

**COMMENTS OF
THE NEW YORK COUNCIL OF DEFENSE LAWYERS
REGARDING PROPOSED JANUARY 17, 2003 AMENDMENTS TO
THE SENTENCING GUIDELINES**

**Respectfully submitted,
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Once again, we would like to thank the Sentencing Commission for the opportunity to present our views on the proposed amendments. The New York Council of Defense Lawyers ("NYCDL") is an organization comprised of more than 150 attorneys whose principal area of practice is the defense of criminal cases in federal court. Many of our members are former Assistant United States Attorneys, including previous chiefs of the Criminal Division in the Southern and Eastern Districts of New York. Our membership also includes attorneys from the Federal Defender Services offices in the Eastern and Southern Districts of New York.

Our members thus have gained familiarity with the Sentencing Guidelines both as prosecutors and as defense lawyers. In the pages that follow, we address those of the proposed amendments and Requests for Comment published in the Federal Registry on January 17, 2003 which are of interest to our organization.

The contributors to these comments, members of the NYCDL's Sentencing Guidelines Committee, are Brian Maas, Chairman and Jacqueline Wolff, Nick DeFeis, Steven Kimelman and Michael Miller.

OVERVIEW

The NYCDL applauds the Commission in its promulgation of emergency amendments to the Guidelines that respond to the Congressional directive in the Sarbanes-Oxley Act of 2002 (the "Act") to address the Enron debacle and other recent large-scale corporate frauds. However, we have substantial concerns that certain of the emergency amendments upon which the Commission seeks comment as well as some of the additional amendments requested by the Department of Justice in its December 18, 2002 letter to the Commission and are the subjects of Requests for Comment go far beyond Congress's directives under the Act. Specifically, the NYCDL objects to those emergency and proposed amendments that would (i) modify the fraud loss table to increase offense levels for lower loss amounts, (ii) increase the fraud base offense level, (iii) provide a four level enhancement, simply because the defendant is an officer or director of a public company, rather than the two level enhancement for "abuse of trust", without any consideration of the size of the company or number of victims, and (iv) require an enhancement based on endangering the financial security of an organization if such endangerment can be established by events common to most small and medium sized companies in the current economic climate, whether defrauded or not, such as, for example, a substantial reduction in a company's workforce or a substantial reduction in the value of the company's stock. In short, as discussed below in our specific responses to the Issues for Comment set out in both the December 18 and January 17 public notices, the NYCDL objects to any amendments to the guidelines or to the commentaries to any

specific guideline that do not target the sort of large scale massive fraud cases with multiple victims that was the primary focus of Sarbanes-Oxley..

Congress' directive to the Commission was made very clear when enacting Sarbanes-Oxley: that is, that the Commission is to "review and *consider* enhancing as *appropriate* criminal penalties in cases involving obstruction of justice and *serious* fraud cases." 148 Cong. Rec. § 7418 (emphasis supplied). Therefore, as a preliminary matter, enhancements are required only if "appropriate". This comports with the Commission's own view of one of its functions to amend the guidelines "as necessary". An Overview of the United States Sentencing Commission, at p. 4, available at <http://www.ussc.gov/general.htm>.

Amendments affecting smaller or "garden-variety" fraud cases can hardly be deemed "appropriate" or "necessary" given the Commission's recent amendments issued pursuant to the Economic Crime Package and effective only since November 1, 2001. The Commission, as is its responsibility, spent years gathering statistics, inviting comment and drafting enhancement provisions prior to promulgating those amendments. Now, we respectfully submit, the Commission must give the courts time to apply these amendments in order for the Commission to conduct further research to determine how the new amendments affect the various goals of sentencing including just punishment, deterrence, incapacitation, rehabilitation and certainty and fairness in sentencing. Only after such a review can the Commission determine whether enacting additional

enhancements or further modifying the loss table for smaller fraud cases is necessary to meet those goals.¹

