$200,000,000	add 32
(R) More than \$400,000,000	add 34."

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 amending § 2B1.1(a) 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, property destruction, and fraud 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 separate 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 § 2X5.1 (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?

4. The emergency amendment effective January 25, 2003, increased the base offense level in § 2J1.2 (Obstruction of Justice) from level 12 to level 14 and provided a new enhancement in § 2J1.2 addressing the directive relating to the destruction of evidence and offenses that are otherwise extensive in scope, planning, or preparation. The Commission requests comment regarding whether, in light of these changes to § 2J1.2, modifications also should be made to § 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness) in order to maintain proportionate sentencing between these two guidelines. For example, should the Commission increase the base offense level in § 2J1.3 or increase the magnitude of the enhancement of the current specific offense characteristics?

2. Campaign Finance

Synopsis of Proposed Amendment

This proposed amendment responds to the Bipartisan Campaign Reform Act of 2002 (the "Act"), Public Law 107-155. Under emergency amendment authority, the Commission promulgated a temporary amendment, effective January 25, 2003, to implement the Act.