The Sentencing Commission's Implementation of the Sarbanes-Oxley Act

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Note: The views expressed herein are the author's own and do not necessarily represent the official position of the U.S. Sentencing Commission.

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The landmark Sarbanes-Oxley Act of 2002 (the Act)[1] is directed principally toward civil regulatory mechanisms to reform corporate accounting procedures and governance. However, a secondary but very important purpose of this legislation is to augment the reach and potential sting of federal criminal law. The Act's changes in crimes and penalties, and associated directives, have been a major focus of the United States Sentencing Commission in recent months as it hastened to implement a series of temporary emergency amendments to the federal sentencing guidelines. The Commission then promptly moved to turn these recently promulgated emergency guideline amendments into more permanent sentencing rules.

This article will describe the Sentencing Commission's implementation of the pertinent Sarbanes-Oxley criminal provisions. It will do so within the broader context of discussing the sentencing guidelines for economic crimes committed by both individuals and organizations. This discussion begins with a brief review of the historical development and evolution of the guidelines for individual defendants convicted of theft, fraud, and closely-related property crimes.

Historical Development of the Economic Crime Guidelines

The group of commissioners who developed the initial sentencing guidelines for individual defendants used a systematic approach, which included a rather sophisticated measurement of past sentencing practices. Analyzing this research, the Commission noted some apparent inequities. For example, generally speaking, "blue-collar" theft and property destruction offenses were being sentenced more severely than "white-collar" fraud offenses that caused comparable dollar harm. Furthermore, economic crimes generally were punished less severely than other criminal conduct that the Commission considered to be of equivalent seriousness.[2] That first group of commissioners also carefully studied the Commission's organic statute and its legislative history. They found therein strong indications that Congress wanted the Commission to toughen the sentences for fraud, embezzlement, and other economic crimes.[3] The Commission did just that, reducing substantially the general availability of probation sentences, and increasing the likelihood that "white-collar"criminals would have to spend some time in jail (although their average imprisonment sentences would remain relatively short). For example, under the sentencing guidelines as initially promulgated, the percentage of fraud defendants sentenced to straight probation was projected to drop from 59% to 24%, but the average time served for all fraud defendants was expected to increase by only one month, from 7.0 to 8.0 months. For income tax violators, the number sentenced to straight probation was

projected to drop from 57% to 3%, while average time served was estimated to grow from 5.5 months to 11.9 months.[4] This first Commission was motivated by a belief that brief but certain sentences of imprisonment would help deter, as well as more appropriately punish, these types of crimes.[5]

The first sentencing guidelines for individuals took effect for crimes occurring on or after November 1, 1987. Though initially there were separate guidelines for theft-related offenses, fraud offenses, and property destruction offenses, the guidelines for each of these offense categories were conceptually similar and provided comparable punishment for offenses causing monetary harm of more than $2000.00. While each guideline had some unique factors to be taken into account, each relied principally on the dollar loss and a specific offense characteristic entitled "more than minimal planning" to measure offense seriousness. Soon after the guidelines took effect, Congress began directing the Commission to provide more stringent punishment for certain categories of economic crimes of particular concern to Congress at the time. This process has continued over the intervening years leading up to and including Sarbanes-Oxley.

For example, in 1988 Congress, reacting to major defense procurement frauds, instructed the Commission to add a penalty for fraud offenses involving a conscious or reckless risk of serious bodily injury.[6] In 1989 and again in 1990, the defrauding of financial institutions was the legislative focus. The

Commission was told to add major additional enhancements for bank and savings institution frauds and embezzlements that "substantially jeopardized the soundness" of these institutions or that resulted in huge ill-gotten gains for individual defendants.[7] In a similar vein, over the years prior to Sarbanes-Oxley, Congress used legislative instructions to the Commission as the mechanism to accomplish heightened punishment for the following types of economic crimes: (1) frauds against the elderly, (2) international currency counterfeiting, (3) computer crimes, (4) electronic copyright infringement, (5) telemarketing fraud, (6) cellular telephone cloning, (7) identify theft, and (8) higher education financial assistance fraud.[8] In each instance, the Commission endeavored to appropriately implement the congressional intent, and did so in most instances by adding targeted guideline enhancements for the particular category of criminal conduct of concern.[9]

Along the way, the Commission also has made significant modifications of the economic crime guidelines on its own initiative. These changes occurred in response to the Commission's general statutory mandate to continuously monitor and analyze sentences imposed under the guidelines, and to evaluate comments from the federal criminal justice community.[10] Of particular note, in 1989 the Commission changed the severity gradations of the monetary loss table for various economic crimes so that offenses involving substantial losses would be subject to somewhat longer prison terms.[11] Then, beginning in the mid-1990s and

culminating in amendments effective November 1, 2001, the Commission comprehensively revised these guidelines, a project worthy of discussion in some detail.