Furthermore, even if the lack of time to review the effect of the recent amendments would not stand as a bar to additional enhancements, the Commission has not had enough time to consider the need for and potential impact of any enhancements other than those specifically targeted by the Act's sponsors. Commissioner O'Neill himself stated when indicating his concern as to the lack of time Congress has given the Commission to study the issues, "we're not exactly sure what the proper course is." "Panel Clears Harsher Terms in Corporate Crime Cases," New York Times, p. C1, col. 5, at p. C4, col. 6 (January 9, 2003). Having recently enacted a comprehensive revision to the fraud guidelines, including an upward revision of the fraud table, the Commission, an independent agency in the judicial branch of the government, should not now allow current political concerns to prompt an increase in the punishment of financial crimes which will necessarily impact both victims and defendants alike for a lifetime.

Indeed, Congress did not suggest at the time it passed Sarbanes-Oxley that changes other than those specifically called for to address the "investor's crisis of confidence" caused by Enron and other grand scale frauds should be considered by the Commission at this time. As Congress stated, "[S]pecifically the Commission is

¹ The Commission's Report to Congress: Increased Penalties Under the Sarbanes-Oxley Act of 2002 repeatedly points out the lack of reliable data for recently enacted amendments that were used as the basis for the current emergency amendments. For example the amendment providing an enhancement for a fraud endangering the solvency or financial security of a public company or organization with over 1000 employees is based on the just recently enacted amendment providing an enhancement for jeopardizing the safety and soundness of a financial institution. The Report points out that it has no reliable data available on the latter as to its application by the Courts. p. 4. The same is true with respect to the significant changes made to the fraud loss tables in November 2001. The Commission is only receiving relevant data now. The NYCDL respectfully asks how can the commission determine whether an amendment is necessary if it has insufficient information as to the use and affect of the current guideline?

requested to review the fraud guidelines and consider enhancements for cases involving *significantly greater than 50 victims* and cases in which the solvency or *financial security of a substantial number of victims is endangered.*" Id. [emphasis supplied] The legislative history of the Act is packed with references to Enron and the hope that the new legislation and accompanying guidelines will prevent cases like Enron from occurring in the future. As Commissioner Sessions himself recognized, "The law says 'serious' fraud case. We have to do what Congress says." Id. at p. C4, col. 5.

While it is generally accepted that the punishment for "serious" fraud should be influenced in part by the amount of the loss and the number of victims, some of the enhancements included in the emergency amendments as well as some of those suggested in the Issues for Comment run the risk of unnecessarily enhancing guideline sentences for small frauds leading only to more downward departures and inconsistent sentences. Thus, our overriding concern in these comments is that several of the aforementioned proposed and emergency amendments go far beyond the clear directives set forth in the Act, and were promulgated or are being contemplated without the Commission's usual careful review and study. Moreover, we are concerned that were certain of the emergency amendments to become permanent, the result would be a series of unintended consequences, all of which are contrary to the goals of the Commission.

ISSUES FOR COMMENT

1. (A) Proposed Modification of Loss Table for Lower Loss Amounts

Two years ago, criminal defense organizations like ours objected to many elements of the economic crime package proposed by the Commission including the proposal to modify the loss table to increase the penalties across the board. While some of the proposed changes were not adopted, the changes to the loss table were approved based on data collected by the Commission over a substantial period of time that the Commission and others interpreted as demonstrating that white collar defendants were not receiving sufficiently harsh sentences for fraud offenses. Before the changes in the loss table were approved, the Commission had proposed several variations of changes to the table, some more and some less harsh than the table that was ultimately approved.

Although the NYCDL was disappointed that the loss tables were changed as they were, because we did not believe that the data warranted the change, there is no question that the modifications were not enacted until there had been substantial opportunity for the Commission to analyze available data⁸³ and for the public to comment on the proposals. Over multiple amendment cycles, the Commission clearly wrestled with the question of the fairness of the loss tables. The Commission published its data which it contended supported the change and the public had ample opportunity to respond and comment. Moreover, the changes were implemented as part of a comprehensive review of the guidelines governing economic crimes which created public confidence both in the process and in the result.

