

**AMENDMENTS TO USSG § 2B1.1 AND § 2F1.1
1988-2013**

Date	Public Law	Directive to the Commission	USSC Action Taken & Guideline(s) Affected																								
1987			<p>Promulgated USSG §2F1.1 [now §2B1.1] (Fraud and Deceit)</p> <ul style="list-style-type: none"> • Not based on past practice/national experience. The Commission “decided to abandon the touchstone of prior past practice” with respect to white collar offenses.¹ • Based on false premise, not supported by evidence, that “the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm.”² USSC opted to require some form of confinement for all but the least serious cases. • Set BOL at 6. • Loss table: <table border="1" data-bbox="1003 740 1465 1198"> <tbody> <tr> <td>2,000 or less</td> <td>No increase</td> </tr> <tr> <td>More than 2,000</td> <td>Add 1</td> </tr> <tr> <td>More than 5,000</td> <td>Add 2</td> </tr> <tr> <td>More than 10,000</td> <td>Add 3</td> </tr> <tr> <td>More than 20,000</td> <td>Add 4</td> </tr> <tr> <td>More than 50,000</td> <td>Add 5</td> </tr> <tr> <td>More than 100,000</td> <td>Add 6</td> </tr> <tr> <td>More than 200,000</td> <td>Add 7</td> </tr> <tr> <td>More than 500,000</td> <td>Add 8</td> </tr> <tr> <td>More than 1,000,000</td> <td>Add 9</td> </tr> <tr> <td>More than 2,000,000</td> <td>Add 10</td> </tr> <tr> <td>More than 5,000,000</td> <td>Add 11</td> </tr> </tbody> </table> • Other SOCS: <ul style="list-style-type: none"> ○ (b)(2) If “the offense involved (A) more than minimal planning; (B) a scheme to defraud more than one victim; (C) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; or (D) violation of any 	2,000 or less	No increase	More than 2,000	Add 1	More than 5,000	Add 2	More than 10,000	Add 3	More than 20,000	Add 4	More than 50,000	Add 5	More than 100,000	Add 6	More than 200,000	Add 7	More than 500,000	Add 8	More than 1,000,000	Add 9	More than 2,000,000	Add 10	More than 5,000,000	Add 11
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			<p>judicial or administrative order, injunction, decree or process; increase by 2 levels,” with floor of 10.</p> <ul style="list-style-type: none"> ○ (b)(3) floor of 12 “if the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct” • Application Note 7 provided: “In keeping with the Commission’s policy on attempts, if a probable or intended loss that the defendant was attempting to inflict can be determined, that figure would be used if it was larger than the actual loss.” <p>Promulgated USSG §2B1.1 (Larceny, Embezzlement, Receipt of Stolen Property, and Property Destruction)</p> <ul style="list-style-type: none"> • Started with a BOL of 4. • Loss table similar to §2F, but an additional +2 for every loss amount, so that adjusted base offense levels would be same under §2B1.1 and §2F1.1 after accounting for loss. • Other SOCS: <ul style="list-style-type: none"> ○ +1 and floor of 7 “if firearm, destructive device, or controlled substance was taken ○ +2 if “theft was from the person of another” ○ +2 if “more than minimal planning” ○ Floor of 6 if “undelivered United States mail was taken” ○ Floor of 14 if “the offense involved organized criminal activity”
1988		n/a	<p>Amend. No. 7 (June 15, 1988) USSG §2B1.1</p> <ul style="list-style-type: none"> • Added definition of loss in application note: “In cases of partially completed conduct, the loss is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy Not Covered by a Specific Guideline).
1989		n/a	<p>Amend. No. 154 (Nov. 1, 1989) USSG §2F1.1</p> <ul style="list-style-type: none"> • Amended the loss table. This increase was not in response to a congressional directive, nor was it based on empirical evidence or national experience. Instead, as revealed by a Commissioner who resigned over the incident, DOJ’s <i>ex officio</i> persuaded four of six Commissioners “that recent congressional enactments had given oblique ‘signals’ to the Commission to increase fraud penalties,” when the

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			<p>statutes “said no such thing,” and that the Commission had failed to rely on its own data and “gratuitously” increased punishment for reason that were “overtly political and inexpert.”³</p> <ul style="list-style-type: none"> The stated Reason for the Amendment was as follows: “The purposes of this amendment are to conform the theft and fraud loss tables to the tax evasion table in order to remove an unintended inconsistency between these tables in cases where the amount is greater than \$40,000, to increase the offense levels for offenses with larger losses to provide additional deterrence and better reflect the seriousness of the conduct, and to eliminate minor gaps in the loss table.” The new loss table: <table border="1" data-bbox="1003 626 1751 1360"> <tbody> <tr><td>2,000 or less</td><td>No increase</td></tr> <tr><td>More than 2,000</td><td>Add 1</td></tr> <tr><td>More than 5,000</td><td>Add 2</td></tr> <tr><td>More than 10,000</td><td>Add 3</td></tr> <tr><td>More than 20,000</td><td>Add 4</td></tr> <tr><td>More than 40,000</td><td>Add 5 [+1 for 40-50]</td></tr> <tr><td>More than 70,000</td><td>Add 6 [+1 for 70-100]</td></tr> <tr><td>More than 120,000</td><td>Add 7 [+1]</td></tr> <tr><td>More than 200,000</td><td>Add 8 [+1]</td></tr> <tr><td>More than 350,000</td><td>Add 9 [+2 for 350-500]</td></tr> <tr><td>More than 500,000</td><td>Add 10 [+2]</td></tr> <tr><td>More than 800,000</td><td>Add 11 [+3 up to 1 million; +2 at 1million up]</td></tr> <tr><td>More than 1,500,000</td><td>Add 12 [+3 up to 2 million; +2 from 2 million up]</td></tr> <tr><td>More than 2,500,00</td><td>Add 13 [+3 up to 5 million; +2 from 5 million up]</td></tr> <tr><td>More than 5,000,000</td><td>Add 14 [+3]</td></tr> <tr><td>More than 10,000,000</td><td>Add 15 [+4]</td></tr> <tr><td>More than 20,000,000</td><td>Add 16 [+5]</td></tr> </tbody> </table> 	2,000 or less	No increase	More than 2,000	Add 1	More than 5,000	Add 2	More than 10,000	Add 3	More than 20,000	Add 4	More than 40,000	Add 5 [+1 for 40-50]	More than 70,000	Add 6 [+1 for 70-100]	More than 120,000	Add 7 [+1]	More than 200,000	Add 8 [+1]	More than 350,000	Add 9 [+2 for 350-500]	More than 500,000	Add 10 [+2]	More than 800,000	Add 11 [+3 up to 1 million; +2 at 1million up]	More than 1,500,000	Add 12 [+3 up to 2 million; +2 from 2 million up]	More than 2,500,00	Add 13 [+3 up to 5 million; +2 from 5 million up]	More than 5,000,000	Add 14 [+3]	More than 10,000,000	Add 15 [+4]	More than 20,000,000	Add 16 [+5]
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1989	100-700 Major Fraud Act of 1988, sec. 2(b).	<p>Promulgate guidelines, or amend existing guidelines, to provide for appropriate penalty enhancements, where conscious or reckless risk of serious personal injury resulting from the fraud has occurred.</p> <p>Consider the appropriateness of assigning to such a defendant an offense level under Chapter Two of the sentencing guidelines that is at least two levels greater than the level that would have been assigned had conscious or reckless risk of serious personal injury not resulted from the fraud.”</p>	<p>Amend. No. 156 (Nov. 1, 1989) USSG § 2F1.1</p> <ul style="list-style-type: none"> • Amended USSG § 2F1.1 to provide a two-level enhancement “if the offense involved the conscious or reckless risk of serious bodily injury.” The Commission also set a minimum offense level of 13. • The Commission explained that the amendment was intended “to reflect the instruction to the Commission in Section 2(b) of the Major Fraud Act of 1988.” The Commission did not set forth any description of its consideration or analysis of the directive, but stated simply that it “has concluded that a 2-level enhancement with a minimum offense level of 13 should apply to all fraud cases involving a conscious or reckless risk of serious bodily injury.” It is therefore unknown how or even why the Commission selected a minimum level of 13, since the directive did not address minimum offense levels. 				
1990	101-73 Financial Institutions Reform, Recovery, and Enforcement Act of 1989, sec. 961(m).	<p>Promulgate guidelines, or amend existing guidelines, to provide for a substantial period of incarceration for a violation of, or a conspiracy to violate, section 215 [receipt of commissions or gifts for procuring loans], 656 [theft, embezzlement, or misapplication by bank officer or employee], 657 [embezzlement by employees and agents of lending, credit, and insurance institutions], 1005 [unauthorized bank entries, reports, and transactions], 1006 [fraudulent federal credit</p>	<p>Amend. No. 317 (Nov. 1, 1990) USSG §§ 2B1.1, 2B4.1 2F1.1</p> <ul style="list-style-type: none"> • Amended USSG §§ 2B1.1 [Theft], 2B4.1 [Bribery in Procurement of a Bank Loan], and 2F1.1 [Fraud and Deceit, now consolidated with § 2B1.1] to add to each a four-level enhancement “if the offense substantially jeopardized the safety and soundness of a financial institution.” Note that the directive referred only to “federally insured financial institution[s].” • Defined “financial institution” in a new application note more broadly than the directive, as including any institution described and described in several statutes, as well as a long list of institutions such as registered brokers, union pension funds, or “any similar entity, whether or not insured by the federal government.” 				

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		<p>institution entries, reports and transactions], 1007 [improper influence of Federal Deposit Insurance Corporation transactions], 1014 [false statements in loan and credit applications and for crop insurance], 1341 [mail fraud], 1343 [wire fraud], or 1344 [bank fraud] of title 18, United States Code, that substantially jeopardizes the safety and soundness of a federally insured financial institution.</p>	<ul style="list-style-type: none"> • Also in an application note, defined the circumstances under which an offense is “deemed to have ‘substantially jeopardized the safety and soundness of a financial institution,’ as follows: <i>If as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.</i> USSG §§ 2B1.1 comment. (n.10), 2B4.1 comment. (n.4), 2F1.1 comment. (n.15) (1991). • The Commission explained that the amendment “implements, in a broader form the statutory directive in Section 961(m) of Public Law 101-73.” It did not provide any reason for the broader form or any empirical or policy basis for its definitions.
1991	101-647 Crime Control Act of 1990, sec. 2507(a).	<p>Promulgate guidelines, or amend existing guidelines, to provide that a defendant convicted of violating, or conspiring to violate, section 215 [receipt of commissions or gifts for procuring loans], 656 [theft, embezzlement, or misapplication by bank officer or employee], 657 [embezzlement by employees and agents of lending, credit, and insurance institutions], 1005 [unauthorized bank entries, reports, and transactions], 1006 [fraudulent federal credit institution entries, reports and transactions], 1007 [improper influence of Federal Deposit Insurance Corporation transactions], 1014 [false statements in loan and credit applications and for crop insurance], 1032 [concealment of assets], or 1344 [bank fraud] of title 18, United States Code, or section 1341 [mail fraud] or 1343 [wire fraud] affecting a financial institution (as defined in section 20</p>	<p>Amend. No. 364 (Nov. 1, 1991) USSG §§ 2B1.1, 2B4.1, 2F1.1</p> <ul style="list-style-type: none"> • Amended USSG §§ 2B1.1, 2B4.1, and 2F1.1 [now consolidated with § 2B1.1] to set the minimum offense level at 24 if the “offense affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts.” • The directive specifically defines “financial institution” as an institution defined under 18 U.S.C. § 20. The Commission defined the guideline term “financial institution” in Amendment 317, <i>see supra</i>, to cover a range of institutions far broader than the financial institutions covered by this directive. • The Commission did not give any reason for imposing a minimum level of 24 in those cases not involving a financial institution as defined in 18 U.S.C. § 20. It simply stated that the amendment “implements the instruction to the Commission in Section 2507 of the Crime Control Act of 1990 (Public Law 101-647).” • Also amended the guideline meaning of “substantially jeopardized the safety and soundness of a financial institution” in §§ 2B1.1, 2B4.1 and 2F1.1 to add “or was placed in substantial jeopardy of any of” the harms previously listed, (<i>see Amendment 317, supra</i>), so that the enhancement applies even if the harms did not occur. This amendment was not related to the directive and is not otherwise explained.