The 2001 Economic Crime Amendments Package

The 2001 Economic Crime Package was the first comprehensive revision of the federal sentencing guidelines for an entire category of similar crimes. It was accomplished after a detailed study of data and case law, extensive hearings and public comment (including a major symposium in the fall of 2000), and field testing of a draft guideline proposal. The project was a collaborative effort involving the Department of Justice, the Criminal Law Committee of the Judicial Conference and many individual judges, federal probation officers, defense attorneys, and academic professionals.[12]

The amendments package had the following major components: (1) consolidation of structurally similar guidelines, (2) revision of key specific offense characteristics, (3) a comprehensive re-write of the definition of "loss," (4) modification of the loss monetary table to punish small-loss offenses somewhat less severely and large-loss offenses substantially more severely, and (5) conforming amendments to the tax offense loss table and other guidelines.[13]

In order to ensure more consistent sentencing treatment of conceptually similar and comparably serious offenses, the amendment consolidated the three separate guidelines covering (1) theft, embezzlement, and stolen property trafficking, (2) property damage or destruction, and (3) fraud, forgery, and counterfeiting, into one comprehensive guideline. This consolidation decision was a logical extension of the rationalizing process employed by the initial Commission when it sought to more nearly equate the punishment for these similar offenses but accomplished this using separate offense guidelines. Over time, however, usage experience indicated inconsistencies in the choice of guideline for similar offenses, particularly in the case of hybrid, theft-fraud crimes such as embezzlement. Because of the commonality of the loss tables for amounts greater than $2000 in each offense guideline, and because of several duplicative specific offense characteristics, the Commission determined that a single, consolidated guideline, coupled with a unified loss table and a comprehensive revised definition of loss, would generally simplify guideline application and better promote core Sentencing Reform Act objectives.[14]

The process of guideline consolidation, and particularly a desire to resolve conflicting circuit court interpretations of guideline language, motivated the Commission to review carefully each specific offense characteristic in the consolidated guideline and make a number of linguistic modifications. The Commission also eliminated one characteristic – more than minimal planning –

that had become routinely applicable in nearly all fraud offenses and in the vast majority of theft offenses. Although nearly always found by the court, this characteristic had produced an inordinate amount of litigation in both the sentencing and appellate courts. The Commission, therefore, decided to eliminate this litigious factor that failed to meaningfully distinguish offenses. At the same time, the Commission retained and perfected a more narrowly tailored enhancement for "sophisticated means."[15] This factor had been added to the fraud guideline in response to a congressional directive aimed at telemarketing offenses.[11]

The Commission also added a factor to enhance economic crime sentences when the offense adversely affected numerous victims. A mass marketing enhancement that was devised as a broader response to congressional instructions about telemarketing crimes provided the foundation for this expanded specific offense characteristic. The revised factor provided a two-level enhancement (equating to an average sentence increase of about 25%) if the offense involved mass marketing or caused an actual loss for more than ten victims. If 50 or more victims suffered a loss, an additional increase of two offense levels (total enhancement of four levels or about 50%) would be required.[11] This multiple victims enhancement is one of the guideline components upon which Congress and the Commission focused in Sarbanes-Oxley.

The Economic Crime Package's wholesale re-working of the loss definition was motivated by a desire to promote greater consistency in determining pecuniary harm across the wide spectrum of theft, fraud, and property destruction offenses. At the same time, there was a desire to afford maximum judicial flexibility in choosing the most appropriate and practicable method of approximating the monetary harm resulting from the particular offense. The revised "loss" definition retained the core concept of using the greater of the "actual" or the "intended" loss to measure pecuniary harm. It incorporated several pragmatic considerations, such as uniformly excluding interest costs and prosecution expenses from the loss determination. It sought to promote fairness by crediting against loss any repayment of money, return of property, or provision of promised services, completed prior to the detection of the offense. This reconciled previously conflicting rules for theft and fraud offenses.