No such confidence can attend a change in the loss table at the present time. While Congress in the Sarbanes-Oxley Act directed that the loss table be amended

to add more severe offense levels for losses which exceed the current maximum loss amount of \$100,000,000, no such direction was given to the rest of the loss table. While Congress' direction was based on a belief that massive frauds at companies like Enron and Worldcom, which resulted in losses in excess of \$100,000,000, warranted greater penalties than currently available under the loss table, no belief was expressed that the current table, as amended in November 2001, was not adequately punishing offenders who participated in frauds where the losses were less than \$100,000,000. Thus, any change at this time to the overall loss table would constitute inappropriate reaction to the general anger at business misconduct without any evidence whatsoever that any further change in the tables is warranted. We believe that the Commission's credibility built up over the many amendment cycles in which the Economic Crime Package evolved, will be jeopardized by any precipitous action at this time.

Each of the three loss tables included by the Commission in this Request for Comment as possible options lowers the amount of loss that would trigger particular offense level enhancements at all levels of the loss tables except for frauds with losses less than \$10,000. These proposed changes would lower the loss triggers from those included in the new table that was enacted less than eighteen months ago in November 2001, which itself implemented a substantial lowering of the loss triggers from the loss table that had previously been in effect. Thus, as an example, the threshold for a ten point enhancement which required a loss of more than \$500,000 prior to November 2001, and now requires a loss of more than \$120,000, would be reduced to a loss of \$100,000 under all three of the proposed tables. Such a defendant, even if she pleads guilty, and is subject to no other enhancements (an unlikely possibility), would be sentenced at an

offense level of thirteen (13) and would be sentenced to at least one year in prison. This same defendant would currently be sentenced at a level eleven (12) in Zone C, and prior to November 2001, would have been sentenced at offense level ten (10) in Zone B.

That it would be a mistake to change the loss table at this time is highlighted by the fact that the second Request for Comment is seeking input into whether the Commission should decouple the theft guidelines from the fraud guidelines. Having merged the two tables as recently as November 2001, the only reason that the Commission could be considering decoupling of the tables at this time is the concern that the fraud table is becoming inappropriately draconian for "mere" property crimes. In fact, the merging of the tables made sense in November 2001 as the loss factors supporting the sentencing for a property crime should not be affected by whether the loss resulted from fraud or from theft. Thus, the mere fact that the Commission is concerned that it may need to separate the Guidelines should be instructive as whether there is any basis for amending the table for fraud at this time.

The loss tables represent the central element in the guidelines for the sentencing of financial crimes. The legitimacy of the guidelines depends in no small degree on a belief among the participants in the system, including the judges, that the gradations in the loss table are based on empirical evidence and have resulted from a deliberative process in which all of the participants in the system have had ample input into the proposed changes. As there is no evidence to support any change to the loss table at this time, and since there has not been time for the sort of input from the public that such changes should warrant, any new change in the loss tables would substantially undermine the legitimacy of the process. Thus, we strongly urge the Commission to limit

its amendment to the loss table to the addition of two additional levels for losses in excess of \$100,000,000.

For the same reason, the NYCDL opposes any change in the base offense level for fraud offenses. To the extent that Congress increases the statutory maximum for certain fraud offenses, the Commission is proposing other enhancements that will insure that defendants convicted under these statutes will receive greater sentences than are now being imposed. To also increase the base offense level at the same time is to impose an improper form of double counting. The base offense level of six (6) for all financial crimes has been in effect for many years and there is no evidence that it is not an appropriate starting point for the sentencing of economic crimes.

