

# **Proposed Guideline Amendments for Public Comment – Part I**

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***United States Sentencing Commission  
January 1997***

Official text of the proposed amendments can be found in the January 2, 1997, edition of the Federal Register (Vol. 62, No. 1, 152-198).

## INDEX TO PROPOSED GUIDELINE AMENDMENTS FOR PUBLIC COMMENT

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1	1	<b>List I Chemicals (§2D1.11)</b> —addresses section 302 of the Comprehensive Methamphetamine Control Act of 1996, which directs the Commission under emergency amendment authority to increase by at least two levels the offense levels for offenses involving list I chemicals under 21 U.S.C. §§ 841(d)(1),(2) and 960(d)(1),(3).
2	14	<b>Alien Smuggling (§2L1.1)</b> —addresses section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which directs the Commission under emergency amendment authority to make certain amendments to the guidelines for offenses related to smuggling, transporting, or harboring illegal aliens.
3	18	<b>Immigration Document Fraud (§§2L2.1, 2L2.2)</b> —(A) addresses section 211 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which directs the Commission under emergency amendment authority to make certain amendments to the guidelines for offenses related to the fraudulent use of government issued documents; and (B) provides for clarifying commentary.
4	21	<b>Involuntary Servitude (§2H4.1)</b> —(A) addresses section 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which directs the Commission under emergency amendment authority to reduce or eliminate any unwarranted disparity between the sentences for peonage, involuntary servitude, and slave trade offenses and the sentences for kidnaping offenses and alien smuggling, and to ensure enhanced sentences for certain aggravating circumstances; and (B) issue for comment responds to directive in section 218 of the Act to ensure that the guidelines reflect the general appropriateness of enhanced sentences for defendants whose peonage, involuntary servitude, or slave trade offenses involve a large number of victims.
5	23	<b>Terrorism (§3A1.4)</b> —proposes to make permanent the emergency amendment promulgated by the Commission to implement the directive in section 730 of the Antiterrorism and Effective Death Penalty Act of 1996 to apply the adjustment in §3A1.4 to federal crimes of terrorism.
6	24	<b>Application Instructions (§1B1.1)</b> —(A) corrects a technical error in §1B1.1(b); (B) expands the definition of “offense” to specify what is meant by “instant offense”; and (C) makes conforming amendments to §§3C1.1, 4B1.1 and 4B1.2.

7	26	<b>Applicable Guidelines (§1B1.2); Statutory Index</b> —clarifies that, except as otherwise provided in the Introduction to the Statutory Index, the Statutory Index will specify the Chapter Two offense guideline most applicable to an offense of conviction.
8	28	<b>Relevant Conduct (§1B1.3)</b> —incorporates the holding in <u>United States v. Hill</u> , 79 F.3d 1477 (6th Cir. 1996), relating to “same course of conduct” or “common scheme or plan”.
9	29	<b>Relevant Conduct (§1B1.3)</b> —presents three options to address whether acquitted conduct may be considered for sentencing purposes.
10	32	<b>Interpretation of References to Other Offense Guidelines (§§1B1.5, 2X1.1)</b> —(A) amends §1B1.5 to simplify operation of Chapter Two cross references; and (B) replaces in §2X1.1 the three-level reduction for certain offenses involving attempts, solicitation, and conspiracy with a downward departure provision.
11	38	<b>Retroactivity of Amended Guideline Range (§1B1.10)</b> —(A) clarifies Commission intent that the retroactive application of an amendment to previously sentenced, imprisoned defendants authorizes only a reduction in the term of imprisonment pursuant to 18 U.S.C. § 3582(c)(2) and does not open other components of the sentence to modification; and (B) clarifies that the amount of reduction in the sentence is within the discretion of the court.
12	40	<b>Larceny, Embezzlement, and Other Forms of Theft (§2B1.1); Fraud (§2F1.1)</b> —addresses difficulty in interpretation of “affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense” under §§2B1.1(b)(6)(B) and 2F1.1(b)(6)(B).
13	42	<b>Sentencing Table</b> —(A) incorporates the Sentencing Table into a new guideline at §5A1.1 in response to questions about the legal status of the Sentencing Table; and (B) addresses an unwarranted “cliff” in the Sentencing Table between offense levels 42 and 43 by making level 42 the offense level upper limit unless the defendant was subject to level 43 because of the application of §2A1.1 (First Degree Murder), §2M1.1 (Treason), or any other guideline that increases the offense level to level 43 because of the death of a person.
14	45	<b>Robbery (§2B3.1)</b> —addresses a circuit conflict regarding the application of the two-level enhancement for “express threat of death” by clarifying the Commission’s intent to enhance offense levels for defendants whose intimidation of the victim exceeds that amount necessary to constitute an element of a robbery offense.