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		of title 18, United States Code), shall be assigned not less than offense level 24 under chapter 2 of the sentencing guidelines if the defendant derives more than \$ 1,000,000 in gross receipts from the offense.	
1991		n/a	<p>Amend. No. 393 (Nov. 1, 1991) USSG §2F1.1</p> <ul style="list-style-type: none"> Amended §2F1.1 to add to commentary: “In a few instances the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it.”
1993		n/a	<p>Amend. No. 482 (Nov. 1, 1993) USSG §2F1.1</p> <ul style="list-style-type: none"> Added language at end of language above in 1991 to specify: “In such cases, a downward departure may be warranted.”
1995	103-322 Violent Crime Control and Law Enforcement Act of 1994, sec. 110512.	Amend its sentencing guidelines to provide an appropriate enhancement of the punishment for a defendant convicted of a felony under chapter 25 of title 18, United States Code [counterfeiting and forgery], if the defendant used or carried a firearm (as defined in section 921(a)(3) of title 18, United States Code) during and in relation to the felony.	<p>Amend. No. 513 (Nov. 1, 1995) USSG § 2F1.1</p> <ul style="list-style-type: none"> Amended USSG § 2F1.1 (Fraud and Deceit; Forgery; Counterfeit Instruments Other than Bearer Obligations of the United States) (now consolidated with § 2B1.1) to add a 2-level increase with a minimum offense level of 13 “[i]f the offense involved “possession of a dangerous weapon (including a firearm) in connection with the offense.” As set forth in the directive, Congress instructed the Commission to provide for enhanced penalties if the defendant was convicted of a felony under chapter 25 of title 18 [counterfeiting and forgery] and “used or carried a firearm.” Instead, the Commission added enhancements for merely possessing any dangerous weapon to guidelines that applied to far more offenses than just those under chapter 25 of title 18. <i>See</i> USSG §§ 2B5.1, 2F1.1 (1995). With the later consolidation of § 2F1.1 with § 2B1.1, <i>see</i> USSG App. C, Amend. 617 (Nov. 1, 2001), the scope of these enhancements broadened even further. The Commission acknowledged that “this amendment implements this directive in broader form,” but otherwise provided no reason or other empirical support for it.

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1997	104-132 Antiterrorism and Effective Death Penalty Act of 1996, sec. 805.	<p>(a) Not later than 60 calendar days after the date of enactment of this Act, . . . review the deterrent effect of existing guideline levels as they apply to paragraphs (4) and (5) of section 1030(a) of title 18, United States Code [fraud and related activity in connection with computers].</p> <p>(b) [P]repare and transmit a report to the Congress on the findings under the study conducted under subsection (a).</p> <p>(c) [A]mend the sentencing guidelines to ensure any individual convicted of a violation of paragraph (4) or (5) of section 1030(a) of title 18, United States Code [fraud and related activity in connection with computers], is imprisoned for not less than 6 months.</p> <p>Note: At the time of the amendment to the guidelines, paragraphs (4) and (5) of 18 U.S.C. § 1030 read as follows:</p> <p>(4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than \$ 5,000 in any 1-year period;</p>	<p>Amend. No. 551 (Nov. 1, 1997) USSG §§ 2B1.1, 2F1.1</p> <ul style="list-style-type: none"> • Added special instruction to 2F1.1: “If the defendant is convicted under 18 U.S.C. § 1030(a)(4), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months’ imprisonment.” • Though not directly tied to the directive, added commentary in Application Note 2 to § 2B1.1 providing that “[i]n an offense involving unlawfully accessing, or exceeding authorized access to, a ‘protected computer’ as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), ‘loss’ includes the reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.” This definition is currently located at USSG §1B1.1 comment. (n.3(A)(v)(III)) (2007). • Unrelated to the directive, the Commission also added a new SOC to §2B1.1: “If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit any foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.” • Reason for Amendment: “more effectively punish computer-related offenses” It also addresses new offenses “prohibiting ‘economic espionage’ and theft of ‘trade secrets.’” • In addition, the Reason for Amendment also specifies that “special instructions have been added to §§2B1.3 and 2F1.1 to provide the minimum guideline sentence for those convicted under 18 U.S.C. §1030(a)(4) and (5) is six months’ imprisonment. These provisions implement a directive to the Commission.” <p>Report: <i>USSC, Report to the Congress: Adequacy of Federal Sentencing Guideline Penalties for Computer Fraud and Vandalism Offenses</i> (June 1996), avail. at http://www.usc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Computer_Crime/199606_RtC_Computer_Fraud_and_Vandalism_Offenses.pdf.</p> <p>Some of the Commission’s findings and conclusion:</p>

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		<p>(5) (A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;</p> <p>(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or</p> <p>(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage;</p> <p>18 USCS § 1030 (as amended Oct. 11, 1996)</p>	<p>“Federal “computer crime” cases sentenced under the pertinent provisions of 18 U.S.C. § 1030 are relatively uncommon at present. An estimated 60 defendants have been successfully prosecuted and sentenced thereunder in the almost nine years since the guidelines came into existence.” <i>Id.</i> at 2.</p> <p>“A review of the sentences imposed upon those who violated 18 U.S.C. § 1030 (a)(4) or (5) prior to the enactment of the Antiterrorism Act indicates that the guideline adjustments mandated by Congress generally will increase punishment for this class of defendant.” <i>Id.</i> at 3.</p> <p>“[N]one of the 40 computer crime defendants who have been sentenced under the guidelines as a result of convictions under 18 U.S.C. § 1030 (a)(4) or (5) have been subsequently convicted of another federal crime.” <i>Id.</i> at 8.</p> <p>Conclusion: “The limited empirical data available to the Commission and other factors preclude a definitive assessment of the deterrent effect of existing guidelines for computer fraud and computer vandalism. The relatively few convictions under these provisions are insufficient to permit generalized conclusions about their deterrent effect. As convictions increase, the Commission, in cooperation with the Department of Justice, will continue to analyze the operation of the guidelines in the computer crime context and expects to consider additional modifications in the current, 1996-97, amendment cycle to improve their operation and effectiveness.” <i>Id.</i> at 9.</p>
1998	105-101 Veterans’ Cemetery Protection Act of 1997	<p>(a) [R]eview and amend the Federal sentencing guidelines to provide a sentencing enhancement of not less than 2 levels for any offense against the property of a national cemetery.</p> <p>(b) In carrying out subsection (a), . . . ensure that the sentences, guidelines, and policy statements for offenders convicted of an</p>	<p>Amend. No. 576 (Nov. 1, 1998) USSG § 2B1.1</p> <ul style="list-style-type: none"> • Amended USSG § 2B1.1 (Theft) to add a specific offense characteristic: “If the offense involved theft of property from a national cemetery, increase by 2 levels.” • defined “national cemetery” as “a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.” • Reason for Amendment: “The purpose of this amendment is to provide an increase for property offenses committed against national cemeteries. This amendment

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		<p>offense described in that subsection are—</p> <p>(1) appropriately severe; and</p> <p>(2) reasonably consistent with other relevant directives and with other Federal sentencing guidelines.</p> <p>(c) Definition of National Cemetery.—In this section, the term “national cemetery” means a cemetery—</p> <p>(1) in the National Cemetery System established under section 2400 of title 38, United States Code; or</p> <p>(2) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.</p>	<p>implements the directive to the Commission in the Veterans’ Cemetery Protection Act of 1997 This Act directs the Commission to provide a sentence enhancement of not less than two levels for any offense against the property of a national cemetery. In response to the legislation, this amendment adds a two-level enhancement to §§ 2B1.1 (Theft), 2B1.3 (Property Destruction), and 2K1.4 (Arson). ‘National cemetery’ is defined in the same way as that term is defined in the statute.”</p>
1998		n/a	<p>Amend. No. 577 (Nov. 1, 1998) USSG §2F1.1</p> <ul style="list-style-type: none"> • Deleted “foreign bank account” SOC and added a broader SOC: “(A) If the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) if a substantial part of a fraudulent scheme was committed from outside the United States; or (C) if the offense otherwise involved <u>sophisticated concealment</u>, increase by 2 levels.” Floor of 12. The underlined language was then further amended this same year as described below in Amend. No. 578. • Added new SOC: “If the offense was committed through mass-marketing, increase by 2 levels.” The Commission also added a broad definition of “mass-marketing”: “a plan, program, promotion, or campaign that is conducted through solicitation by

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			<p>telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.”</p> <ul style="list-style-type: none"> Reason for Amendment: “(1) to provide an increase for fraud offenses that use mass-marketing to carry out the fraud; (2) to provide an increase for fraud offenses that involve conduct, such as sophisticated concealment, that makes it difficult for law enforcement authorities to discover the offense or apprehend the offender.” “The Commission identified mass-marketing as a central component of telemarketing fraud.” “[T]his amendment provides an increase for fraud offenses that involve conduct... that makes it difficult for law enforcement authorities to discover or apprehend the offenders... There are three alternative provisions to the enhancement. The first two prongs address conduct that the Commission has been informed often relates to telemarketing fraud, although the conduct also may occur in connection with fraudulent schemes perpetrated by other means. Specifically, the Commission has been informed that fraudulent telemarketers increasingly are conducting their operations from Canada and other locations outside the United States. Additionally, testimony offered at a Commission hearing on telemarketing fraud indicated that telemarketers often relocate their schemes to other jurisdictions once they know or suspect that enforcement authorities have discovered the scheme... The third prong provides an increase if any offense covered by the fraud guideline otherwise involves sophisticated concealment. This prong addresses cases in which deliberate steps are taken to make the offense, or its extent, difficult to detect.”
1998	105-184 Telemarketing Fraud Prevention Act of 1998, sec. 6.	(b) (1) [P]romulgate Federal sentencing guidelines or amend existing sentencing guidelines (and policy statements, if appropriate) to provide for substantially increased penalties for persons convicted of offenses described in section 2326 of title 18, United States Code, as amended by this Act,	<p>Amend. No. 587 (Nov. 1, 1998) (promulgated pursuant to emergency amendment authority; made permanent by Amend. No. 595 (Nov. 1, 2000)). USSG §§ 2B1.1, 2F1.1</p> <ul style="list-style-type: none"> Explained that this amendment “[i]mplements in a broader form, the directives” in section 6 of the Act. Amended USSG § 2F1.1 (Fraud and Deceit) (now consolidated in § 2B1.1) to build on the amendments to § 2F1.1 in Amend. No. 577 (described above).