1. (B) Proposed Amendment to Guideline § 2B1.1(b)(13)

The NYCDL strongly urges the Commission not to make permanent the four-level enhancement for defendants who are officers or directors of publicly traded companies and also urges the Commission not to extend this enhancement to other individuals with a fiduciary or statutory duty of trust to investors. The guidelines have always included a two (2) point enhancement for abuse of positions of trust under § 3B1.3 which has regularly been applied to persons such as investment advisors and registered representatives. To the extent that the Commission feels that the guidelines are unclear as to whether such persons in the securities or investment business are covered, an amendment to the Application Notes would clarify the applicability of this section.

As to officers and directors of public companies, the Commission made the judgment in the initial proposed emergency amendments to add a two-point enhancement for such persons. The NYCDL recognizes that Sarbanes-Oxley specifically instructed the Commission to consider such an enhancement for officers and directors of public companies and perceived the proposed two-level enhancement as essentially a clarification that these classes of person are subject to the Abuse of Position of Trust enhancement.

However, the four-level enhancement for any officer or director of public company which was included in the emergency amendment as enacted is unnecessarily harsh. First, by failing to distinguish between the size of the company or the size of the fraud, the four-level enhancement can result in a doubling of the sentence for a participant in a \$120,000 fraud while this enhancement will result in a much smaller proportionate increase in the sentence for a participant in a fraud on the scale of

Enron/Worldcom. Such a disparity is inconsistent with the goals of Sarbanes-Oxley to punish the perpetrators of the massive frauds that undermine the public's confidence in this economic system.

Second, as the Commission implicitly recognized by seeking comment on whether to expand the reach of the four-level enhancement to all fiduciaries in the investment community, a sentencing distinction between officers and directors of public companies and these other fiduciaries is difficult to justify. Just as the stockbroker participant in a \$100,000 fraud warrants a certain enhancement for the loss and a two point enhancement for abuse of the position of trust, so the officer of a small public company whose misconduct results in a \$100,000 loss should be subject to the same fraudulent enhancement.

Finally, although Sarbanes-Oxley was enacted in response to concerns about financial misconduct at publicly traded companies, the Sentencing Commission is charged with devising a sentencing system that minimizes disparity and creates parity within classes of defendants. Thus, in considering an enhancement based on the equivalent of an abuse of a position of trust, the Commission should create an enhancement that treats officers or directors who abuse their positions similarly to other fiduciaries such as attorneys or trustees who have abused their positions of trust. Given that the Commission has not developed evidence suggesting that the two-level enhancement at § 3B1.3 is inadequate for these people, the new enhancement for officers and directors should only be a two-level enhancement.

1. (B) Proposed Amendments to Guideline §2B1.1(b)(12)

The NYCDL generally opposes the amendments to Guideline § 2B1.1(b)(12), which, among other things, add 4 levels to the offense score for frauds that endanger the solvency or “financial security” (whatever this means) of (1) publicly traded companies or companies that have 1000 or more employees or (2) 100 or more victims. Additionally, such offenses are subject to a minimum offense level of 24, which level corresponds to imprisonment terms of 51 to 63 months. Prior to these amendments, only offenses that affected “financial institutions” qualified for such enhanced penalties under § 2B1.1 (or formerly, § 2F1.1). Now, offenses involving all publicly traded companies and large employers will be punished more harshly than offenses against other entities.

Although the application notes contain some helpful commentary regarding the amendments, they make no effort to mitigate the double-counting involved when the enhancements are applied to offense levels that have already been inflated by other emergency amendments that address the same harms. Moreover, they cover many more companies than the large publicly traded companies whose loose accounting and other problems prompted the emergency amendments in the first instance.

The amendments are not entirely objectionable. For instance, Application Note 10 (E) has been eliminated. This Note stated that the enhancement for “substantially jeopardizing the safety and soundness of a financial institution” should be applied whenever the institution was placed in “substantial jeopardy” of becoming insolvent (Note 10 (A)), or reducing benefits to pensioners or insureds (10 (B)), or being unable to refund deposits and the like (10 (C)), or merging with another institution because of asset depletion (10 (D)). Now the actual evils described in Notes 10 (A)

through 10 (D) must have occurred in order for the enhancements to apply. For example, actual insolvency (Note 10 (A)) rather than “substantial jeopardy” of insolvency (formerly permitted under Note 10 (E)) must be established. This change should reduce litigation over the meaning and application of the vague standard of “substantial jeopardy” and promote more accurate fact-finding. As such, it is one helpful feature of the amendments.