The revised and consolidated guideline continues to base punishment primarily on the pecuniary harm resulting from these offenses; however, in the new unified monetary loss table, the quantum of punishment associated with a given amount of pecuniary harm was re-graded. Reflecting a pragmatic compromise, the Commission effectively drew a "line" of demarcation at the $70,000-$120,000 loss category. All other things being equal, offenses with loss amounts of $70,000 or less were punished somewhat less severely. A principal purpose of the modest guideline penalty reductions, in the Commission's view,

was expanding the availability of non-imprisonment sentencing alternatives. In turn, it was hoped that allowing defendants to remain productive in the community would enhance the likelihood of their paying restitution to victims.[11] To illustrate the impact of this change, a first offender who conducted a planned embezzlement of $65,000, pleaded guilty (indicating acceptance of responsibility for the offense), and was subject to no other guideline enhancements, could qualify for a probation/home confinement or other non-imprisonment sentencing option (*e.g.*, probation with six months home detention). Under the former guideline, the same defendant would have been required to spend at least four months in prison, with an additional four months in community or home confinement.

In contrast to these modest expansions of guideline leniency, the Commission increased the punishment gradient above the $120,000 demarcation line and did so substantially for offenses causing much higher dollar losses. For example, an offense causing a $1 million loss (with more than minimal planning assumed) was graded three levels more severely than under the previous guidelines, approximating a sentence increase of about ten months (guideline range enhanced from 24-30 months to 33-41 months, again assuming a two-level reduction for acceptance of responsibility). Large loss offenses exceeding $100 million face a revised guideline range of 97-121 months, up from 51-63 months (using the same assumptions of offense and offender characteristics). Finally,

along with this bottom-to-top severity re-grading, the Commission issued a revised monetary table that employed two-level increments in lieu of one-level increments. Designed to facilitate judicial fact-finding, this table effectively increased the range of loss amounts corresponding to a given offense level and compressed the table from 19 to 14 loss categories.

Criminal Provisions of The Sarbanes-Oxley Act and The Commission's Procedural Response

The criminal provisions of Sarbanes-Oxley, contained in titles VIII, IX, and XI of the Act, generally fall into the following categories: (1) new offenses involving destruction of corporate records, securities fraud, and falsification of financial reports, (2) enhanced penalties or expanded reach of existing criminal statutes, including quadrupling the maximum penalty for mail and wire fraud (from five to 20 years' imprisonment), and equating the maximum penalties for fraud attempts and conspiracies with the penalties for the underlying substantive offense, and (3) a series of overlapping, general and specific directives to the Sentencing Commission regarding desired changes in the relevant sentencing guidelines. The latter included a command that the Commission complete its work under emergency amendment procedures within 180 days of the Act's July 30, 2002, effective date.

The Sentencing Commission began its work immediately last summer upon enactment of the new law, meeting monthly to consider the relevant issues. In November, the Commission published for public comment a series of proposed temporary, emergency amendments.[11] On January 8, 2003, the Commission adopted modified versions of these amendments and made them effective January 25, 2003. After an additional comment period and public hearing, the Commission will modify these proposals as necessary and submit them to Congress as "permanent" amendments by May 1. Absent congressional action to modify or reject them, these superseding amendments will then take effect on November 1, 2003, when the emergency amendments expire by law.