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		<p>in connection with the conduct of telemarketing; and (2) submit to Congress an explanation of each action taken under paragraph (1) and any additional policy recommendations for combating the offenses described in that paragraph. (c) In carrying out this section,— (1) ensure that the guidelines and policy statements promulgated or amended pursuant to subsection (b)(1) and any recommendations submitted thereunder reflect the serious nature of the offenses; (2) provide an additional appropriate sentencing enhancement, if the offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States; (3) provide an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims, including but not limited to victims described in section 2326(2) of title 18, United States Code, are affected by a fraudulent scheme or schemes; (4) ensure that guidelines and policy statements promulgated or amended pursuant to subsection (b)(1) are reasonably consistent with other relevant statutory directives to the Commission and with other guidelines; (5) account for any aggravating or mitigating circumstances that might justify upward or</p>	<ul style="list-style-type: none"> • Broadened the “sophisticated concealment” enhancement to cover not only efforts to conceal, but all “sophisticated means.” Defined “sophisticated means” as “especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense.” Provided examples: “[I]n a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.” For the enhancement to apply, the conduct must be “significantly more complex or intricate than the conduct that may form the basis for an enhancement for more than minimal planning.” Note: This definition of “sophisticated means” drew on the definition of sophisticated means that previously appeared in the tax guidelines, § 2T1.4 and § 2T3.1, before they were changed in 1998 to the narrower “sophisticated concealment” in Amend. No. 577 (and then changed back in 2001 to “sophisticated means” in Amend. No. 617). • Increased the two-level enhancement for vulnerable victims under § 3A1.1 to four levels “if the offense involved a large number of vulnerable victims.” • The Commission acknowledged in its Reason for Amendment that the amendment “may apply more broadly than the Act’s above-stated directives minimally require.” It explained that “the Commission acts consistently with other directives in the Act (<i>e.g.</i>, section 6(c)(4) (requiring the Commission to ensure that its implementing amendments are reasonably consistent with other relevant directives to the Commission and other parts of the sentencing guidelines)) and with its basic mandate in sections 991 and 994 of title 28, United States Code (<i>e.g.</i>, 28 U.S.C. § 991(b)(1)(B)) (requiring sentencing policies that avoid unwarranted disparities among similarly situated defendants).”

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		<p>downward departures;</p> <p>(6) ensure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code; and</p> <p>(7) take any other action the Commission considers necessary to carry out this section.</p> <p>(d) Emergency Authority .--The Commission shall promulgate the guidelines or amendments provided for under this subsection as soon as practicable, and in any event not later than 120 days after the date of the enactment of the Telemarketing Fraud Prevention Act of 1998, in accordance with the procedures set forth in section 21(a) of the Sentencing Reform Act of 1987, as though the authority under that authority had not expired,* except that the Commission shall submit to Congress the emergency guidelines or amendments promulgated under this section, and shall set an effective date for those guidelines or amendments not earlier than 30 days after their submission to Congress.</p> <p>Note: Defines the term “telemarketing” as having the meaning given that term in 18 U.S.C. § 2326.</p> <p>*Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. 28 U.S.C. § 994 note.</p>	

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Date	Public Law	Directive to the Commission	USSC Action Taken & Guideline(s) Affected
2000	105-172 Wireless Telephone Protection Act, sec. 2(e).	<p>[R]eview and amend the Federal sentencing guidelines and the policy statements of the Commission, if appropriate, to provide an appropriate penalty for offenses involving the cloning of wireless telephones (including offenses involving an attempt or conspiracy to clone a wireless telephone).”</p> <p>[I]n carrying out this subsection, the Commission shall consider [the following factors]:</p> <p>(A) the range of conduct covered by the offenses;</p> <p>(B) the existing sentences for the offenses;</p> <p>(C) the extent to which the value of the loss caused by the offenses (as defined in the Federal sentencing guidelines) is an adequate measure for establishing penalties under the Federal sentencing guidelines;</p> <p>(D) the extent to which sentencing enhancements within the Federal sentencing guidelines and the court’s authority to sentence above the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offenses;</p> <p>(E) the extent to which the Federal sentencing guideline sentences for the offenses have been constrained by statutory maximum penalties;</p> <p>(F) the extent to which Federal sentencing guidelines for the offenses adequately achieve the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code;</p>	<p>Amend. No. 596 (Nov. 1, 2000) USSG §§ 2B1.1, 2F1.1</p> <ul style="list-style-type: none"> • Amended § 2F1.1 (Fraud and Deceit) to provide a two-level enhancement, with a minimum offense level of 12, if the offense involved “the possession or use of any device-making equipment [or] the production or trafficking of any unauthorized access device or counterfeit access device.” • Defined “counterfeit access device” as having the meaning given the term in 18 U.S.C. § 1029(e)(2), and adding that the term also includes “a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service.” • Defined “device-making equipment” as it is defined in 18 U.S.C. § 1029(e)(6), and adding that the term includes “any hardware or software that has been configured as described in [§ 1029(a)(9), and] a scanning receiver referred to in 18 U.S.C. § 1029(a)(8).” Defined “scanning receiver” as defined by the same statute in subsection (e)(8). • Defined “unauthorized access device” as in 18 U.S.C. § 1029(e)(3). • Explained that “[a]lthough cloned telephones may be possessed and used in connection with a variety of offenses, the Commission determined that the possession or use of a cloned phone does not necessarily increase the seriousness of the underlying offense. However, the Commission decided that offenders who manufacture or distribute cloned telephones are more culpable than offenders who only possess them. Accordingly, the new enhancements at [§ 2F1.1] recognize that such offenders warrant greater punishment. However, to ensure that the guidelines apply consistently to similarly serious conduct regardless of the technology employed, this amendment provides for a broader enhancement that applies to the manufacture or distribution of any access device, including a cloned telephone.” • Added a minimum loss rule in § 2F1.1 and § 2B1.1 that extends to all access devices,

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		<p>(G) the relationship of Federal sentencing guidelines for the offenses to the Federal sentencing guidelines for other offenses of comparable seriousness; and (H) any other factor that the Commission considers to be appropriate.</p>	<p>not just cloned telephones. Then increased the minimum loss rule from \$100 to \$500 per access device. Explained that “the Commission’s research and data supported increasing the minimum loss amount” to \$500, though “the data were insufficient to support using the increased amount in cases that involve only the possession, and not the use, of means of telecommunications access that identify a specific telecommunications instrument or account.” For such cases, “the Commission decided the minimum loss amount should be \$ 100 per unused means.”</p> <p>The Commission’s published a working group report setting forth its findings. USSC, <i>Cellular Telephone Cloning</i> (2000), http://www.ussc.gov/Research/Working_Group_Reports/Intellectual_Property_and_Tech/20000125_Cell_Phone_Cloning/cloning.PDF</p>
2000	105-318 Identity Theft and Assumption Deterrence Act of 1998, sec. 4.	<p>[R]eview and amend the Federal sentencing guidelines and the policy statements of the Commission, as appropriate, to provide an appropriate penalty for each offense under section 1028 of title 18 [identity fraud], United States Code, as amended by this Act.” [C]onsider, with respect to each offense described in subsection (a)— (1) the extent to which the number of victims (as defined in 18 U.S.C. § 3663A(a)) involved in the offense, including harm to reputation, inconvenience, and other difficulties resulting from the offense, is an adequate measure for establishing penalties under the Federal sentencing guidelines; (2) the number of means of identification, identification documents, or false identification documents (as those terms are defined in section 18 U.S.C. §1028(d) as amended by this Act) involved in the offense,</p>	<p>Amend. No. 596 (Nov. 1, 2000) USSG §§ 2B1.1, 2F1.1</p> <ul style="list-style-type: none"> • Amended § 2F1.1 (now at § 2B1.1) to include an upward enhancement at (b)(5)(C), with a minimum offense level of 12, specifically directed at “breeding”: if the offense involved “the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or (ii) the possession of 5 or more means of identification that unlawfully were produced from another means of identification or obtained by the use of another means of identification.” • Explained that the enhancement for breeding was based on its research of identity theft, as defined by 18 U.S.C. § 1028, and the legislative history of the Identity Theft and Assumption Deterrence Act. “Identity theft . . . occurs along a continuum of conduct. . . .After analyzing the legislative history of the [Act] and Commission data, the Commission determined that the more aggravated and sophisticated forms of identity theft, about which Congress seemed particularly concerned, should be the focus of enhanced punishment under the guidelines.” • Explained that breeding is “considered more sophisticated because of the additional steps the perpetrator takes to ‘breed’ additional means of identification in order to conceal and continue the fraudulent conduct.” Also explained that the minimum

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		<p>is an adequate measure for establishing penalties under the Federal sentencing guidelines;</p> <p>(3) the extent to which the value of the loss to any individual caused by the offense is an adequate measure for establishing penalties under the Federal sentencing guidelines;</p> <p>(4) the range of conduct covered by the offense;</p> <p>(5) the extent to which sentencing enhancements within the Federal sentencing guidelines and the court’s authority to sentence above the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by the offense;</p> <p>(6) the extent to which Federal sentencing guidelines sentences for the offense have been constrained by statutory maximum penalties;</p> <p>(7) the extent to which Federal sentencing guidelines for the offense adequately achieve the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code; and</p> <p>(8) any other factor that the United States Sentencing Commission considers to be appropriate.</p>	<p>offense level of 12 “accounts for the non-monetary harm associated with identity theft (<i>e.g.</i> harm to reputation or credit rating, which typically are difficult to quantify.”</p> <ul style="list-style-type: none"> • Added a note to 2F1.1 specifying that if the new enhancements for breeding, possession/use of device-making equipment, or production of unauthorized access device apply, there “shall be a rebuttable presumption that the offense also involved more than minimal planning for purposes of subsection (b)(2). The note further specifies that if this access device conduct addressed in (b)(5) is “the only conduct that forms the bases of an enhancement under subsection (b)(6) [sophisticated means], do not apply an enhancement under (b)(6).” • Provided an encouraged upward departure in cases “in which the nature and scope of the harm to an individual victim is so egregious that the two-level enhancement and minimum offense level provide insufficient punishment.”
2001		n/a	<p>Amend. No. 617 (Nov. 1, 2001) USSG §2B1.1 “Economic Crime Package”—a 6-part amendment that “is the result of Commission study of economic crime issues over a number of years.”</p> <ul style="list-style-type: none"> • Consolidates §2B1.1, §2B1.3, and §2F1.1 into §2B1.1. Commission reports “[c]onsolidation will provide similar treatment for similar offenses for which