Unfortunately, this commendable change is overshadowed by several negative and possibly unintended consequences of the amendments. First, the enhancements and minimum offense levels (and consequent punishment) apply to far too many potential defendants. They apply to fraudulent conduct at *any* publicly traded company – whether the subject security is liquid or illiquid; whether it trades on a major exchange or only on the so-called “bulletin board” or “pink sheets.” To be sure, frauds involving marginal or thinly-traded companies must be (and are) punished. The NYCDL, however, reminds the Commission that these are not the frauds that compelled the emergency amendments.

On a second and related note, these amendments lack any type of asset test or similar proxy for their application to publicly traded companies. (Notably, companies that are not publicly traded must have 1000 or more employees for the amendments to apply. Employment at these levels would be a reasonable proxy for a certain level of assets or revenue). Among the factors that now weigh in favor of enhanced punishment is whether the organization suffered a “substantial reduction in the value of its assets” or whether it “substantially reduced” its workforce. (See new Application Notes 10 (B) (ii) (I) and (IV)). Publicly traded companies can be quite small. The NYCDL does not

believe that an offense that contributed to layoffs at a small publicly traded company warrants the punishment called for by the emergency amendments. These amendments, if made permanent, should require threshold levels of employment and/or assets for the enhanced penalties.

The NYCDL objects to the factors listed in the application notes to support an enhancement for endangering the solvency and financial security of a public company or organization of over 1000 employees on other grounds as well. It is fundamentally sound to hold a defendant accountable for factors over which he has control. The imposition of enhancements for factors just as likely due to the current economic climate than due to the defendant's actions runs contrary to current case law where losses resulting from acts over which the defendant had no control are routinely excluded. See e.g., United States v. Marlatt, 24 F.3d 1005 (7th Cir. 1994) ("The reason for the distinction is no doubt to prevent the sentencing hearing from turning into a tort or contract suit."); United States v. Barker, 89 F.3d 851; 1996 WL 294141, at *2 (10th Cir.) (Mem.) ("This policy prevents a sentencing proceeding from becoming a tort or contract action, and promotes uniformity in sentencing."); United States v. Dadonna, 34 F.3d 163, 170-72 (3d Cir. 1994); United States v. Izydore, 167 F.3d 213, 223 (5th Cir. 1999).

The NYCDL is also concerned that the amendments do not take into account the possibility that there may be "double-counting" when a victim of an offense involving multiple victims under 2B1.1(b)(2) counts as an employee for the purposes of determining whether a company that had more than 1000 employees was "substantially endangered." The same person should not count as a victim for the purposes of 2B1.1(b)(2) and employee for the purposes of 2B1.1(b)(12).

Finally, the amendments also provide for enhanced punishment when an offense “substantially endangered the *solvency* or *financial security* of 100 or more victims.” (emphasis supplied). Once again, we have a potential double-counting issue when some of these victims are also victims for the purposes of 2B1.1(b)(2) – or even triple-counting if these are employees for the purposes of 2B1.1(b)(12). More significantly, the Application Notes contain absolutely no guidance on the meaning of this language. The definition of “solvency” might not engender major debate, but the same cannot be said about “financial security.” Is the test objective or subjective? Does it apply only when a victim’s standard of living has been reduced to subsistence levels or whenever it has changed dramatically? Does the forced sale of one out of two (or more) vacation homes evidence a loss of financial security? Additionally, do dependents of victims also count as victims for the purposes of this provision? Unless the Commission can provide guidance on these fundamental issues, the NYCDL believes this provision should be stricken as confusing and redundant when viewed in light of other amendments, and thus unnecessary to achieve the ends of the emergency amendments.