15	47	<p><b>Carjacking</b>—(A) presents two options for addressing the Carjacking Correction Act of 1996, which included aggravated sexual assault under 18 U.S.C. § 2241 and sexual abuse under 18 U.S.C. § 2242 within the meaning of “serious bodily injury”; and (B) provides cumulative enhancements in §2B3.1 if the offense involved bank robbery and carjacking.</p>
16	51	<p><b>Offenses Involving Counterfeit Bearer Obligations of the United States (§2B5.1)</b>—(A) addresses section 807(h) of the Antiterrorism and Effective Death Penalty Act of 1996, which directs the Commission to provide an enhancement to cover counterfeit offenses that occur outside the United States; (B) moves the coverage of offenses involving altered bearer instruments of the United States from §2F1.1 to §2B5.1; and (C) clarifies the operation of §2B5.1 by deleting the reference to photocopying notes found in Application Note 3.</p>
17	53	<p><b>Use of Communication Facility in Committing a Drug Offense (§2D1.6); Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations (§2E1.1); Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise (§2E1.2); Violent Crimes in Aid of Racketeering Activity (§2E1.3)</b>—addresses a circuit conflict by clarifying that, for purposes of these guidelines, “underlying offense” is determined on the basis of the conduct of which the defendant was convicted.</p>
18	55	<p><b>Fraud, Theft, and Tax Offenses (Chapter Two, Parts B, F, and T)</b>—(A) eliminates the more-than-minimal-planning enhancement in §§2B1.1 and 2F1.1 and other guidelines, builds a corresponding increase into the loss table, and creates a two-level enhancement like the one in §2T4.1 for offenses involving “sophisticated means”; (B) increases the base offense level of §2B1.1 and presents three options for revision to the loss tables in §§2B1.1, 2F1.1 and 2T4.1; (C) changes the current one-level increments in the loss tables in §§2B1.1, 2F1.1 and 2T4.1 (to two-level increments or a combination of one- and two-level increments); (D) increases the severity of the loss tables in §§2B1.1, 2F1.1 and 2T4.1 at higher loss amounts; (E) adds telemarketing enhancements to §§2B1.1 and 2F1.1; (F) adds a cross references in §2F1.1 for offenses involving arson; and (G) makes conforming technical changes. Issues for comment regarding (A) loss tables in §§2B1.1 and 2F1.1; (B) telemarketing offenses; (C) cross references; (D) consolidation of §§2B1.1 and 2F1.1; (E) standard of causation; (F) market value; (G) consequential damages and administrative costs; (H) benefit received by victims; (I) diversion of government benefits; (J) pledged collateral and payments; (K) gain; (L) intended loss; (M) risk of loss; and (N) loss amount that over- or under-represents the significance of the offense.</p> <hr/>

19	75	<b>Chapter Two, Part M</b> —(A) issue for comment regarding how Commission should respond to sections 511 (expanding biological weapons offenses) and 521 (creating new chemical weapons offense) of the Antiterrorism and Effective Death Penalty Act of 1996; and (B) issue for comment regarding how Commission should respond to section 702 of the Antiterrorism and Effective Death Penalty Act of 1996, which created a new offense at 18 U.S.C. § 2332b (relating to transnational criminal conduct).
20	76	<b>Accessory After the Fact (§2X3.1); Misprision of a Felony (§2X4.1)</b> —(A) clarifies the application of §2X3.1 when this guideline is applied as the result of a cross reference; (B) clarifies the interaction of §1B1.3 (Relevant Conduct) and §§2X3.1 (Accessory After the Fact) and 2X4.1 (Misprision of a Felony); and (C) clarifies that in §§2X3.1 and 2X4.1, if the offense guideline applicable to the underlying offense refers to the defendant, the reference is to the defendant who committed the underlying offense.
21	78	<b>Aggravating Role in the Offense (§3B1.1)</b> —(A) revises the Introductory Commentary to Chapter Three, Part B; and (B) presents three options revising §3B1.1.
22	84	<b>Mitigating Role in the Offense (§3B1.2)</b> —(A) clarifies the application of §3B1.2; and (B) issues for comment regarding 1) a single role guideline; 2) aggravating role characteristics in specific reference to Option Three of the proposed aggravating role amendments; and 3) mitigating role characteristics.
23	88	<b>Obstruction or Impeding the Administration of Justice (§3C1.1)</b> —(A) addresses a circuit conflict and clarifies that not all inaccurate testimony or statements reflect a willful attempt to obstruct justice; (B) deletes as unnecessary subdivision (i) of Application Note 3; (C) clarifies the meaning of “absent a separate count of conviction” in Application Note 4; and (D) moves the last two sentences of Application Note 6 to a new Application Note 7 to clarify that those two sentences apply to a broader set of cases than the cases described in the first two sentences of Application Note 6.
24	90	<b>Acceptance of Responsibility (§3E1.1)</b> —revises §3E1.1 to provide greater flexibility to the sentencing court in determining whether the defendant qualifies for a reduction for acceptance of responsibility.
25	93	<b>Acceptance of Responsibility (§3E1.1)</b> —addresses a circuit conflict by clarifying that the commission of a new offense while pending trial or sentencing on the instant offense is a negative indicant of acceptance of responsibility.
26	94	<b>Acceptance of Responsibility (§3E1.1)</b> —provides consideration of the additional 1-level reduction in subsection (b) for all offense levels.