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			<p>pecuniary harm is a major factor in determining the offense level... Commentators have noted that inasmuch as theft and fraud offenses are conceptually similar, there is no strong reason to sentence them differently.”</p> <ul style="list-style-type: none"> • Increased BOL for theft offenses that were under the old 2B1.1, from 4 to 6 – making it the same BOL as fraud. • Increased loss table even further than in 1989 (though decreased it for 5,000 or less). This was in response to “comments received from the Department of Justice, the Criminal Law Committee of the Judicial Conference, and others, that he offenses sentenced under the guidelines... under-punish individuals involved with moderate and high loss amounts, relative to penalty levels for offenses of similar seriousness sentenced under other guidelines.” The Commission claimed this change would result in “slightly lower offense levels” for relatively low dollar losses “because of (1) the elimination of the enhancement for more than minimal planning; (2) the change from one-level to two-level increments for increasing loss amounts; (3) the selection of breakpoints for the loss increments (including \$5,000 as the first loss amount that results in an increase); and (4) the slope chosen for the relationship between increases in loss amount and increases in offense level at the lower loss amounts.” These “lower offense levels” were deemed “appropriate for several reasons: (1) the lower offense levels provide appropriate deterrence and punishment, generally, (2) at lower offense levels more defendants will be subject to the court’s ability to fashion sentencing alternatives as appropriate...; and (3) these penalty levels may facilitate the payment of restitution.” <table border="1" data-bbox="1003 1029 1751 1373"> <tr> <td>More than 5,000</td> <td>Add 2</td> </tr> <tr> <td>More than 10,000</td> <td>Add 4[+1 up to 20,000; same for 20-30,000]</td> </tr> <tr> <td>More than 30,000</td> <td>Add 6 [+2 up to 40; +1 for 40-70] [[since original, it is +2 up to 50; +1 from 50-70]]</td> </tr> <tr> <td>More than 70,000</td> <td>Add 8 [+2] [[since original, +3 for 70-100; +2 for 100-120]]</td> </tr> <tr> <td>More than 120,000</td> <td>Add 10 [+3] [[since original +4 for whole range]]</td> </tr> </table>	More than 5,000	Add 2	More than 10,000	Add 4[+1 up to 20,000; same for 20-30,000]	More than 30,000	Add 6 [+2 up to 40; +1 for 40-70] [[since original, it is +2 up to 50; +1 from 50-70]]	More than 70,000	Add 8 [+2] [[since original, +3 for 70-100; +2 for 100-120]]	More than 120,000	Add 10 [+3] [[since original +4 for whole range]]
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More than 120,000	Add 10 [+3] [[since original +4 for whole range]]												

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			More than 200,000	Add 12 [+4 up to 350; +3 for 350-400] [[since original +5 for whole range]]
			More than 400,000	Add 14 [+5 up to 500; +4 for 500-800; +3 for 800 up] [[since original, +7 for 400-500; +6 for 500-1 million]]
			More than 1,000,000	Add 16 [+5 1-1.5; +4 for 1.5-2.5] [[since original, +7 up to 2; +6 above that]]
			More than 2,500,00	Add 18 [+5 for 2.5-5; +4 for 5-7] [[since original +8 up to 5; +7 above that]]
			More than 7,000,000	Add 20 [+6 for 7-10; +5 for 10-20] [[since original +9]]
			More than 20,000,000	Add 22 [+6 up to 40; +5 up to 50] [[since original +11]]
			More than 50,000,000	Add 24 [+7 to 80; +6 for 80-100] [[since original +13]]
			More than 100,000,000	Add 26 [+8] [[since original +15]]
			<ul style="list-style-type: none"> • Added new definition of loss. “Significantly, the new definition of loss retains the core rule that loss is the greater of actual and intended loss. The Commission concluded that, for cases in which intended loss is a greater than actual loss, the intended loss is a more appropriate initial measure of the culpability of the offender. Conversely, in cases which the actual loss is greater, that amount is a more appropriate measure of the seriousness of the offense.” • Intended loss: “intended loss includes unlikely or impossible losses that are intended, because their inclusion better reflects the culpability of the offender.” [note: until this amendment, the commentary to the fraud guideline since it was promulgated indicated the loss may overstate seriousness when, for example, the 	

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			<p>defendant attempted “to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it.”]</p> <ul style="list-style-type: none"> • Actual loss: defined it as the “reasonably foreseeable pecuniary harm” • Deleted enhancement for more than minimal planning. “The two-fold reason for this change was to obviate the need for judicial fact-finding about this frequently occurring enhancement and to avoid the potential overlap between the more than minimal planning enhancement and the sophisticated means enhancement.” • Added +2 for 10-50 victims and +4 for 50+ victims. • Increased minimum offense level from 13 to 14 for risk of serious bodily injury, and made clear that applies for risk of death as well as serious bodily injury. This was done to “promote proportionality within the guidelines” – for example chop shops at level 13, jeopardizing solvency of financial institution at level 24. • Changed enhancement for a defendant who personally derives more than 1 million in gross receipts from an offense that affected a financial institution. Kept floor of 24, but decreased enhancement from 4 to 2 because of increased offense levels from the loss tables and because “elimination of the enhancement entirely would not provide an appropriate punishment for those offenders involved with losses that are in the \$1,000,000 to \$2,500,000 range of loss. • Revised commentary on “in the business of” – to make clear totality of the circumstances test • Addressed circuit conflict over charitable organization and sided with broader view – that it applies regardless of whether the defendant actually was associated with the organization/agency. • Added 2B1.4 re: insider trading with BOL of 8. • 2T amended from “sophisticated concealment” to “sophisticated means”
2001	106-420 College Scholarship Fraud Prevention Act of 2000,	[A]mend the Federal sentencing guidelines in order to provide for enhanced penalties for any offense involving fraud or misrepresentation in connection with the obtaining or providing of, or the furnishing of information to a consumer on, any scholarship, grant, loan, tuition, discount,	<p>Amend. No. 617 (Nov. 1, 2001) USSG § 2B1.1</p> <ul style="list-style-type: none"> • Provided a 2-level enhancement with a minimum offense level of 10 “if the offense involves the misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education.” Explained that the enhancement “targets the provider of the financial assistance or scholarship services, not the individual applicant for such assistance or scholarship, consistent

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	sec. 3.	award, or other financial assistance for purposes of financing an education at an institution of higher education, such that those penalties are comparable to the base offense level for misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency.	with the intent of the legislation.” This enhancement was the same as the enhancement for misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government charity.
2002		n/a	<p>Amend. No. 638 (Nov. 1, 2002) USSG 2B1.1</p> <ul style="list-style-type: none"> • Added cultural heritage cross reference and cultural heritage guideline at 2B1.5.
2003	107-204 Sarbanes-Oxley Act of 2002, title VIII, sec. 805(a) [White-Collar Crime Penalty Enhancement Act of 2002].	<p>Section 805(a): [R]eview and amend, as appropriate, the Federal Sentencing Guidelines and related policy statements to ensure that—</p> <p>(1) the base offense level and existing enhancements contained in § 2J1.2 relating to obstruction of justice are sufficient to deter and punish that activity;</p> <p>(2) the enhancements and specific offense characteristics relating to obstruction of justice are adequate in cases where—</p> <p>(A) the destruction, alteration, or fabrication of evidence involves—</p> <p>(i) a large amount of evidence, a large number of participants, or is otherwise extensive;</p> <p>(ii) the selection of evidence that is particularly probative or essential to the investigation; or</p> <p>(iii) more than minimal planning; or</p> <p>(B) the offense involved abuse of a special skill or a position of trust;</p>	<p>Amend. No. 647 (Jan. 25, 2003) USSG § 2B1.1</p> <ul style="list-style-type: none"> • Added six-level enhancement to USSG § 2B1.1 for a fraud offense involving 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.” • Added two additional prongs to § 2B1.1(b)(12)(B). First, the amendment increased by four levels offenses that substantially endangered the solvency or financial security of an organization that was a publicly traded company or had 1,000 or more employees. This prong “reflects the Commission’s determination that such an offense undermines the public’s confidence in the banking system” and serves as a proxy for determining solvency or financial security of an assumed substantial number of individual victims. The second prong added a four-level increase if the offense substantially endangered the solvency or financial security of 100 or more victims, “regardless of whether a publicly traded company or other organization was affected by the offense.” Pointing to the directive in section 805(a)(4), the Commission explained that this enhancement “shall apply cumulatively with the enhancement” based solely on the number of victims, “to reflect the particularly acute harm suffered by victims of offenses for which” this new prong applies.”

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	Sarbanes-	<p>(3) the guideline offense levels and enhancements for violations of section 1519 [destruction or falsification of records in federal investigations and bankruptcy] or 1520 [destruction of corporate audit accounts] of title 18, United States Code, as added by this title, are sufficient to deter and punish that activity;</p> <p>(4) a specific offense characteristic enhancing sentencing is provided under § 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; and</p> <p>(5) the guidelines that apply to organizations in United States Sentencing Guidelines, chapter 8, are sufficient to deter and punish organizational criminal misconduct [<i>see</i> Amend. No. 673, <i>infra</i>].</p> <p>(b) Emergency Authority and Deadline for Commission Action.--The United States Sentencing Commission is requested to promulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than 180 days after the date of enactment of this Act, in accordance with the procedures set forth in section 219(a) of the Sentencing Reform Act of 1987,* as though the authority under that Act had not expired.</p> <p style="text-align: center;">* * *</p> <p>Section 905: [R]eview and, as appropriate,</p>	<ul style="list-style-type: none"> • Added an application note for § 2B1.1(b)(12)(B) to set forth a non-exhaustive list of factors for the court to consider in determining whether an offense endangered the solvency or financial security of a publicly traded company or an organization with 1,000 or more employees. • Potentially broadened the application note for § 2B1.1(b)(12)(B) for the previously existing financial institutions enhancement so that it is also triggered by non-exhaustive list, rather than a specified list. However, also removed the factor allowing the enhancement if the financial institution “was placed in substantial jeopardy of any of the [other listed factors].” The Commission explains that this was done “to be consistent structurally with the new prongs of the enhancement.” • Added a four-level enhancement at USSG § 2B1.1(b)(13) if “the offense involved a violation of securities law and, at the time of the offense, the defendant was an officer or director of a publicly traded company.” “The Commission concluded” that the enhancement “appropriately reflects that an officer or director of a publicly traded company who commits such an offense violates certain heightened fiduciary duties imposed by securities law upon such individuals.” Through this wholesale factual finding, the enhancement effectively doubled the increase for abuse of position of trust for an officer or director of a publicly traded company and now without requiring any particular finding. • Amended the application note for the new four-level enhancement under USSG § 2B1.1(b)(13) applying to an officer or director of a publicly traded company to “expressly provide that the enhancement would apply regardless of whether the defendant was convicted under a specific securities fraud statute.” As a result, if the offense of conviction was under a general fraud statute but the judge finds by a preponderance of the evidence that it “involved a violation of ‘securities law’ as defined in the application note,” the enhancement applies. • Expanded the loss table at USSG § 2B1.1(b)(1) “to punish adequately offenses that cause catastrophic losses of magnitudes previously unforeseen, such as the serious

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	Oxley Act of 2002, title IX, sec. 905.	<p>amend the Federal Sentencing Guidelines and related policy statements to implement the provisions of the White Collar Crime Penalty Enhancement Act of 2002, which increased the maximum penalties for certain white collar offenses [mail and wire fraud, ERISA violations under 29 U.S.C. § 1131].</p> <p>In carrying out the above directive, the Sentencing Commission shall—</p> <p>(1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses and the penalties set forth in [the White-Collar Crime Penalty Enhancement Act of 2002], the growing incidence of serious fraud offenses which are identified above, and the need to modify the sentencing guidelines and policy statements to deter, prevent, and punish such offenses;</p> <p>(2) consider the extent to which the guidelines and policy statements adequately address whether the guideline offense levels and enhancements for violations of the sections amended by [the White-Collar Crime Penalty Enforcement 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;</p> <p>(3) assure reasonable consistency with other relevant directives and sentencing guidelines;</p> <p>(4) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable</p>	<p>corporate scandals that gave rise to several portions of the Act” (not specified). Added two additional loss amount categories: a 28-level increase for loss over \$200 million, and a 30-level increase for loss over \$400 million. These new levels “address congressional concern regarding particularly extensive and serious fraud offenses, and more fully effectuate increases in statutory maximum penalties provided by the Act.”</p> <ul style="list-style-type: none"> • Modified the tax table in USSG § 2T4.1 “in a similar manner to maintain the longstanding proportional relationship between the loss table in § 2B1.1 and the tax table.” • Added “the reduction in the value of securities or other corporate assets” to the general enumerated factors that the court may consider in determining the amount of loss under § 2B1.1(b)(1). • See U.S. Sentencing Comm’n, <i>Report to Congress: Increased Penalties Under the Sarbanes Oxley Act of 2002</i> (Jan. 2003), http://www.ussc.gov/r_congress/S-Oreport.pdf. This report contains a more detailed explanation for these amendments.

