U.S. Justice Department Statement on Guidelines Amendments Responsive to Sarbanes-Oxley Act, December 18, 2002

Honorable Diana E. Murphy
Chair, U.S. Sentencing Commission
Washington, D.C.

Dear Judge Murphy:

On behalf of the Department of Justice, we submit the following comments regarding the proposed emergency amendments to the federal sentencing guidelines and issues for comment published in the Federal Register on November 27, 2002. We look forward to continuing to work with the Commission during the remainder of this amendment year on all of the published amendment proposals.

Proposed Amendment 1—Corporate Fraud
I. Significant Penalty Increases for Fraud and Obstruction Offenses Are Warranted

Just a few months ago, the President announced a comprehensive plan to renew confidence in corporate America and to revive trust in America’s markets. A key element of the President’s plan is to ensure that those who refuse to play by the rules face tough criminal penalties and other relevant enforcement provisions. As the President said, those who threaten the integrity of our financial markets must be held accountable. The Congress responded—with virtual unanimity within both parties—by passing the Sarbanes-Oxley Act of 2002 (“Act”). Central to the Act were substantial increases in the statutory penalties for the crimes most commonly charged by federal prosecutors in corporate fraud and obstruction-of-justice cases (so-called “white collar” crimes); the Act included specific and general directives to the United States Sentencing Commission to implement amendments to the sentencing guidelines responsive to these changes, and provided emergency amendment authority to underscore the urgency of taking prompt and substantive action.

As was stated in the Attorney General’s letter to the Commission this past summer, and in our implementation proposal letter of October 1, 2002, it is our view that the President and Congress intended that the Sarbanes-Oxley Act would help bring about a new ethic of responsibility in corporate America. By substantially increasing maximum criminal penalties, the President and Congress sent a clear message in one voice: that those who commit corporate crimes will be held accountable, and will do real time in prison, just as do those who steal from innocent victims using force rather than guile. Because the Sentencing Commission is charged with implementing the punishment policies that Congress sets out, and in light of the emergency directives to the Commission included in the Act, the Commission must craft sentencing guidelines that translate this statute into practical effect. Therefore, in our previous letters, and in our ongoing meetings and discussions with the Commission, we have strongly urged the Commission to significantly increase federal fraud penalties by amending the fraud loss table in §2B1.1 of the guidelines, by adding several specific offense characteristics to §2B1.1, and by restricting the use of downward departures in fraud and other related cases. We have also urged the Commission to amend the guidelines applicable to obstruction of justice offenses in accordance with the directives in the Act.

Our October 2002 letter laid out in detail our proposal for implementing the Act and amending §2B1.1 in a way that will be fully responsive both to the letter of the specific statutory directives and to the overall goals of this important legislation. We need not repeat these details here. However, we do think it important to reiterate our position that significant penalty increases for fraud offenses are necessary. As we have stated consistently, we believe that these penalty increases should apply not only to the billion-dollar cases that have dominated the news headlines in recent months, but also to the many so-called “lower-loss” criminal fraud cases that make up the bulk of federal prosecutions across the country. In addition to the WorldComs and Enrons, the Department prosecutes many smaller-scale frauds around the country that, while evidently less newsworthy, nonetheless constitute heart-rending calamities for their victims. Congress did not intend to ignore such cases and reserve severe punishment only for those whose illegal deeds make the front page. Yet the proposal published by the Commission—which increases penalties only modestly, and primarily in the most egregious, large-loss cases involving major public corporations—would achieve exactly that result.

The amendment currently under consideration by the Commission—which will result in little or no change in the actual sentences imposed on those who commit corporate and other types of fraud—would send the entirely wrong signal. If the Commission adopts its
proposed amendment, it will send a message to the American public and corporate officers that fraud crimes are not taken seriously. We believe the Commission’s action must ensure that white collar criminals are held fully accountable and must result in tough, consistent, incarceratory penalties for those who would threaten the integrity of our financial markets and our economy.

Some, including the Practitioners Advisory Group, have contended that no changes in the current fraud loss table—and very limited, if any, additional penalty enhancements—are warranted in response to Sarbanes-Oxley. These commentators argue that the Commission should not revisit the changes made to the fraud table only a year after making substantial revisions to those guidelines pursuant to the “Economic Crime Package” which became effective in November 2001. However, as we have previously stated, we believe that the Department’s proposals build constructively upon those revisions and are contemplated by the language of the Act, which directs the Commission, in section 905 to:

“(i) ensure that the sentencing guidelines and policy statements reflect the serious nature of the offenses and the penalties set forth in this Act, 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; [and to]

(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 this 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 . . . ."

Moreover, we also note that key legislators recognized the inadequacy of corporate crime penalties under the current guidelines, even as amended in November, 2001. For example, Senator Biden, who was the author of section 905 of the Act, heard testimony prior to passage of the Act urging him and other members of Congress not to include directives in the Act because the Economic Crime Package had already made all necessary changes. Several witnesses before Senator Biden’s Subcommittee, including Professor Frank Bowman, urged Congress to give the new fraud guideline a chance to be applied and the Commission an opportunity to evaluate its effects. Yet, despite this testimony, in a floor statement in support of the directive, Senator Biden stated: “Our bill also directed the U.S. Sentencing Commission to review our existing Federal sentencing guidelines. As you know, the sentencing guidelines carefully track the statutory maximum penalties that Congress sets for specific criminal offenses. Our bill requires the sentencing commission to go back and recalibrate the sentencing guidelines to raise penalties for the white collar offenses affected by this legislation.” Congressional Record, July 26, 2002, S7426. Similarly, a section-by-section analysis of the bill inserted into the record by Senate Judiciary Chairman Patrick Leahy contains similar clear statements on the issue: “The Act is not intended as criticism of the current guidelines, which were based on the hard work of the Commission to conform with the goals of prior existing law. Rather, it is intended to join the provisions of the Act which substantially raise current statutory maximums in the law as a policy expression that the former penalties were insufficient to deter financial misconduct and to request the Commission to review and enhance its penalties as appropriate in that light.” Congressional Record, July 26, 2002, S7420. Finally, and perhaps most simply, the Senate Report to the Act declared at the outset that the Act was intended “to provide for criminal prosecution and enhanced penalties” for corporate “white collar” crimes such as securities fraud and obstruction of justice. S. Rep. 107-146 at 2 (107th Cong., 2d Sess. May 6, 2002).

