Report to the Congress:

INCREASED PENALTIES UNDER THE SARBANES-OXLEY ACT OF 2002

(As required by Section 1104(a)(3) of the Sarbanes-Oxley Act of 2002, Public Law 107-204)

UNITED STATES SENTENCING COMMISSION

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EXECUTIVE SUMMARY

This report is submitted by the United States Sentencing Commission (the "Commission") pursuant to section 1104(a)(3) of the Sarbanes-Oxley Act of 2002, Pub. L. 107–204 (the "Act"). Sections 805, 905, and 1104 contain several emergency directives to the Commission generally pertaining to fraud and obstruction of justice offenses that required implementation by January 25, 2003. On January 8, 2003, the Commission unanimously approved an emergency amendment that implements the various congressional directives and will significantly increase future penalties for convicted criminals who commit corporate crime and serious fraud and obstruction of justice offenses. The effective date of the emergency amendment is January 25, 2003. This temporary amendment will expire on November 1, 2003, when a permanent amendment becomes effective. The Commission plans to submit the permanent amendment for congressional review on or before May 1, 2003.

The Commission worked diligently in the abbreviated 180 day period to implement these emergency directives and significantly increased guideline penalties as directed by the Act. These penalty increases were incorporated into the existing sentencing guideline structure under §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), **§2J1.2** (Obstruction of Justice), **and §2E5.3** (False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act; Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act).

In response to the congressional directives, the Commission modified §2B1.1 to account more adequately for the significant impact such offenses have on victims. The emergency amendment expands the existing sentencing enhancement at §2B1.1(b)(2) to provide a six level enhancement for offenses involving 250 or more victims, an approximate 25 percent increase over the penalty which was previously provided. This six level enhancement will double the guideline sentence for any fraud, theft, or property destruction offense that impacts 250 or more victims, compared to the sentence for a comparable offender who impacts less than ten victims.

To further account for the adverse victim impact of these offenses, the Commission added a new sentencing enhancement applicable to offenses that endanger the solvency or financial security of a substantial number of victims. The amendment expands the existing guideline enhancement at §2B1.1(b)(12)(B) to apply to offenses that endanger the solvency or financial security of (1) a publicly traded corporation, (2) an organization that employs 1,000 or more employees, or (3) 100 or more individual victims. Accordingly, offenders who cause this acute harm will receive a four level enhancement and a minimum offense level of 24, which will increase the guideline sentence by approximately 50 percent, compared to a comparable offender who does not cause such financial jeopardy.

The impact of these victim related enhancements is substantial. As a result of the amendment, offenders can be subjected to an increase of ten offense levels – approximately tripling the guideline sentence in many cases – based solely on these victim related harms.

The emergency amendment also targets offenses committed by officers or directors of publicly traded companies for especially severe penalties because of statutory fiduciary duties imposed upon such individuals. The amendment adds a new four level enhancement for officers or directors of publicly traded companies who commit securities violations. Based solely on this enhancement, such officers or directors will receive an approximate 50 percent increase in sentence length. If the securities violation also substantially endangered the financial security of the publicly traded company and/or caused an economic loss for 250 or more victims, the new enhancements that account for these factors will apply as well, resulting in a further increase in the guideline sentence.

The emergency amendment also addresses offenses that cause catastrophic economic losses of magnitudes previously not anticipated, such as the serious corporate scandals that gave rise to several portions of the Act. The amendment adds two new loss categories to the loss table under §2B1.1(b)(1) for offenses that involved more than $200 million, or more than $400 million, in loss. The amended loss table provides a 28 level enhancement for offenses involving more than $200 million in loss, and 30 levels for offenses involving more than $400 million. The addition of these new categories raises the maximum offense level based solely on the guideline base offense level and loss amount enhancement from level 32 (121-151 months) to level 36 (188 - 235 months), which corresponds to a penalty increase of more than five years imprisonment. The amendment also made similar changes to the tax loss table at §2T4.1 (Tax Table).

In addition to the impact these modifications will have on individual defendants, the modifications to §2B1.1 will significantly increase fines for many organizations sentenced under Chapter Eight of the guidelines. As explained in Part III, the offense level calculated under §2B1.1 provides one way of determining the base fine for organizational defendants convicted of fraud offenses. Therefore, the fine for an organizational defendant convicted of committing a fraud offense involving the aggravating conduct accounted for by the new enhancements in §2B1.1 may be significantly increased. For example, a publicly traded company convicted of securities fraud which caused $1.2 million in loss to more than 250 victims will receive a minimum base fine of $17.5 million under §8C2.4 (Base Fine), compared to $3.7 million previously required by the guidelines.

The Commission also significantly modified §2J1.2 (Obstruction of Justice) to reflect congressional concern regarding obstructive conduct, particularly document destruction. The emergency amendment increases the base offense level in §2J1.2 by two levels, from level 12 to 14, and adds a new two level enhancement for offenses involving the destruction, alteration, or fabrication of documents, records, or other tangible objects, or that are otherwise extensive in scope, planning, or preparation. The combined effect of these modifications for a defendant who substantially interferes with the administration of justice by shredding a substantial amount of documents or particularly probative documents is to approximately double the guideline sentence to about three years imprisonment (30 to 37 months).