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	<p>Sarbanes-Oxley Act, title XI, sec. 1104 [Corporate Fraud Accountability Act of 2002].</p>	<p>sentencing ranges; (5) make any necessary conforming changes to the sentencing guidelines; and (6) assure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.</p> <p>Requests that the Commission promulgate any such guidelines or amendments as soon as practicable, and in any event not later than 180 days after the date of enactment of this Act, in accordance with the procedures set forth in section 219(a) of the Sentencing Reform Act of 1987,* as though the authority under that Act had not expired. * * *</p> <p>Section 1104: (1) [P]romptly review the sentencing guidelines applicable to securities and accounting fraud and related offenses; (2) expeditiously consider the promulgation of new sentencing guidelines or amendments to existing sentencing guidelines to provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses; and (3) submit to Congress an explanation of actions taken by the Sentencing Commission pursuant to paragraph (2) and any additional policy recommendations the Sentencing Commission may have for combating offenses</p>	

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		<p>described in paragraph (1). [Review the following considerations in carrying out the above requests]:</p> <ol style="list-style-type: none"> (1) 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; (2) assure reasonable consistency with other relevant directives and with other guidelines; (3) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements; (4) ensure that guideline offense levels and enhancements for an obstruction of justice offense are adequate in cases where documents or other physical evidence are actually destroyed or fabricated; (5) ensure that the guideline offense levels and enhancements under § 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; (6) make any necessary conforming changes to the sentencing guidelines; and (7) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553 (a)(2) of title 18, United States Code. 	

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		<p>[P]romulgate the guidelines or amendments provided for under this section as soon as practicable, and in any event not later than the 180 days after the date of enactment of this Act, in accordance with the procedures set forth in section 21(a) of the Sentencing Reform Act of 1987,* as though the authority under that Act had not expired.</p> <p>Note: Section 903 increased the statutory maximum penalties for wire fraud and mail fraud offenses from five to 20 years.</p> <p>*Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is set forth at 28 U.S.C. § 994 note.</p>	
2003		Same as above	<p>Amend No. 653 (Nov. 1, 2003) USSG 2B1.1</p> <ul style="list-style-type: none"> • Amendment expands on temporary emergency Amend No. 647. • With this amendment, the Commission “continues its work to deter and punish economic and white collar crimes, building on its Economic Crime Package of 2001 and subsequent formation in early 2002 of an Ad Hoc Advisory Group on the Organizational Guidelines.” • Modifies BOL with a “higher alternative base offense level 7 if the defendant was convicted on an offense referenced to 2B1.1 and the offenses carries a statutory maximum term of imprisonment of 20 years or more.” The “effect” is “to limit the availability of a probation only sentence... to offenses involving loss amounts of \$10,000 or less” when it was previously available for loss amounts of \$30,0000 or less. • Further expanded the new SOC for officer or director – amending the SOC to

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			<p>apply not just to violations of securities law, but also commodities law, and expanding beyond “officer or director” to also include: registered broker or dealer; investment advisor; commodities trading advisor; commodity pool operator.</p>
2003	<p>107-296</p> <p>Cyber Security Enhancement Act of 2002, title II, sec. 225(b), (c) of the Homeland Security Act of 2002.</p>	<p>[R]eview and, if appropriate, amend its guidelines and its policy statements applicable to persons convicted of an offense under 18 U.S.C. § 1030 [computer fraud and related activity].</p> <p>In carrying out the directive above, [] ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses described [above], the growing incidence of such offenses, and the need for an effective deterrent and appropriate punishment to prevent such offenses.”</p> <p>[C]onsider the following factors and the extent to which the guidelines may or may not account for them—</p> <p>(i) the potential and actual loss resulting from the offense;</p> <p>(ii) the level of sophistication and planning involved in the offense;</p> <p>(iii) whether the offense was committed for purposes of commercial advantage or private financial benefit;</p> <p>(iv) whether the defendant acted with malicious intent to cause harm in committing the offense;</p> <p>(v) the extent to which the offense violated the privacy rights of individuals harmed;</p> <p>(vi) whether the offense involved a computer</p>	<p>Amend. No. 654 (Nov. 1, 2003)</p> <ul style="list-style-type: none"> • Made several changes “designed to supplement existing guidelines and policy statements and thereby ensure that offenses under 18 U.S.C. § 1030 are adequately addressed and punished.” <p>USSG § 2B1.1:</p> <ul style="list-style-type: none"> • Added a new specific offense characteristics at USSG § 2B1.1(b)(13): A 2-level increase for convictions that involve a “computer system used to maintain or operate a critical infrastructure or used in furtherance of the administration of justice, national defense, or national security” or “an intent to obtain private personal information”; a 4-level increase for a conviction under § 1030(a)(5)(A)(i), which involves intentionally inflicted damage to a protected computer; and a 6-level increase, with a minimum offense level of 24, if the offense “resulted in a substantial disruption of a critical infrastructure.” Explained that “the graduated levels ensure incremental punishment for increasingly serious conduct, and were chosen in recognition of the fact that conduct supporting application of a more serious enhancement frequently will encompass behavior relevant to a lesser enhancement as well.” • Explained that the minimum offense level of 24 for “substantial disruption of a critical infrastructure” was “chosen to maintain parity with the minimum offense level that applies to an offense that substantially jeopardized the safety and soundness of a financial institution” at USSG § 2B1.1(b)(12). Also explained that the enhancement “reflects the fact that some offenders to whom the enhancement may apply will be subject to a statutory maximum penalty of five years’ imprisonment.” • Provided an encouraged upward departure “for cases in which the disruption of the

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		<p>used by the government in furtherance of national defense, national security, or the administration of justice;</p> <p>(vii) whether the violation was intended to or had the effect of significantly interfering with or disrupting a critical infrastructure; and</p> <p>(viii) whether the violation was intended to or had the effect of creating a threat to public health or safety, or injury to any person.”</p> <p>[A]ssure reasonable consistency with other relevant directives and with other sentencing guidelines; to account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges; make any necessary conforming changes to the sentencing guidelines; and assure that the guidelines adequately meet the purposes of sentencing as set forth in 18 U.S.C. § 3553(a)(2).</p> <p>[S]ubmit a brief report to Congress, no later than May 1, 2003, that explains any actions taken by the Sentencing Commission in response to this section and includes any recommendations the Commission may have regarding statutory penalties for offenses under 18 U.S.C. § 1030.</p>	<p>critical infrastructure has a debilitating impact on national security, national economic security, national public health or safety, or any combination of these matters.”</p> <ul style="list-style-type: none"> • Defined “critical infrastructure” (a term that does not appear as an element of any offense under § 1030) by drawing “in part” from the definition of “critical infrastructure” in the PATRIOT Act, but modifying it “to ensure that the enhancement will apply to substantial disruptions of critical infrastructure that are regional, rather than national, in scope.” • “Modifie[d] the rule of construction relating to the calculation of loss in protected computer cases . . . to incorporate more fully the statutory definition of loss at 18 U.S.C. § 1030(e)(11),” which was added as part of the PATRIOT Act, and to “clarify its application to all 18 U.S.C. § 1030 offenses sentenced under § 2B1.1.” Note: This statutory definition of loss for § 1030 offenses is somewhat different from the “rule of construction” in the guideline. Before the amendment, the rule stated that actual loss included “pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable.” This language remained, despite that it does not appear in the statutory definition. • Expanded the upward departure note relating to non-monetary or physical harm to add “a provision that expressly states that an upward departure would be warranted for an offense under 18 U.S.C. §1030 involving damage to a protected computer that results in death.” <p>In its Report to Congress, the Commission described in greater detail its reasoning regarding the amendments and referred to a study of 116 cases as support for the amendments. <i>See Report to the Congress: Increased Penalties for Cyber Security Offenses</i> (May 2003), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Computer_Crime/200304_RtC_Increased_Penalties_Cyber_Security.pdf.</p> <p>Note: Recommended in the Report that Congress increase the penalties for violations</p>

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			of 18 U.S.C. § 1030(a)(1) (accessing and dissemination of national defense or restricted information with reason to believe that such information could be used to the injury of the United States or to the advantage of a foreign nation.), which currently has a statutory maximum of ten years in prison. Recognized that the guidelines treat that offense far more seriously than Congress, assigning a base offense level of 35 at CHC I for an advisory sentencing range of 168-210 months. Congress has not increased the penalty.
2003		n/a	<p>Amend. No. 656 (Nov. 1, 2003) USSG 2B1.1</p> <ul style="list-style-type: none"> • Commentary added an invited upward departure “in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.”
2004	108-187 Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, sec. 4(b).	[R]eview and, as appropriate, amend the sentencing guidelines and policy statements to provide appropriate penalties for violations of [18 USC § 1037], United States Code, [e-mail fraud] as added by this section, and other offenses that may be facilitated by the sending of large quantities of unsolicited electronic mail. In carrying out the directive, . . . consider providing sentencing enhancements [for the following]: (A) those convicted under [18 USC § 1037] who— (i) obtained electronic mail addresses through improper means, including— (I) harvesting electronic mail addresses of the users of a website, proprietary service, or other online public forum operated by another person, without the authorization of such	<p>Amend. No. 665 (Nov. 1, 2004) USSG § 2B1.1</p> <ul style="list-style-type: none"> • Referred violations of 18 USC § 1037 to § 2B1.1. “The Commission determined that reference to § 2B1.1 is appropriate because subsection 18 USC § 1037(a)(2) through (a)(5) involve deceit. • “Because each offense under 18 USC § 1037 contains as an element the transmission of multiple commercial electronic messages . . . the amendment provides in Application Note 4 that the mass-marketing enhancement in § 2B1.1(b)(2)(A)(ii) shall apply automatically to any defendant who is convicted under 18 USC § 1037 or who committed an offense involving conduct described in 18 USC § 1037. Broadening application of the mass marketing enhancement to all defendants sentenced under § 2B1.1 whose offense involves conduct described in 18 USC § 1037, whether or not the defendant is convicted under 18 USC § 1037, responds specifically to that part of the directive concerning offenses that are facilitated by sending large volumes of electronic mail. NOTE: The other offenses listed as examples in Congress’s directive seem geared toward particular crimes already associated with large quantities of email (fraud, identity theft, and certain sex offenses). Without any reason given by the Commission, the amendment expands the enhancement to apply to <i>any</i> offense under