Amendments to Application Notes in the Commentary to § 2B1.1

The U.S.S.G. Commission proposes to amend the Application Notes in the Commentary to Section 2B1.1 to permit courts to estimate loss by reference to “the reduction that resulted from the offense in the value of equity securities or other corporate assets.” We believe that this method of valuation, particularly as it applies to equity securities, is neither workable nor appropriate.

First, an enormous number of factors effect the market valuation of a publicly-traded company. Without even attempting to offer an exhaustive list, we note that market value is often effected by general economic cycles, volatility in particular market sectors (e.g., semiconductor stocks are generally more volatile than consumer staple stocks), and the financial health and/or consolidation of peers, suppliers and customers. In addition, news unrelated to a specific company, like a threat of war or changes in interest rates, can have significant impact on its share price. Any effort to pin loss valuations on such a complex, multi-faceted analysis will require significant research, expert testimony, and complicated and lengthy sentencing hearings. Given this complexity, it seems likely that a vigorous defense will often demonstrate that the court lacks reliable proof linking a drop in market value to a specific criminal act. Not all defendants, of course, will be able to afford to mount such an effective defense at sentencing, which raises the prospect that defendants will receive vastly disproportionate sentences based on the economic status of the defendant.

Second, even if it were feasible to efficiently and reliably link criminal conduct with stock value, this analysis will often offer an inappropriate measure of “loss.” This is particularly true with the accounting disclosure cases which have

triggered this proposed amendment. In those cases, the share price of a company's stock falls to, and often past, its true value when the accounting irregularities are eventually revealed to the public. Many shareholders will not suffer any real loss, however, having purchased shares before the value of the company was inflated. It would clearly work an injustice to any defendant whose term of incarceration is pegged to a drop in equity value where the actual investor did not realize a true loss.

This proposed amendment should not be adopted.

Fraud Related Contempt

With respect to the Commission's Request for Comment concerning the guideline treatment of fraud related contempt, the NYCDL urges the Commission to resist the Department of Justice request to amend this guideline so that all "fraud contempt" violations are governed by the fraud guidelines instead of the obstruction guidelines. We believe that such an amendment would in effect punish a defendant for committing a crime, to wit, fraud, without the government having to prove its case beyond a "reasonable doubt" and would grossly distort the sentencing process so that a criminal contempt of a court order arising out of a civil fraud action would be sentenced more harshly than a criminal contempt arising out of a civil action unrelated to fraud.

While conceding that courts normally and appropriately sentence defendants convicted of fraud-related contempts using fraud guideline, the government's submission nevertheless suggests that the application notes to the Contempt Guideline, § 2J1.1, should state clearly that the guideline for fraud and deceit applies to fraud-related contempts. Presently, the guideline for contempt directs courts to rely on § 2X5.1, which provides that where no express guideline exists for a particular offense, courts should use the most analogous offense guideline. The direction in § 2X5.1 is clear and it is also clear, as the government concedes, that most courts apply the most analogous guideline offense to fraud-related contempts: the fraud guideline. The government's reliance on only one obviously exceptional case (United States v. Kenneth Sterling, No. 0:99 Cr 06105-001 (S.D. Fla. Nov. 5, 1999) to demonstrate the need for change, moreover, fails to show that there is a widespread problem in the application of § 2J1.1 to the application

notes for fraud-related contempts. In fact, the government concedes that most courts apply the fraud offense guideline.

The government's proposed change contravenes the spirit of the Contempt Application Notes, which seek to provide courts flexibility in determining the appropriate offense guideline for contempts given the nature of that offense. The government has failed to make the case that the Sentencing Commission should limit the discretion it provided courts when it crafted § 2J1.1 and drafted the application notes. If the government is concerned about those rare instances where courts do not prudently exercise the discretion the Sentencing Commission provided for contempts, the government's remedy is to appeal those sentences.

