

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission

ACTION: Notice of a temporary, emergency amendment to sentencing guidelines and commentary.

SUMMARY: Pursuant to section 5(c) of the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. 110–179, the Commission hereby gives notice of a temporary, emergency amendment to the sentencing guidelines and commentary. This notice sets forth the temporary, emergency amendment and the reason for amendment.

DATE: The Commission has specified an effective date of February 6, 2008, for the emergency amendment.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer,
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SUPPLEMENTARY INFORMATION: The Commission must promulgate a temporary, emergency amendment to implement the directive in section 5(c) of the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. 110–179, by February 6, 2008. The statutory deadline for the promulgation of the temporary, emergency amendment, in conjunction with the Commission’s public meeting schedule (the promulgation of such amendments must occur in a public meeting), made it impracticable to publish a proposed temporary, emergency amendment in the Federal Register in order to provide an opportunity for public comment, and to publish the promulgated amendment not less than 30 days before the effective date. The Commission therefore had good cause not to publish a proposed amendment before promulgation of the amendment and not to publish the promulgated amendment 30 days or more before the specified effective date of the amendment. See 5 U.S.C. § 553(b), (d)(3).

The temporary, emergency amendment set forth in this notice also may be accessed through the Commission’s website at www.ussc.gov.

AUTHORITY: 28 U.S.C. § 994(a), (o), (p), (x); section 5(c) of Pub. L. 110–179.

Ricardo H. Hinojosa,

Chair

1. Amendment: Section 2B1.1(b) is amended by adding at the end the following:

"(16) If 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 2 levels."

The Commentary to §2B1.1 captioned "Application Notes" is amended in Note 3 by inserting after the paragraph that begins "(III) Offenses Under 18 U.S.C. § 1030.—" the following:

"(IV) Disaster Fraud Cases.—In 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 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."

The Commentary to §2B1.1 captioned "Application Notes" is amended by redesignating Notes 15 through 19 as Notes 16 through 20, respectively; and by inserting after Note 14 the following:

"15. Application of Subsection (b)(16).—

(A) Definitions.—For purposes of this subsection:

‘Emergency’ has the meaning given that term in 42 U.S.C. § 5122.”.

‘Major disaster’ has the meaning given that term in 42 U.S.C. § 5122.

The Commentary to §2B1.1 captioned "Background" is amended by adding at the end the following:

"Subsection (b)(16) implements the directive in section 5 of Public Law 110–179.”.

Appendix A (Statutory Index) is amended by inserting after the line reference to 18 U.S.C. § 1039 the following:

"18 U.S.C. § 1040 2B1.1”.

Reason for Amendment: This amendment implements the emergency directive in section 5 of the Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. 110–179. The directive, which requires the Commission to promulgate an amendment under emergency amendment authority by February 6, 2008, directs that the Commission forthwith shall—

promulgate 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 section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) or an emergency declaration under section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5191)

Section 5(b) of the Act further requires the Commission to—

(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;

(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) make any necessary conforming changes to the sentencing guidelines; and

(5) assure that the guidelines adequately meet the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

The amendment addresses the directive by creating a two-level enhancement that applies if the offense involved fraud or theft in connection with a declaration of a major disaster or emergency, as those terms are defined in 42 U.S.C. § 5122. In addition, the amendment modifies Application Note 3 to provide that for purposes of determining loss under subsection (b)(1), reasonably foreseeable pecuniary harm includes certain administrative costs in such cases.