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		<p>person; and (II) randomly generating electronic mail addresses by computer; or (ii) knew that the commercial electronic mail messages involved in the offense contained or advertised an Internet domain for which the registrant of the domain had provided false registration information; and (B) those convicted of other offenses, including offenses involving fraud, identity theft, obscenity, child pornography, and the sexual exploitation of children, if such offenses involved the sending of large quantities of electronic mail.</p>	<p>the guideline.</p> <ul style="list-style-type: none"> • “Additionally, in response to the directive, a new specific offense characteristic in § 2B1.1(b)(7) provides for a two-level increase if the defendant is convicted under 18 USC § 1037 and the offense involved obtaining electronic mail addressed through improper means. A corresponding application note provides a definition of ‘improper means.’” • “Finally, the Commission also responded to the directive concerning other offenses by making several modifications to other guidelines, as set forth in Amendment 2 of this document. For example, an amendment to the obscenity guideline, § 2G3.1 . . . , added a two-level enhancement if the offense involved the use of a computer or interactive computer service.” <i>See</i> USSG App. C, Amend. 664 (Nov. 1, 2004).
2004		n/a	<p>Amend. No. 674 (Nov. 1, 2004) USSG 2B1.1</p> <ul style="list-style-type: none"> • broadened the special multiple victim rule for offenses involving stolen mail to include theft of mail from hosing unit cluster boxes. It provides a presumption that this theft involves the number of victims corresponding to the number of mailboxes contained in the cluster box for these reasons (i) “unique proof problems”; (ii) “frequently significant, but difficult to quantify, non-monetary losses”; (iii) “importance of maintaining the integrity of the United States mail service.” • Amended 2B1.1(b)(10) to address not only device-making equipment and counterfeit access device, but also “authentication feature.” The Commission explained the amendment response to The Secure Authentication Feature and Enhanced Identification Defense Act of 2003 (“SAFE ID Act”) which created a new offense prohibiting trafficking of authentication features, and prohibiting transfer or possession of authentication features.
2006		n/a	<p>Amend. No. 685 (Nov. 1, 2006) USSG 2B1.1</p> <ul style="list-style-type: none"> • Added +2 for offenses that involve destruction of veterans’ memorials.

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			<ul style="list-style-type: none"> Reason for Amendment: it “responds to section 2 of the Veterans’ memorial Preservation and Recognition Act of 2003, Pub. L. 108-29. The Act created a new offenses... that prohibits the destruction of veterans’ memorials.... This amendment ... broadens the application of the two-level enhancement under both §§2B1.1(b)(6) and 2B1.5(b)(2) to include veterans’ memorials.” This “ensures that the penalty for the destruction of veterans’ memorials will reflect the status of a veterans’ memorial as a specially protected cultural heritage resource.”
2007	109-177 USA Patriot Improvement and Reauthorization Act of 2005, sec. 307(c)	[R]eview the Federal Sentencing Guidelines to determine whether [a] sentencing enhancement is appropriate for any offense under [18 USC §§ 659 or 2311].	<p>Amend. No. 699 (Nov. 1, 2007) USSG § 2B1.1 “[R]esponds to the directive” by expanding § 2B1.1(b)(11) “to cover cargo theft and adds a reference to the <i>receipt</i> of stolen vehicles or goods to ensure application of the enhancement is consistent with the scope of 18 USC §§ 659 and 2313. The Commission determined that the two-level increase, and the minimum offense level of 14, appropriately responds to concerns regarding the increased instances of organized cargo theft operations.” (emphasis added).</p> <p>Note: The directive referred to § 2311, not § 2313. The guideline also refers to the receipt of stolen vehicle parts, which is not expressly covered by § 2313, even if the directive had referenced it.</p>
2008	110-179 Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, sec. 5	[Sec. 2 of the Act created a new offense at 18 U.S.C. § 1040 (fraud in connection with a major disaster or emergency benefits).] (a)(1) [P]romulgate sentencing guidelines or amend existing sentencing guidelines to provide for increased penalties for persons convicted of fraud or theft offenses in connection with a major disaster declaration under [42 U.S.C. § 5170] or an emergency declaration under [42 U.S.C. § 5191]; and	<p>Amend. No. 714 (Feb. 6, 2008) USSG § 2B1.1</p> <ul style="list-style-type: none"> Added two-level enhancement at § 2B1.1(b)(16), stating that “[i]f the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a declaration of a major disaster or an emergency, increase by two levels.” Added an Application Note stating that “[i]n a case in which subsection (b)(16) applies, reasonably foreseeable pecuniary harm includes the administrative costs to any federal, state, or local government entity or any commercial or not-for-profit

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		<p>(2) submit to the Committee on the Judiciary of the Senate and the House “an explanation of actions taken by the Commission pursuant to paragraph (1) and any additional policy recommendations the Commission may have for combating offenses described in that paragraph.</p> <p>(b) In carrying out this section, the Sentencing Commission shall—</p> <p>(1) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses described in subsection (a) and the need for aggressive and appropriate law enforcement action to prevent such offenses;</p> <p>(2) assure reasonable consistency with other relevant directives and with other guidelines;</p> <p>(3) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the sentencing guidelines currently provide sentencing enhancements;</p> <p>(4) make any necessary conforming changes to the sentencing guidelines; and</p> <p>(5) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States</p>	<p>entity of recovering the benefit from any recipient thereof who obtained the benefit through fraud or was otherwise ineligible for the benefit that were reasonably foreseeable.”</p> <ul style="list-style-type: none"> • Defined the terms “emergency” and “major disaster” to have the same definition as in 42 USC § 5122. <p>Amend. No. 719 (Nov. 1, 2008)</p> <p>Repromulgated the emergency amendment as permanent, but with several changes, as follows:</p> <ul style="list-style-type: none"> • Deleted the amendments to § 2B1.1 made by Amend. No. 714. • Added a 2-level enhancement and a minimum offense level of 12 at § 2B1.1(b)(11) if the offense “involved conduct described in 18 U.S.C. § 1040.” • Explained that “the Commission frequently adopts a minimum offense level in circumstances in which, as in these cases, loss as calculated by the guidelines is difficult to compute or does not adequately account for the harm caused by the offense. The Commission studied a sample of disaster fraud cases and compared those cases to other cases of defrauding government programs. This analysis supported claims made in testimony to the Commission that the majority of the disaster fraud cases resulted in probationary sentences because the amount of loss calculated under subsection (b)(1) of §2B1.1 had little impact on the sentences. The Commission also received testimony and public comment identifying various harms unique to disaster fraud cases. For example, charitable institutions may have a more difficult time soliciting contributions because fraud in connection with disasters may erode public trust in these institutions. Moreover, the pool of funds available to aid legitimate disaster victims is adversely affected when fraud occurs. Further, the inherent tension between the imposition of fraud controls and the need to provide aid to disaster

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		<p>Code.</p> <p>Note: The Act also authorized the Commission to promulgate these amendments pursuant to its emergency authority.*</p> <p>*Pub. L. No. 100-182, § 21 (Dec. 7, 1987) (authorizing the Commission to promulgate emergency, temporary amendments, for which no notice or comment is required). Amendments promulgated under this authority are to expire unless made permanent during the regular amendment cycle. This section is forth at 28 U.S.C. § 994 note.</p>	<p>victims quickly makes it difficult for relief agencies and charitable institutions to prevent disaster fraud. All of these factors provide support for a minimum offense level.”</p> <ul style="list-style-type: none"> • Added a downward departure provision if defendant received the minimum offense level of 12 under the amended § 2B1.1(b)(11) and if the defendant “sustained damages, loss, hardship, or suffering caused by a major disaster or an emergency as those terms are defined in 42 U.S.C. 5122 and . . . the benefits received illegally were only an extension of overpayment of benefits received legitimately, a downward departure may be warranted. • Explained that the downward departure “provision recognizes that a defendant’s legitimate status as a disaster victim may be a mitigating factor warranting a downward departure in certain cases involving relatively small amounts of loss.” <p>These amendments and their history are detailed at USSC, <i>Report to the Congress: Amendments to the Federal Sentencing Guidelines in Response to the Emergency Disaster Assistance Fraud Penalty Enhancement Act of 2007</i> (Sept. 2008), avail. at http://www.usc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Disaster_Fraud/200809_RtC_Disaster_Fraud/index.htm.</p>
2009	110-326 Identity Theft Enforcement and Restitution Act of 2008, sec. 209.	(a) [] Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review its guidelines and policy statements applicable to persons convicted of offenses under sections 1028 [fraud in connection with identification documents], 1028A [aggravated identity theft], 1030 [fraud in connection with computers], 2511 [illegal wiretap or disclosure], and 2701 [unlawful access to	<p>Amend. No. 726 (Nov. 1, 2009) USSG § 2B1.1</p> <ul style="list-style-type: none"> • Inserted a new freestanding 2-level enhancement, at § 2B1.1(b)(15), if the defendant was convicted under 18 U.S.C. § 1030 [fraud in connection with computers] and the offense “involved an intent to obtain personal information.” • The effect of this change for § 1030 offenses involving the intent to obtain personal information is that they will now be subject to a <i>cumulative</i> two-level enhancement. (The Commission moved the two-level enhancement for computer offenses under 18 U.S.C. § 1030 if the offense involved “intent to obtain personal information” to create this new, free-standing specific offense characteristic.) As a result, a defendant can be

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		<p>stored communications] of title 18, United States Code, and any other relevant provisions of law, in order to reflect the intent of Congress that such penalties be increased in comparison to those currently provided by such guidelines and policy statements.</p> <p>(b) Requirements. –In determining its guidelines and policy statements on the appropriate sentence for the crimes enumerated in subsection (a), the United States Sentencing Commission shall consider the extent to which the guidelines and policy statements may or may not account for the following factors in order to create an effective deterrent to computer crime and the theft or misuse of personally identifiable data:</p> <p>(1) The level of sophistication and planning involved in such offense.</p> <p>(2) Whether such offense was committed for purpose of commercial advantage or private financial benefit.</p> <p>(3) The potential and actual loss resulting from the offense including –</p> <p>(A) the value of information obtained from a protected computer, regardless of whether the owner was deprived of use of the information; and</p> <p>(B) where the information obtained constitutes a trade secret or other proprietary information, the cost the victim incurred developing or compiling the information.</p> <p>(4) Whether the defendant acted with intent to</p>	<p>subject to enhancements for both “intent to obtain personal information” (two levels) under new subsection (b)(15) and any relevant enhancement relating to computer offenses (if the offense involved a computer system used to maintain or operate a critical infrastructure or government computer (two levels), involved intentional damage to such a computer (four levels), or caused substantial disruption of a critical infrastructure (six levels)) under subsection (b)(16).</p> <ul style="list-style-type: none"> • As its reason, the Commission explained that “the amendment responds to concerns that a case involving those other harms is different in kind from a case involving an intent to obtain personal information. Moving the intent to obtain personal information prong out of the computer crime enhancement into a new enhancement ensures that a defendant convicted under section 1030 receives an incremental increase in punishment if the offense involved both an intent to obtain personal information and another harm addressed by the computer crime enhancement.” The Commission did not explain why the fact that these cases are “different” requires greater punishment. • Added a two-level enhancement applicable to all cases sentenced under §2B1.1 (not just those addressed by this directive) “if the offense involved the unauthorized public dissemination of personal information.” The Commission did not define “public dissemination.” • Expanded the definition of “victim” under § 2B1.1 so that in a case involving means of identification (as defined at 18 U.S.C. § 1028(d)(7) and belonging to an actual person), a victim for purposes of the victim table at subsection (b)(2) includes “any individual whose means of identification was used unlawfully and without authority.” As its reason, the Commission explained that an individual whose personal information is compromised “even if fully reimbursed, must often spend significant time resolving credit problems and related issues.” This is contrary to the relevant data presented to the Commission, compiled by the Federal Trade Commission and demonstrating that the majority of individuals who know about the misuse of their identifying information spend minimal time resolving problems, with the median time

