

(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