Substance of the Emergency Guideline Amendments

1. Fraud Offenses

The Commission's implementation of Sarbanes-Oxley sought to fairly reflect the congressional will as expressed in three different sets of directives, and particularly focused on the more specific of those instructions. One such directive, contained in section 1104(b)(5) of the Act, requested the Commission to "ensure that the guideline offense levels and enhancements under ... [guideline 2B1.1.] ... are sufficient for a fraud offense when the number of victims adversely involved is significantly greater than 50." In response to this expression, the

Commission added a third tier to the multiple victim enhancement constructed in the 2001 Economic Crime Package. The additional enhancement provides another two-level increase, for a total of six levels, if the offense caused an actual loss for 250 or more victims. The number 250 was not scientifically determined, but continues the ten-fold progression existing between the first and second tiers of this "multiple victims table." It also reflects the Commission's analysis of sentencing data showing that more than one quarter of securities fraud offenses involved 250 or more victims, and a general Commission view that large-scale victimization of this magnitude generally warrants almost doubling of the sentence.[22]

The second part of the Commission's Sarbanes-Oxley amendment responds to directive language in section 805(a)(4) of the Act. This subsection requires the Commission to ensure that "a specific offense characteristic enhancing sentencing is provided under ... guideline 2B1.1 ... for a fraud offense that endangers the solvency or financial security of a substantial number of victims." The Commission assumed from this language that Congress was looking for an enhancement analogous to the existing, four-level guideline specific offense characteristic (now found at §2B1.1(b)(12)(B)) applicable to economic crimes that endanger the solvency of a financial institution.[22] Accordingly, this part of the Commission emergency amendment focuses primarily on corporate crimes that similarly endanger the financial security of a

large number of employees, pensioners, or other investors. As constructed, it provides for a three-prong enhancement of the same magnitude as the existing financial institution provision, applicable to offenses that endanger the solvency or financial security of (1) a publicly-traded company, (2) another organization employing 1,000 or more persons, or (3) 100 or more individual victims. After careful consideration of the precise language of the Act and public comment, the Commission concluded that the third prong (focusing on 100 or more individual victims) was a necessary augmentation of the other two prongs, which are designed to provide reasonable and readily provable proxies for the kind of financial harm Congress intended. To assist the courts in making the assessment of financial security endangerment, the Commission provided a non-exclusive listing of pertinent measuring factors (*e.g.*, bankruptcy filing, substantial workforce reduction).[22]

In addition to the two victim-oriented enhancements, another specific directive, in section 1104(a)(2) of the Act, focuses on culpable corporate actors. It instructs the Commission to "provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses." The emergency amendment directly addresses this concern by providing a new four-level enhancement if the offense involves a violation of securities law and the defendant is a corporate officer or director at the time of the offense. Those familiar with the sentencing guidelines will recall that there is a long standing

guideline upward adjustment for defendants who abuse a position of public or private trust in committing an offense.[22] The Commission's analysis of relevant sentencing practices found, somewhat surprisingly, that this existing "Abuse of Trust" enhancement was applied to less than one-third of 35 officers or directors convicted of securities fraud offenses in fiscal year 2001.[22] The Commission concluded that (1) compliance with the pertinent directive required an increase in sentence beyond that obtainable under the existing two-level, section 3B1.3 Abuse of Trust adjustment, and (2) the essence of that enhancement should be assumed in cases involving corporate officer/director defendants. Hence, the emergency amendment provides a four-level, approximate 50 percent increase for affected corporate officer/director defendants. However, if this new provision is triggered, the existing and more generally applicable Abuse of Trust enhancement will *not* apply; thus, the court will omit consideration of that provision. The net effect of these changes is to increase sentences for corporate officer/directors by at least two levels over the former guidelines.

The Commission is continuing to consider, and will decide in the permanent amendment, whether this new enhancement should apply more broadly to other categories of possible defendants. For example, securities analysts and registered brokers or dealers, and persons in similar positions with duties of trust to investors, might also be candidates for a comparable increase if their offenses involved a securities law violation.

Responding generally to the various directives and the large corporate fraud offenses that preceded Sarbanes-Oxley, the Commission also extended by two loss amount categories the monetary loss table in the fraud-theft guideline (§2B1.1). Previously, that table topped out at losses of $100,000,000. The magnitude of the losses in some of the recent gargantuan corporate frauds led the Commission to add a category of $200-$400 million losses, equating to a 28-level increase, and a new upper category of greater than $400 million losses, which will net an increase of 30 levels over the base offense level of six. The emergency amendment also makes an equivalent extension in the loss table for tax offenses, reflecting a long-established Commission policy of maintaining penalty parity between fraud and tax avoidance offenses.

