

“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), 2J1.2 (Obstruction of Justice), and 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), as well as conforming changes to §§ 2J1.1 (Contempt), 2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), and 2T4.1 (Tax Table). The amendment also responds to increased statutory penalties for existing crimes and several severely punished new crimes created by the Act.

The directives in the Act generally pertain to serious fraud and related offenses and obstruction of justice offenses. Congress gave the Commission 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. This amendment expands upon the temporary emergency amendment effective January 25, 2003, and repromulgates it as a permanent amendment.

First, the amendment modifies the base offense level in § 2B1.1 to implement more fully the directive contained in section 905(b)(2) of the Act to consider whether the guidelines “for violations of the sections amended by this Act are sufficient to deter and punish such offenses, and specifically, are adequate in view of the statutory increases in penalties contained in this Act.” Section 903 of the Act, for example, quadrupled the statutory maximum penalties for wire fraud and mail fraud from five to 20 years’ imprisonment, while section 902 made attempts and conspiracies subject to these same heightened penalties. Specifically, the amendment provides a new higher alternative base offense level of level 7 if the defendant was convicted of an offense referenced to § 2B1.1 and

the offense carries a statutory maximum term of imprisonment of 20 years or more. The alternative base offense levels are intended to calibrate better the base guideline penalty to the seriousness of the wide variety of offenses referenced to that guideline, as reflected by statutory maximum penalties established by Congress.

For those offenses to which the higher alternative base offense will apply (including wire fraud and mail fraud), the effect of the amendment is to limit the availability of a probation only sentence in Zone A of the sentencing table to offenses involving loss amounts of \$10,000 or less, assuming a two level reduction for acceptance of responsibility. Prior to the amendment, a Zone A sentence was available for all offenses sentenced under § 2B1.1 involving loss amounts of \$30,000 or less. Similarly, for those offenses for which the higher alternative base offense level will apply, the effect of the amendment is to require an imprisonment sentence in Zone D for offenses involving loss amounts of more than \$70,000. Prior to the amendment, a Zone D sentence was required for all offenses sentenced under § 2B1.1 involving loss amounts of more than \$120,000.

Second, 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 emergency 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 also more fully effectuate increases in statutory maximum penalties provided by 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 3(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.

Third, 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 emergency 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 accounts for the extensive nature of, and the large scale victimization caused by, such offenses.

Fourth, 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 emergency amendment, § 2B1.1(b)(12)(B) provided a four level enhancement and a minimum offense