

DYKEMA GOSSETT PLLC

CORPORATE GOVERNANCE BULLETIN

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SENTENCING GUIDELINES MODIFIED IN RESPONSE TO SARBANES-OXLEY ACT

As required by sections 805, 905, and 1104 of the Sarbanes-Oxley Act of 2002 (the "Act"), the United States Sentencing Commission ("USSC") promulgated emergency amendments to the Federal Sentencing Guidelines in January 2003 aimed at lengthening prison sentences for white-collar criminal activity. These amendments became effective January 25, 2003, and will remain in effect until November 1, 2003. The USSC is in the process of drafting permanent amendments that they expect to vote on in April of this year. The following is an analysis of the most significant of the emergency amendments.

Enhancement for Substantial Number of Victims

The amendments impose severe sentences on defendants whose fraud affects a large number of victims. In determining the applicable sentence range for a fraud offense, courts must take several factors into account, including the amount of loss and the number of victims. Prior to the Act, the sentencing guidelines established an escalating punishment scheme with three classifications based on the number of victims impacted: 0 – 9, 10 – 49, and more than 50. The amendments now add a fourth tier to this scheme by enhancing penalties for defendants whose conduct affects 250 or more victims. In practice, this change increases penalties for large impact fraud by approximately 20% in most cases.

The following chart shows the effect of adding the additional tier to the sentencing ranges (in months) for fraud offenses involving at least \$500,000, \$25 million, or \$125 million in loss where the number of victims exceeds 50.

Sentence Range in Months¹

		Number of Victims Impacted	
		50 – 249	250 or more
\$500,000	Old Guidelines	51 – 63	51 – 63
	New Guidelines	51 – 63	63 – 78
\$25,000,000	Old Guidelines	121 – 151	121 – 151
	New Guidelines	121 – 151	151 – 188
\$125,000,000	Old Guidelines	188 – 235	188 – 235
	New Guidelines	188 – 235	235 – 293

¹These figures are guidelines. Courts generally take into account additional factors in arriving at a sentencing range, such as the defendant's prior criminal history and other possibly aggravating circumstances, which may increase the sentence in any specific case.

Enhancement for Significant Loss Resulting from Fraud Offense

The amendments expand the possible penalty for losses resulting from particularly extensive and serious fraud and more fully effectuate the increase in statutory maximum penalties for fraud from five to 20 years as required by Section 903 of the Act.

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Previously, the guidelines established a minimum punishment floor of 121 months of confinement for losses in excess of \$100 million. The amendments add two additional levels, so that the minimum confinement for loss in excess of \$200 million but less than \$400 million would be 151 months and the minimum confinement for loss in excess of \$400 million would be 188 months. The following chart illustrates these changes.

Sentence Range in Months²

Number of Victims Impacted	\$200 Million to \$400 Million		More than \$400 million	
	Old Guidelines	New Guidelines	Old Guidelines	New Guidelines
0 – 9	121 – 151	151 – 188	121 – 151	188 – 235
10 – 49	151 – 188	188 – 235	151 – 188	235 – 293
More than 50	188 – 235	235 – 293	188 – 235	292 – 365

²These figures are guidelines. Courts generally take into account additional factors in arriving at a sentencing range, such as the defendant's prior criminal history and other possibly aggravating circumstances, which may increase the sentence in any specific case.

The new amendments most profoundly impact offenders convicted of fraud offenses that affect a large number of victims (e.g., 250 or more) and involve significant monetary loss (e.g., more than \$400 million). In such an instance, a defendant would receive a minimum sentence of 360 months, compared to 188 months under the previous guidelines.

Enhancement for Endangering Solvency/Financial Security of a Company or Substantial Number of Victims

The amendments have expanded the application of an existing enhancement provision in the guidelines for conduct that endangers the solvency or financial security of a substantial number of victims. Now, fraudulent conduct that substantially endangers the solvency or financial security of any organization that was either publicly traded, had 1,000 or more employees, or substantially endangers the solvency or financial security of 100 or more victims will also be subject to this enhanced sentencing provision in the guidelines. Alternatively, a court could also enhance a sentence where sufficient evidence existed to conclude that the amount of loss suffered by individual victims substantially endangered the solvency or financial security of those victims. In ascertaining whether to apply this newly expanded enhancement, courts are to consider a non-exhaustive list of factors, including whether the organization in question became insolvent, was forced to file for bankruptcy protection, suffered a substantial reduction in the value of its stock or employee retirement accounts or was forced to substantially reduce its workforce or its employee benefits. Should the court deem this enhancement applicable, the minimum resulting sentence is 51 – 63 months.

Enhancement Based on Status of Offender

If an officer or director of a publicly-traded corporation commits any offense involving a violation of the securities laws, he or she will be subject to additional confinement, regardless of whether the offense of conviction was one under a securities statute, (e.g., 18 U.S.C. § 1348, a new offense created by the Act specifically prohibiting securities fraud) or a general fraud statute (e.g., 18 U.S.C. § 1341, prohibiting wire fraud). Thus, an officer or director of a publicly-traded corporation who defrauds more than 250 employees of \$25 million will now receive a minimum sentence of 235 – 293 months, compared to a minimum of 151 months where the defendant is not an officer or director.

Enhancement for Particular Types of Obstruction of Justice

Section 805 of the Act directs the USSC to ensure that the sentencing guidelines are sufficient to deter and punish obstruction of justice, particularly obstruction that is extensive or aimed at particularly probative evidence. In response to this mandate, the amendments increase the minimum punishment to 21 – 27 months if the offense involved:

- the destruction, alteration or fabrication of a substantial amount of evidence;
- the selection of especially probative evidence to destroy or alter; or
- conduct that was otherwise extensive in scope, planning or preparation.