2. Obstruction of Justice Offenses

In addition to the above-described changes in the fraud offense guideline, the emergency amendment makes two significant changes in the offense guideline for obstruction of justice offenses (§2J1.2). Section 805(a) of the Act directs the Commission to amend section 2J1.2 "as appropriate," to ensure that the base offense level is adequate to deter and punish, and further, that the specific offense characteristics in that guideline adequately address cases where either a large quantity of, or especially valuable, evidentiary material was destroyed, altered, or fabricated. Section 1104(b)(4) of the Act contains a similar expression that the

obstruction of justice guideline should adequately punish cases involving the destruction or fabrication of documents or other physical evidence. These directives, of apparent Enron-derivation, motivated the Commission to increase the base offense level in section 2J1.2 from 12 to 14. The Commission then added a new specific offense characteristic pertaining to document and physical evidence destruction or alteration. The terms of this two-level enhancement closely track pertinent statutory directive language relating to the quantity and/or probative value of material destroyed or altered.

3. New Offenses

Finally, the Commission took actions to ensure appropriate guideline treatment of new Sarbanes-Oxley crimes pertaining to destruction of corporate audit records (new 18 U.S.C. § 1520), securities fraud (new 18 U.S.C. § 1348), and false certifications of financial reports (new 18 U.S.C. § 1350). The pertinent amendment references these offenses to guideline 2E5.3 and broadens that guideline (which formerly dealt with ERISA and Labor Management Reporting and Disclosure Act violations) to encompass destruction of, and failure to, maintain corporate audit records.

Impact of the Emergency Amendment on Sentences

1. Corporate Officer Fraud Offenses

As a result of the various guideline changes discussed above, future corporate fraud or obstruction of justice crimes likely will face much more severe punishment. This is especially true where the newly added guideline enhancements apply cumulatively. To illustrate the substantial aggregate effect of the several changes affecting large-scale corporate frauds, consider the following hypothetical. Defendant, the CEO of a publicly traded company, commits a $90 million fraud against the company and its shareholders, forcing the company into bankruptcy and rendering its stock worthless. The defendant, a first offender, pleads guilty to mail fraud and, receives at sentencing the maximum three-level reduction for acceptance of responsibility (under §3E1.1). Other than the enhancement for monetary loss and the newly created guideline changes (or their predecessor versions), no other guideline adjustments are assumed. The following tabular comparison shows the effect of the amended fraud guideline.

	2002 Guidelines	2003 Emergency Amendment
Base offense level	6	6
Increase for $90 million loss	+24	+24
250+ victims sustain loss	+ 4	+ 6
Financial insolvency of company	N/A	+ 4
Defendant corporate officer	+ 2 (Abuse of Trust assumed)	+ 4
Acceptance of Responsibility	- 3	- 3
Adjusted Offense Level	33	41
Guideline Range	135-168 months	324-405 months

Thus, under this cumulative impact scenario, the several guideline changes equate to a dramatic, increase in prison time of approximately 240%. Of course, the new guideline enhancements will not always apply cumulatively

because of differences in real case facts, variations in court determinations, and probable plea bargain agreements. On the other hand, based on the dimensions of real world corporate scandals of recent vintage, one can readily conceive of a more severe set of facts in which the amended guideline range will equate to life imprisonment.

2. Obstruction of Justice Offenses

The two guideline penalty increases for obstruction of justice offenses are not nearly as dramatic in their sentence-lengthening effects, but they are not insubstantial. Consider a hypothetical defendant who is convicted at trial of an offense under new 18 U.S.C. § 1519 (or a comparable statutory violation). The offense involved the knowing destruction of especially probative documents, with the intent and effect of obstructing an ongoing investigation. The following compares the guideline sentence determined under section 2J1.2 (Obstruction of Justice), before and after the emergency guideline amendment.

	2002 Guidelines	2003 Emergency Amendment
Base offense level	12	14
Enhancement for destruction of		

especially probative documents	N/A	+ 2
Substantial interference with		
administration of justice	+ 3	+ 3
Adjusted Offense Level	15	19
Guideline Range	18-24 months	30-37 months

In this illustrative case scenario, the emergency amendment adds about a year to the resulting guideline sentence, an increase of more than 50 percent.