The government argues that confusion exists over whether the enhancement set forth in § 2B1.1(b)(7) applies if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines, such as a violation of a condition of release (§ 2J1.7) or a violation of probation (§ 4A1.1). The government, however, cites only two cases in support of its view that courts are confused over when to apply the enhancement in § 2B1.1(b)(7). It is worth noting that one of the cases on which the government relies, United States v. Lonny Remmers, No. CR-98-4-LHM (C.D. Cal., Nov. 23, 1998) was decided nearly five years ago. Thus, whatever confusion may exist over the application of the enhancement is obviously limited to a handful of cases, at best.

We believe that § 2B1.1(b)(7) is clear that where a fraud offense is related to the violation of a prior judicial order, a two-point enhancement is warranted. Otherwise, a violation of a court order arising from a civil fraud claim should be punished

in a similar manner to violations of other court orders. In those rare instances where courts fail to appreciate the clear language of the guideline and its commentary, the government's remedy is to appeal the sentence.

Amendment to § 2J1.2, Obstruction of Justice

Following its emergency amendment of § 2J1.2, Obstruction of Justice, on January 25, 2003, the U.S. Sentencing Guidelines Commission invited public comment on the two primary changes instituted: (1) an increase in the offense base level from a 12 to a 14; and (2) an additional two point adjustment to be applied “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.” *See* Supplement to the 2002 Sentencing Guidelines § 2J1.2(b)(3). Notwithstanding Congress’ recent mandate for increased maximum penalties for defendants guilty of destroying or altering documents material to an on-going investigation (from ten to twenty years),² the combined effect of these guideline changes is both unnecessary and unwise.

Prior to the emergency amendment, the Sentencing Guidelines already provide the Courts ample resources to sentence defendants guilty of destroying or altering probative material or documents. Starting with U.S.S.G. § 2J1.2’s existing base level of 12, the guideline already provided a three-level enhancement for any “substantial interference with the administration of justice.” U.S.S.G. § 2J1.2(b)(2). Courts may apply this upward adjustment if the defendant’s conduct resulted in (a) “a premature or improper termination of a felony investigation”; (b) “an indictment, verdict or any judicial determination based upon perjury, false testimony, or other false evidence”; or

² *Cf.* 18 U.S.C. §1519 and 18 U.S.C. §1503.

(c) “the unnecessary expenditure of substantial governmental or court resources.” *Id.* at Application Note 1. In order to base this enhancement on an unnecessary expenditure of resources (U.S.S.G. § 2J1.2(b)(2), the government must merely “(1) identify a particular expenditure of governmental resources (time or money); (2) which but for the defendant’s conduct would not have been expended; and (3) was ‘substantial’ in amount, as that adjective is used in common parlance.” *United States v. Weissman*, 22 F. Supp. 2d 187, 196 (S.D.N.Y. 1998) (applying the collective holdings of various Circuit Court decisions, including the First, Second, Seventh and Tenth Courts of Appeal).

The emergency amendment added a two-level enhancement if (a) the defendant destroyed, altered or fabricated a substantial number of documents; (b) the defendant selected any “essential or especially probative” record to destroy or alter; or (c) the defendant’s obstruction was extensive in scope or planning. *See* Supplement to the 2002 Sentencing Guidelines § 2J1.2(b)(3). Thus, the proposed amendment, if made permanent, would appear to subject a defendant to a potential five-level enhancement under subsections (b)(2) and (b)(3). In our view, the conduct set forth in proposed subsection (b)(3) is already taken into account by the “substantial interference” enhancement already set forth in subsection (b)(2). Adding the (b)(2) enhancement to the (b)(3) enhancement, therefore, would constitute impermissible double-counting.