As discussed in our October letter, we propose significant revisions to the applicable sentencing guidelines for fraud, obstruction of justice, and ERISA; we also recommend revisions to Commission policy statements regarding certain non-substantial-assistance related downward departures, which we believe are susceptible to misuse in “white collar” cases. Because the guidelines consider the financial losses caused by fraud as the primary proxy for the gravity (and resultant punishment) for most white collar cases, our proposal centers on further revisions to the loss table in §2B1.1 to ensure that all but relatively minor fraud crimes will result in prison time for the wrongdoer. We also propose adding a number of enhancements to the guidelines, including one in §2B1.1 for culpable corporate officers and directors—which we believe must be cumulative to the existing abuse-of-trust enhancement to avoid thwarting the purpose of the statute. We think our overall proposal to amend §2B1.1 would fulfill the intent of Congress in passing Sarbanes-Oxley, and that anything short of significant overall penalty increases for fraud offenses will fail to comply with the Act’s broad directives and substantial increases in the statutory maximums.

II. Other Sarbanes-Oxley Sentencing Issues Not Addressed in Our October Letter

[Editor’s Note: A discussion of the tax loss table and fraud-related contempt proceedings is omitted.]

III. Emergency Authority

In several Commission discussions of Sarbanes-Oxley implementation, a question has arisen over whether the
emergency authority in the Act permits the Commission to revise the fraud table at all. The concern stems from the fact that the fraud table is used to determine the sentence for many non-fraud offenders (see, e.g., §2C1.1, covering offenses involving the offering, giving, soliciting, or receiving a bribe).

We believe the directives in sections 905 and 1104 of the Sarbanes-Oxley Act provide ample authority for the Commission to revise the fraud table and make other corresponding changes necessary to maintain consistency with other guidelines. Specifically, section 905(b) directs the Commission, in promulgating any necessary guideline amendments, to, “(3) assure reasonable consistency with other relevant directives and sentencing guidelines;” and “(5) make any necessary conforming changes to the sentencing guidelines.” The directive in section 1104 repeats these two requirements and also tells the Commission to review “securities and accounting fraud and related offenses.” From these provisions—and the remaining text of the directives—we conclude that the Commission has the necessary authority to amend the fraud loss table in section 2B1.1 and to make other corresponding changes to maintain reasonable consistency in the sentencing tables.

While there is little legislative history from which to analyze the scope of the directives, we think the text of the legislation itself—especially the language giving the Commission the ability to “make any necessary conforming changes”—strongly suggest that Congress anticipated that the Commission would make broad changes, including to the loss table. Having quadrupled the maximum penalty for fraud offenses, Congress directed the Commission to review the guidelines for fraud offenses and to promulgate amendments to reflect the statutory increases. At a minimum, it would seem anomalous to misread the Act as if Congress, having directed the Commission in broad terms to review and amend the guidelines in light of increased statutory penalties for fraud, nonetheless intended to preclude the Commission from amending the loss table, which is at the heart of the guidelines’ penalty scheme for such crimes.

We also note that the latter two Sarbanes-Oxley directives closely parallel language originally drafted by the Commission itself (in the context of earlier legislation) to ensure that it had sufficient authority to make all necessary changes to keep the guidelines consistent and in conformity with other directives and policies. That Congress employed such language in these directives suggests that it intended to confer broad authority, not limited authority. Congress has used similar language several times before and on at least one occasion, the Commission has interpreted such language to confer broad authority.

In the Telemarketing Fraud Prevention Act of 1998, Congress directed the Commission to raise penalties for telemarketing frauds. In response to the directive, the Commission not only provided for a two-level increase for mass-marketing, but added an enhancement in then 2Fl.1 for sophisticated means that applied to all fraud cases—not just telemarketing fraud cases—as well as other cases that are sentenced with reference to §2F1.1 (see e.g., food and drug offenses—§2N2.1; impersonations resulting in fraud—§2J1.4). The amendment also changed §3A1.1 by adding an enhancement for a large number of vulnerable victims. This change applied to all offense types, fraud or otherwise. In its reasons for amendment, the Commission wrote, “This amendment implements, in a broader form, the directives to the Commission in section 6 of the Telemarketing Fraud Prevention Act of 1998... “In designing enhancements that may apply more broadly than the Act’s above stated directives minimally require, the Commission acts consistently with other directives in the Act (e.g., section 6(c)(4) (requiring the Commission to ensure that its implementing amendments are reasonable 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...” USSG, Appendix C, amendment §87 (emphasis added).

We believe the language of the directives themselves, the origin of the language, and the Commission’s previous interpretation of similar language on prior occasions all demonstrate that the Act’s grant of emergency authority is broad enough to permit amendment of the fraud table and related guidelines.

[Editor’s Note: A discussion of downward departures in white collar cases and guidelines amendments relating to campaign finance is omitted.]

We appreciate the opportunity to provide the Commission with our views, comments, and suggestions. We look forward to working further with you and the other Commissioners to refine the sentencing guidelines and to develop effective, efficient, and fair sentencing policy.

Sincerely,

Eric H. Jaso
Counselor to the Assistant Attorney General