Major Unresolved Issue Under Consideration

As indicated, these emergency changes in the fraud, obstruction of justice, and other guidelines are now in effect, and as the law requires, the Commission has provided an explanatory report to Congress.[22] In its Report, the Commission describes the manner in which it has implemented the several Sarbanes-Oxley directives.

As this article was written, the Commission was continuing to consider whether, in addition to these focused enhancements, it also should provide

broader-based penalty increases by amending the monetary loss table applicable to fraud and related offenses. The Department of Justice has strongly urged this course of action, arguing that Congress contemplated such increased penalties would result from the Act's general directives and the quadrupled statutory maximum penalties for mail and wire fraud.[22] In addition to perfecting the several specific enhancements, this issue of upwardly adjusting the loss table-based penalties presumably will be addressed in the permanent amendments sent to Congress by May 1.[22]

Sarbanes-Oxley and the Sentencing Guidelines for Organizations

Discussion to this point has concerned the sentencing guidelines for individual defendants. Of course, as evidenced by the recent, much-publicized *Arthur Anderson* case, corporate entities and other organizations may be criminally convicted, regardless of whether linked individual actors are prosecuted. Since November 1991, the federal courts have used a system of sentencing guidelines for organizations that also was developed and is overseen by the Sentencing Commission. Monetary fine penalties for convicted corporations under these guidelines are likely to be enhanced by the Commission's implementation of Sarbanes-Oxley, although the Act made no change in the generally applicable statutory fine structure for organizations.[22]

The sentencing guidelines for organizations, set out in Chapter Eight of the *Guidelines Manual*, calculate a guideline fine range using a multi-step formula. The formula produces a "base fine" that is equal to the greater of the loss caused by the offense, the organizational defendant's gain, or an amount derived from a partial application of the guidelines for individual defendants in Chapter Two of the *Manual*.[22] Experience to date indicates that the base fine calculation in slightly more than half the cases sentenced is derived from those individual guidelines in Chapter Two.[33] Furthermore, corporate fraud is by far the largest category of corporate crime, comprising 35 percent of the organizational defendants sentenced in FY 2001.[33] The confluence of these two realities is important because, to the extent that the fraud guideline penalties for individual defendants are increased pursuant to implementation of Sarbanes-Oxley, the fines for many future de-frauding corporations also will be increased substantially.

Additionally, section 805(a)(5) of the Act instructs the Commission to ensure that "the guidelines that apply to organizations ... are sufficient to deter and punish organizational criminal misconduct." The Commission has underway a review process aided by a diverse 16-person advisory committee with experience in the use, study, or teaching of the organizational sentencing guidelines. In fact, the Commission constituted this body of experts, wrote its mission statement, and initiated its work before Congress acted through Sarbanes-Oxley. This Ad Hoc Advisory Group on the Organizational Sentencing

Guidelines regularly meets, held an all-day public hearing in November 2002, and expects to make its final report to the Commission in October 2003.

The Commission asked the Advisory Group to focus principally on those features of the organizational sentencing guidelines that provide substantial mitigation of the otherwise applicable fine for "good corporate citizens" that operate an "effective compliance program."[33] The guidelines' prescription of seven general criteria that together describe a program "reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct,"[33] has been widely acclaimed and adopted by several federal regulatory agencies and the Department of Justice.[33] There is considerable evidence that this guideline feature, and the powerful fine mitigation incentives embodied within it, have resulted in substantial beneficial effects over the past decade by advancing corporate ethics, improving corporate governance, and preventing crime.[33] The Commission is determined to maintain, and to the extent practicable, strengthen the guideline incentives yielding these benefits. It expects that the upcoming report and recommendations of its advisory committee will further these goals.

Conclusion

The Sarbanes-Oxley Act has impacted profoundly the federal sentencing guidelines for economic crimes and has motivated the U.S. Sentencing Commission to increase substantially penalties for fraud and obstruction of justice offenses. A temporary emergency amendment furthering this objective was issued effective January 25, 2003. At the time of this writing, the Commission was slated to decide how this amendment might be modified, if at all, in a superseding, permanent amendment due to Congress by May 1, 2003. The Commission also is continuing to review the sentencing guidelines for organizational offenders and may amend those guidelines in the 2003-04 amendment cycle.