We also believe subsection (b)(3)(B) of the emergency amendment should be removed entirely from the Obstruction Guideline. *See* § 2J1.2, Application Note 1; §3B1.1, Application Note 3; *Weissman*, 22 F. Supp. at 194-195. Its text, based on a defendant’s “selection of any *essential or especially probative* record...to destroy or alter,” introduces an unacceptable level of subjectivity and doubt into the sentencing

process without any guidance from the Sentencing Commission's Application Notes. Moreover, the conduct described would seem to be already covered as an "attempt" under the current Sentencing Guidelines. *See* Supplement to the 2002 Sentencing Guidelines § 2J1.2(b)(3)(B).

It is respectfully suggested that the Sentencing Commission (i) return the base level of § 2J1.2 to "12" in line with similar offenses (i.e., perjury); (ii) remove subsection (b)(3)(B) entirely; and (iii) make emergency amendment subsections (b)(3)(A) and (C) additional means by which a Court may impose a three-level enhancement under § 2J1.2(b)(2). *See* Appendix A. These changes achieve several important goals. They recognize and fairly reflect Congress' will to strongly deter and punish criminal defendants guilty of "substantial" or "extensive" document destruction or alteration as in the Enron/Anderson prosecutions. Two of the three suggested courses of conduct that most troubled Congress, i.e., the destruction and alteration of a substantial number of documents relevant to a criminal investigation and an extensively planned and executed obstruction of justice, would now specifically be appropriate candidates for three-level enhancements. By moving them into subsection (b)(2), the Sentencing Commission provides additional clarity and definition to these specific acts and avoids a potential double counting issue. Finally, by removing emergency amendment (b)(3)(B) from consideration, the Sentencing Commission spares the government, the defense bar and the Courts the inevitable problems of dealing with unduly subjective and undefined language already covered as an attempt by the Sentencing Guidelines.

APPENDIX A

§ 2J1.2. Obstruction of Justice

(a) Base Offense Level: 12

(b) Specific Offense Characteristics

(1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by 8 levels.

(2) If the offense (A) resulted in substantial interference with the administration of justice; (B) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; or (C) was otherwise extensive in scope, planning, or preparation, increase by 3 levels.

(c) Cross Reference

(1) If the offense involved obstructing the investigation or prosecution of a criminal offense, apply § 2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1503, 1505-1513, 1516, 1519. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. "Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.

2. For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation or trial of the obstruction of justice count.

3. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense that is the object of the obstruction), see the Commentary to Chapter Three, Part C (Obstruction), and to § 3D1.2(c) (Groups of Closely Related Counts).

4. If a weapon was used, or bodily injury or significant property damage resulted, a departure may be warranted. See Chapter Five, Part K (Departures).

5. The inclusion of "property damage" under subsection (b)(1) is designed to address cases in which property damage is caused or threatened as a means of intimidation or retaliation (e.g., to intimidate a witness from, or retaliate against a witness for, testifying). Subsection (b)(1) is not intended to apply, for example, where the offense consisted of destroying a ledger containing an incriminating entry.

Background: This section addresses offenses involving the obstruction of justice generally prosecuted under the above-referenced statutory provisions. Numerous offenses of varying seriousness may constitute obstruction of justice: using threats or force to intimidate or influence a juror or federal officer; obstructing a civil or administrative proceeding; stealing or altering court records; unlawfully intercepting grand jury deliberations; obstructing a criminal investigation; obstructing a state or local investigation of illegal gambling; using intimidation or force to influence testimony, alter evidence, evade legal process, or obstruct the communication of a judge or law enforcement officer; or causing a witness bodily injury or property damage in retaliation for providing testimony, information or evidence in a federal proceeding. The conduct that gives rise to the violation may, therefore, range from a mere threat to an act of extreme violence. The specific offense characteristics reflect the more serious forms of obstruction. Because the conduct covered by this guideline is frequently part of an effort to avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense, a cross reference to §2X3.1 (Accessory After the Fact) is provided. Use of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 172-174); November 1, 1991 (see Appendix C, amendment 401); January 25, 2003 (see Appendix C, amendment 647).