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		<p>cause either physical or property harm in committing the offense.</p> <p>(5) The extent to which the offense violated the privacy rights of individuals.</p> <p>(6) The effect of the offense upon the operations of an agency of the United States Government, or of a State or local government.</p> <p>(7) Whether the offense involved a computer used by the United States Government, a State, or a local government in furtherance of national defense, national security, or the administration of justice.</p> <p>(8) Whether the offense was intended to, or had the effect of, significantly interfering with or disrupting a critical infrastructure.</p> <p>(9) Whether the offense was intended to, or had the effect of, creating a threat to public health or safety, causing injury to any person, or causing death.</p> <p>(10) Whether the defendant purposefully involved a juvenile in the commission of the offense.</p> <p>(11) Whether the defendant’s intent to cause damage or intent to obtain personal information should be disaggregated and considered separately from the other factors set forth in USSG 2B1.1(b)(14).</p> <p>(12) Whether the term “victim” as used in USSG 2B1.1, should include individuals whose privacy was violated as a result of the offense in addition to individuals who</p>	<p>spent of four hours. <i>See</i> Federal Trade Commission, 2006 Identity Theft Report (Nov. 2007), available at www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf</p> <ul style="list-style-type: none"> • The Commission also explained that it had “received testimony that the incidence of data breach cases, in which large numbers of means of identification are compromised, is increasing.” It does not explain why or how this evidence supports an increase in punishment by designating those who have not suffered pecuniary loss as “victims.” (On a positive note, the Commission limited the new definition of “victim” to “cover only those individuals whose means of identification are <i>actually used</i>.” (Emphasis added.)) • Amended the commentary at Application Note 3(C), which explains how to calculate estimated loss, to state that the estimate of loss may be based on the fair market value of property that is copied. Explained that “[t]his change responds to concerns that the calculation of loss does not adequately account for a case in which an owner of proprietary information retains possession of such information, but the proprietary information is unlawfully copied.” The change is intended to recognize that “a computer crime that does not deprive the owner of the information on the computer nonetheless may cause loss inasmuch as it reduces the value of the information.” • Also amended the commentary to Application Note 3(C) to state that “in the case of proprietary information (<i>e.g.</i>, trade secrets), the cost of developing that information or the reduction in the value of that information that resulted from the offense. Explains that it “responds to concerns that the guidelines did not adequately explain how to estimate loss.” • With respect to the factors listed in the directive that did not result in a guideline increase, the Commission stated that it “determined that certain factors listed in the directive are adequately accounted for by existing provisions in the <i>Guidelines Manual</i>.” • For a full discussion of the directive and reasons why the Commission might have

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		<p>suffered monetary harm as a result of the offense. (13) Whether the defendant disclosed personal information obtained during the commission of the offense. (c) Additional Requirements.--In carrying out this section, the United States Sentencing Commission shall – (1) assure reasonable consistency with other relevant directives and with other sentencing guidelines; (2) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges; (3) make any conforming changes to the sentencing guidelines; and (4) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.</p>	<p>decided not to take any action, see Testimony of Jennifer N. Coffin Before the Commission Public Hearing on Proposed Amendments for 2009 Re: offenses involving computer crimes and the misuse of identifying information (Mar. 17, 2009), avail. at www.fd.org/pdf_lib/id%20theft.pdf.</p>
2009	<p>110-384 Let Our Veterans Rest In Peace Act of 2008, sec. 3.</p>	<p>(a) In General. –Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and, if appropriate, amend the Federal sentencing guidelines and policy statements to ensure the guidelines and policy statements provide adequate sentencing enhancements for any offense involving the desecration, theft, or trafficking in, a grave marker, headstone, monument, or other object, intended to permanently mark a</p>	<p>Amend. No. 733 (Nov. 1, 2009) USSG § 2B1.1</p> <ul style="list-style-type: none"> • Amended the SOC at subsection (b)(6), which adds two levels if the “offense level involved theft of, damage to, destruction of property from a national cemetery or veterans’ memorial,” to apply to “trafficking in” such property as well. • Explained that “[t]here is a specific offense characteristic at subsection (b)(6) of § 2B1.1 for damage, destruction, or theft of a veteran’s grave marker. The amendment amends this specific offense characteristic so that it also covers trafficking in a

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		veteran's grave. (b) Commission Duties.—In carrying out this section, the Sentencing Commission shall – (1) ensure that the sentences, guidelines, and policy statements relating to offenders convicted of these offenses are appropriately severe and reasonably consistent with other relevant directives and other Federal sentencing guidelines and policy statements; (2) make any necessary conforming changes to the Federal sentencing guidelines; and (3) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.	veteran's grave marker.” <ul style="list-style-type: none"> • Did not say how this increase will serve the purposes of sentencing.
2010		n/a	Amend. No. 745 (Nov. 1, 2010) USSG §2B1.1 <ul style="list-style-type: none"> • Added cross reference to §2B1.5 for paleontological resources, as with cultural heritage resources. • Reason for Amendment: responding to Omnibus Public Land Management Act of 2009, Pub. L. 111-11, which created a new offense making it unlawful to remove, damage, alter, traffic in, or make a false record relating to a paleontological resource on federal land.
2011	111-148 Patient Protection and Affordable Care Act, sec. 10606(a)(2).	(a) Fraud Sentencing Guidelines.-- (1) Definition. – In this subsection, the term “Federal health care offense” has the meaning given that term in section 24 of title 18, United States Code, as amended by this Act. (2) Review and amendments. – Pursuant to the authority under section 994 of title 28, United States Code, and in accordance with this subsection, the United States Sentencing Commission shall –	Amend. No. 749 (Nov. 1, 2011) USSG § 2B1.1 <ul style="list-style-type: none"> • Added new tiered enhancement at subsection (b)(8) that applies in “Federal health care offenses involving a Government health care program,” as directed, except that the tiers apply to loss amounts “more than” the specified amount rather than “not less than” the specified amount, to maintain consistency with other provisions. • Added a new special rule at Application Note 3(F), as directed by Congress, to

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		<p>(A) review the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses;</p> <p>(B) amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of Federal health care offenses involving Government health care programs to provide that the aggregate dollar amount of fraudulent bills submitted to the Government health care program shall constitute prima facie evidence of the amount of the intended loss by the defendant; and</p> <p>(C) amend the Federal Sentencing Guidelines to provide –</p> <p>(i) a 2-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than \$ 1,000,000 and less than \$ 7,000,000;</p> <p>(ii) a 3-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than \$ 7,000,000 and less than \$ 20,000,000;</p> <p>(iii) a 4-level increase in the offense level for any defendant convicted of a Federal health care offense relating to a Government health care program which involves a loss of not less than \$ 20,000,000; and</p> <p>(iv) if appropriate, otherwise amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of</p>	<p>provide that, if a person is convicted of a “Federal health care offense involving a Government health care program, the aggregate dollar amount of fraudulent bills is prima facie evidence of intended loss, “if not rebutted.”</p> <ul style="list-style-type: none"> • Defined “Federal health care offense” as that term is defined in 18 U.S.C. § 24, as required by the directive. • Defined “Government health care program” as “any plan or program that provides health benefits, whether directly, through insurance or otherwise, which is funded directly, in whole or in part, by federal or state government.” Examples are “the Medicare program, the Medicaid program, and the CHIP program.” By including state funded health care plans, this definition is broader than required by the directive. For further analysis, see the Federal Public Defender Comments on the 2011 proposed amendments: www.fd.org/pdf_lib/FPD%20Public%20Comment%202011.pdf. • Amended Application Note 3(A) to § 3B1.2 “to make clear that a defendant who is accountable under § 1B1.3 (Relevant Conduct) for a loss amount under § 2B1.1 that greatly exceeds the defendant’s personal gain from a fraud offense, and who had limited knowledge of the scope of the scheme, is not precluded from consideration for a mitigating role adjustment.” Provides example of a defendant “whose role in the scheme was limited to serving as a nominee owner and who received little personal gain relative to the loss amount.”

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		<p>Federal health care offenses involving Government health care programs.</p> <p>(3) Requirements. –In carrying this subsection, the United States Sentencing Commission shall –</p> <p>(A) ensure that the Federal Sentencing Guidelines and policy statements –</p> <p>(i) reflect the serious harms associated with health care fraud and the need for aggressive and appropriate law enforcement action to prevent such fraud; and (ii) provide increased penalties for persons convicted of health care fraud offenses in appropriate circumstances;</p> <p>(B) consult with individuals or groups representing health care fraud victims, law enforcement officials, the health care industry, and the Federal judiciary as part of the review described in paragraph (2);</p> <p>(C) ensure reasonable consistency with other relevant directives and with other guidelines under the Federal Sentencing Guidelines;</p> <p>(D) account for any aggravating or mitigating circumstances that might justify exceptions, including circumstances for which the Federal Sentencing Guidelines, as in effect on the date of enactment of this Act, provide sentencing enhancements;</p> <p>(E) make any necessary conforming changes to the Federal Sentencing Guidelines; and</p> <p>(F) ensure that the Federal Sentencing Guidelines adequately meet the purposes of sentencing.</p>	