Notes

1. Pub.L. No. 107-204, 116 Stat. 745 (2002).

2. *See* U.S. Sentencing Comm'n., *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 18, 27-34 (1987); U.S. Sentencing Comm'n., *Guidelines Manual* ("*Guidelines Manual*"), Ch. 1, Pt. A3 (2002), at 4. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L.Rev. 1, 20-23 (1988).

3. *See* 28 U.S.C. § 994(m); S.Rep. No. 225, 98th Cong, 2d Sess. 76-77, 177 (1983).

4. *Supplementary Report*, *supra* note 2, at 68-69.

5. *Guidelines Manual*, Ch. 1, Pt. A, at 8; Breyer, *supra* note 2.

6. Pub. L. No. 100-700, Ch. 47, § 2B; 102 Stat. 4632 (1988), directing the Commission to enhance fraud penalties when personal inquiry resulted. In response the Commission promulgated Amendment 156, adding the enhancement now found at §2B1.1(b)(11)(A).

7. Pub. L. 101-73, Title IX, § 961(m), 103 Stat. 501 (1989), directing the Commission to enhance penalties for certain financial institution frauds; Pub. L. 101-647, Title XXV, § 2507, 104 Stat. 4862 (1990), directing a minimum guideline penalty for certain financial crimes. In response, the Commission issued Amend. 317, adding the enhancement now found at §2B1.1(b)(12)(B), and Amend. 364, adding the enhancement at §2B1.1(b)(12)(A).

8. *See* 28 U.S.C. § 994, Editorial Notes.

9. For example, *see* App. C., Amend. 521, adding an encouraged upward departure commentary (Applic. note 4) to §3A1.1, in response to the directive in section 240002 of the Violent Crime Control and Law Enforcement Act of 1994; App. C., Amend. 554, adding an enhancement for international counterfeiting activity at §2B5.1(b)(5), in response to the directive in section 807(h) of the Antiterrorism and Effective Death Penalty Act of 1996; App. C. Supp., Amend. 577, adding enhancements to §2F1.1 (subsequently merged into §2B1.1) for mass-marketing (now §2B1.1(b)(2)(A)) and sophisticated concealment (now §2B1.1(b)(8)©)), in response to directives in section 6 of Pub. L. No. 105-184 (relating to telemarketing).

10. *See* 28 U.S.C. § 994(o).

11. *Guidelines Manual*, App. C, Amend. 154.

12. *See generally* Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 Indiana L.Rev. 5 (2001).

13. *See Guidelines Manual*, App. C, Amend. 617.

14. *Id*., Reason for Amendment.

15. *Guidelines Manual*, §2B1.1(b)(8)©).

16. *See supra* note 9.

17. *Guidelines Manual*, §2B1.1(b)(2).

18. *See supra* note 13, Reason for Amendment.

19. 67 Fed. Reg. 70999 (Nov. 27, 2002).

20. *See* U.S. Sentencing Comm'n., *Report to the Congress: Increased Penalties Under the Sarbanes-Oxley Act of 2002,* 2-3 (Jan. 2003) ("*Report*").

21. *See supra* note 7.

22. *See Report*, *supra* note 20, at 3-4.

23. *Guidelines Manual*, §3B1.3.

24. *Report*, *supra* note 20, at 5.

25. *Report, supra* note 20.

26. Public comment letters of Dec. 18, 2002; Oct. 1, 2002 (on file with the Commission). *See also* 72 Crim. L. Rep. 291 (Jan. 15, 2003).

27. *See* 68 Fed. Reg. 2615 (Jan. 17, 2003); *also available at www.ussc.gov/notice.htm* (describing several alternative possible revisions in the economic crimes loss table).

28. *See* 18 U.S.C. § 3571©).

29. *See Guidelines Manual,* §8C2.4.

30. *Report, supra* note 20, at 13.

31. *Id*.

32. *See Guidelines Manual*, §8C2.5(f).

33. *Id.*, §8A1.2(k).

34. *Report, supra* note 20, at 11-12.

35. *See generally* Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 Iowa L. Rev. 697 (2002); John R. Steer, *Changing Organizational Behavior - The Federal Sentencing Guidelines Experiment Begins to Bear Fruit (2002)*, *available at* www.ussc.gov/orgguide.