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2012	111-203 Dodd-Frank Wall Street Reform and Consumer Protection Act, sec. 1079A(a)(1)	<p>(A) Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this paragraph, the United States Sentencing Commission shall review and, if appropriate, amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of offenses relating to securities fraud or any other similar provision of law, in order to reflect the intent of Congress that penalties for the offenses under the guidelines and policy statements appropriately account for the potential and actual harm to the public and the financial markets from the offenses.</p> <p>(B) Requirements.--In making any amendments to the Federal Sentencing Guidelines and policy statements under subparagraph (A), the United States Sentencing Commission shall –</p> <p>(i) ensure that the guidelines and policy statements, particularly section 2B1.1(b)(14) and section 2B1.1(b)(17) (and any successors thereto), reflect –</p> <p>(I) the serious nature of the offenses described in subparagraph (A);</p> <p>(II) the need for an effective deterrent and appropriate punishment to prevent the offenses; and</p> <p>(III) the effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);</p> <p>(ii) consider the extent to which the guidelines</p>	<p>Amend. No. 761 (Nov. 1, 2012)</p> <p>USSG §§ 2B1.1, 2B1.4</p> <ul style="list-style-type: none"> • Created a new Application Note 3(F)(ix) to § 2B1.1 to establish a rebuttable presumption that “the actual loss attributable to the change in value of the security or commodity is the amount determined by (I) calculating the difference between the average price of the security or commodity during the period that the fraud occurred and the average price of the security or commodity during the 90-day period after the fraud was disclosed to the market, and (II) multiplying the difference in average price by the number of shares outstanding.” • To provide “flexibility” (and to place the burden on the defendant to rebut the presumption), provided that in determining whether this will provide a “reasonable estimate of the actual loss,” the court “may consider, among other factors, the extent to which the amount so determined includes significant changes in value not resulting from the offense,” such as “changes caused by external market forces. • Explained that the rule is based on the “modified rescissory method” and “should ordinarily provide a ‘reasonable estimate of the loss.’” It is intended to be “a workable and consistent formula.” [It is also the option endorsed by the government because it eliminates the need for expert testimony and opposed by Defenders and PAG because it may increase the guideline range based on external market forces, not intended, foreseen, or caused by the defendant]. Although the Commission cited two circuit cases in support of the rule (from the Third and Eleventh), it did not mention that two other circuits had adopted the “market adjusted method” of calculating loss, <i>see United States v. Rutkoske</i>, 506 F.3d 170, 179 (2d Cir. 2007); <i>United States v. Olis</i>, 429 F.3d 540, 546 (5th Cir. 2005), or that the Ninth Circuit had accepted the principle that only losses actually caused by the defendant’s actions may be counted. <i>See United States v. Berger</i>, 587 F.3d 1038, 1044-46 (9th Cir. 2009).

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		<p>appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;</p> <p>(iii) ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;</p> <p>(iv) make any necessary conforming changes to guidelines; and</p> <p>(v) ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.</p>	
2012	<p>111-203</p> <p>Dodd-Frank Wall Street Reform and Consumer Protection Act, sec. 1079A(a)(2)</p>	<p>(A) Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this paragraph, the United States Sentencing Commission shall review and, if appropriate, amend the Federal Sentencing Guidelines and policy statements applicable to persons convicted of fraud offenses relating to financial institutions or federally related mortgage loans and any other similar provisions of law, to reflect the intent of Congress that the penalties for the offenses under the guidelines and policy statements ensure appropriate terms of imprisonment for offenders involved in substantial bank frauds or other frauds relating to financial institutions.</p> <p>(B) Requirements. – In making any amendments to the Federal Sentencing Guidelines and policy statements under subparagraph (A), the United States</p>	<p>Amend. No. 761 (Nov. 1, 2012)</p> <p>USSG § 2B1.1</p> <ul style="list-style-type: none"> • Amended Application Note 3(E) to establish a new rule for determining credits against loss in mortgage fraud cases. It now provides that, in cases in which the collateral has not been disposed of at the time of sentencing, the loss to the victim shall be reduced by “the fair market value of the collateral as of the date on which the guilty of the defendant has been established, whether by guilty plea, trial, or plea of <i>nolo contendere</i>.” Also established a rebuttable presumption that the most recent tax assessment value of the collateral is a “reasonable estimate of the fair market value.” • In making the determination, the court “may consider, among other factors, the recency of the tax assessment and the extent to which the jurisdiction’s tax assessment practices reflect factors not relevant to fair market value.” • Under the old rule, the fair market value of undisposed-of collateral was determined at the time of sentencing and based on actual appraisals. The new rule relieves probation officers (who advocated it) of accurately determining fair market value

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		<p>Sentencing Commission shall –</p> <p>(i) ensure that the guidelines and policy statements reflect—</p> <p>(I) the serious nature of the offenses described in subparagraph (A);</p> <p>(II) the need for an effective deterrent and appropriate punishment to prevent the offenses; and</p> <p>(III) the effectiveness of incarceration in furthering the objectives described in subclauses (I) and (II);</p> <p>(ii) consider the extent to which the guidelines appropriately account for the potential and actual harm to the public and the financial markets resulting from the offenses;</p> <p>(iii) ensure reasonable consistency with other relevant directives and guidelines and Federal statutes;</p> <p>(iv) make any necessary conforming changes to guidelines; and</p> <p>(v) ensure that the guidelines adequately meet the purposes of sentencing, as set forth in section 3553(a)(2) of title 18, United States Code.</p>	<p>through appraisal. In some jurisdictions, tax assessment value is significantly lower than fair market value, so that the presumptive credit against loss will now be lower (resulting in a higher loss amount). Even the government said that this method, though “easily found,” “is not always a just statement of the value of the property.” The new rule shifts the burden to defendants to show that the tax assessment value is not a reasonable estimate of the fair market value of the collateral.</p> <ul style="list-style-type: none"> • Amended commentary to the 4-level enhancement at § 2B1.1(b)(15)(B)(ii) if the offense “substantially endangered the solvency or financial security of an organization.” Application Note 12 sets forth criteria for the court to consider, and includes a new consideration: Whether “one or more of the criteria listed [] was likely to result from the offense but did not result from the offense because of federal government intervention, such as a bailout.” • Explained that the amendment reflects the Commission’s “intent that [the enhancement] account for the risk of harm from the defendant’s conduct and its view that a defendant should not avoid the application of the enhancement because the harm that was otherwise likely to result from the offense conduct did not occur because of fortuitous federal government intervention.” • Amended the commentary to add a special rebuttable presumption rule on calculating loss in cases involving the fraudulent inflation or deflation in the value of a publicly traded security or commodity. • Explained “[c]ase law and comments received by the Commission indicate that determinations of loss in cases involving securities fraud and similar offenses are complex and that a variety of different methods are in use, possibly resulting in unwarranted sentencing disparities.” • Amended the upward departure provision at Application Note 19(A)(iv) to add an example. It now reads that departure may be warranted if “the offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1), such

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			<p><u>as a risk of significant disruption of a national financial market.”</u></p> <ul style="list-style-type: none"> • Explained that this example responds to the directive to consider whether the guidelines applicable to the offenses covered by the directives appropriately “account for the potential and actual harm to the public and the financial market[s].” [The Commission had proposed a new specific offense characteristic, so the amendment was less harsh than proposed. The government opposed a departure provision, urging the adoption of a 6-level upward enhancement and a minimum offense level of 24. It said that the burden would be higher if only a departure.] • Added an example to Application Note 19(C), which provides that a downward departure may be warranted in cases “in which the offense level determined under this guideline substantially overstates the seriousness of the offense.” The example provides that “a securities fraud involving a fraudulent statement made publicly to the market may produce an aggregate loss amount that is substantial but diffuse, with relatively small loss amounts suffered by a relatively large number of victims,” and that, “in such a case, the loss table in subsection (b)(1) and the victims table in subsection (b)(2) may combine to produce an offense level that substantially overstates the seriousness of the offense.” • Explained that the amendment “responds to concerns raised in comment and case law that the cumulative impact of the loss table and the victims table may overstate the seriousness of the offense in certain cases.”
2013	112-269 Foreign and Economic Espionage Penalty Enhancement Act of 2012		<p>Amend. No. ____ (Nov. 1, 2013) USSG §2B1.1 Amended SOC regarding trade secrets to increase the enhancement in many cases. Before this amendment, there was a 2-level enhancement if the offense “involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent.” With the amendment, the same conduct is now subject to a 4-level enhancement and a floor of 14. The Commission also added a new 2-level enhancement where the defendant knew or intended that the misappropriated trade secret “would be transported or transmitted out of</p>

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			the United States.”
2013	112-186 Strengthening and Focusing Enforcement to Deter Organized Stealing and Enhance Safety Act of 2012	<p>Pursuant to its authority under section 994 of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, if appropriate, amend the Federal sentencing guidelines and policy statements applicable to persons convicted of offenses under section 670 of title 18, United States Code, as added by this Act, section 2118 of title 18, United States Code, or any another section of title 18, United States Code, amended by this Act, to reflect the intent of Congress that penalties for such offenses be sufficient to deter and punish such offenses, and appropriately account for the actual harm to the public from these offenses.</p> <p>(b) Requirements.--In carrying out this section, the United States Sentencing Commission shall--</p> <p>(1) consider the extent to which the Federal sentencing guidelines and policy statements appropriately reflect--(A) the serious nature of such offenses; (B) the incidence of such offenses; and (C) the need for an effective deterrent and appropriate punishment to prevent such offenses;</p> <p>(2) consider establishing a minimum offense level under the Federal sentencing guidelines and policy statements for offenses covered by this Act;</p>	<p>Amend. No. ____ (Nov. 1, 2013) USSG §2B1.1</p> <ul style="list-style-type: none"> • Amended 2B1.1 to add the greater of (1) a 2-level increase if the offense involved conduct described in 18 U.S.C. § 670 (theft and related offenses regarding pre-retail medical products); or (2) a 4-level increase if the offense involved such conduct and the defendant was employed by, or was an agent of, an organization in the supply chain for the pre-retail medical product (if the 4-level increase applies, §3B1.3 for abuse of position of trust does not apply). • Explained that “[b]ased on public comment, testimony and sentencing data, the Commission concluded that an enhancement differentiating fraud and theft offenses involving medical products from those involving other products is warranted by the additional risk such offenses pose to public health and safety. In addition, such offenses undermine the public's confidence in the medical regulatory and distribution system. The Commission also concluded that the risks and harms it identified would be present in any theft or fraud offense involving a pre-retail medical product, regardless of the offense of conviction. Therefore application of the new specific offense characteristic is not limited to offenses charged under 18 U.S.C. § 670. • Added an invited upward departure where a § 570 offense “resulted in serious bodily injury or death, including serious bodily injury or death resulting from the use of the pre-retail medical product.” • Explained that “[p]ublic comment and testimony indicated that §2B1.1 may not adequately account for the harm created by theft or fraud offenses involving pre-retail medical products when such serious bodily injury or death actually occurs as a result of the offense. For example, some pre-retail medical products are stolen as part of a scheme to re-sell them into the supply chain, but if the products have not been properly stored in the interim, their subsequent use can seriously injure the individual consumers who buy and use them. Thus, the amendment expands the scope of the existing upward departure provision to address such harms and to clarify that an upward departure is appropriate in such cases not only if serious bodily injury or death occurred during the theft or fraud,

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		(3) account for any additional aggravating or mitigating circumstances that might justify exceptions to the generally applicable sentencing ranges; (4) ensure reasonable consistency with other relevant directives, Federal sentencing guidelines and policy statements; (5) make any necessary conforming changes to the Federal sentencing guidelines and policy statements; and (6) ensure that the Federal sentencing guidelines and policy statements adequately meet the purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code.	but also if such serious bodily injury or death resulted from the victim’s use of a pre-retail medical product that had previously been obtained by theft or fraud.”

¹ Justice Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest*, 17 Hofstra L. Rev. 1, 7 (1988).

² USSG, ch. 1, intro., pt. 4(d) (1987); *see also* USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 56 (2004)(Commission sought to ensure that white collar offenders faced “short but definite period[s] of confinement”).

³ Jeffery S. Parker & Michael Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 Am. Crim. L. Rev. 289, 318-20 (1989).