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27	96	<b>Definitions of Terms Used in §4B1.1 (§4B1.2)</b> —(A) addresses a circuit conflict by including in the career offender definition of “controlled substance offense” offenses of possessing a listed chemical with intent to manufacture a controlled substance or possessing a prohibited flask or equipment with intent to manufacture a controlled substance; (B) clarifies that certain offenses are “crimes of violence” or “controlled substance offenses” if the offense of conviction established that the underlying offense was a “crime of violence” or a “controlled substance offense”; and C) makes certain nonsubstantive amendments to improve to internal consistency of the guidelines.
28	98	<b>Circuit Court Conflicts</b> —issues for comment regarding whether, and in what manner, the Commission should address certain circuit court conflicts.
29	101	<b>Conditions of Probation and Supervised Release (§§5B1.3, 5B1.4, 5D1.3, and 8D1.3)</b> —(A) responds to the Antiterrorism and Effective Death Penalty Act of 1996 and other statutory provisions, which added required conditions of probation and supervised release; and (B) issue for comment regarding reorganization of §§5B1.3 (Conditions of Probation), 5B1.4 (Recommended Condition of Probation and Supervised Release), and 5D1.3 (Conditions of Supervised Release) to better distinguish between statutorily required, standard, and special conditions of probation and supervised release.
30	110	<b>Term of Supervised Release (§5D1.2)</b> —clarifies that a defendant who qualifies for the “safety valve” (§5C1.2, 18 U.S.C. § 3553(f)) is not subject to any statutory minimum term of supervised release.
31	111	<b>Restitution (§§5E1.1, 8B1.1)</b> —(A) conforms the provisions of §§5E1.1 and 8B1.1 to the mandatory restitution provisions of the Antiterrorism and Effective Death Penalty Act of 1996, and provides a special instruction to address <i>ex post facto</i> implications of the new restitution provisions; and (B) issue for comment responds to section 205 of the Antiterrorism and Effective Death Penalty Act of 1996, which directs the Commission to promulgate guidelines to assist courts in determining the appropriate amount of “community restitution” to be ordered in certain cases in which there is no identifiable individual victim.
32	116	<b>Special Assessments (§§5E1.3, 8E1.1)</b> —responds to section 210 of the Antiterrorism and Effective Death Penalty Act of 1996 by providing for a special assessment, in the case of a felony, of not less than \$100 for an individual and not less than \$400 for an organization.

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33	119	<p><b>Susceptibility to Abuse in Prison and Designation of Prison Facility (Chapter 5, Part H)</b>—creates additional policy statement at §5H1.13 that provides that neither susceptibility to abuse in prison nor the type of prison facility is ordinarily relevant in determining a departure.</p>
34	119	<p><b>Grounds for Departure (§5K2.0)</b>—(A) moves language discussing departure policies from the Introduction of the Guidelines Manual to §5K2.0; (B) reflects the proposed emergency amendment to the immigration guideline; (C) adds reference to <u>Koon v. United States</u>, 116 S. Ct. 2035 (1996) to reflect the greater deference to be accorded to district court departure decisions by appellate courts; (D) provides that departures must be consistent with the purposes of sentencing and the Sentencing Reform Act; and (E) improves the precision of the policy statement’s language.</p>
35	121	<p><b>Successive Federal Prosecution (Chapter 5, Part H)</b>—creates additional policy statement at §5K2.19 to provide that a federal prosecution following another jurisdiction’s prosecution for the same or similar conduct is not ordinarily relevant, except as authorized by §5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment).</p>
36	121	<p><b>Presentence Report (§6A1.1)</b>—addresses recent changes in the structure of Rule 32, Fed. R. Crim. P.</p>

**Consolidation of Closely Related Guidelines—(A)**

consolidates §2A1.5 with §2E1.4 and replaces the cross reference in §2A1.5(c)(2) with a bodily injury enhancement; (B) consolidates §§2A2.3 and 2A2.4 and provides an option for the cross reference to apply to either the underlying conduct or the offense of conviction;

(C)(1) consolidates §2B1.3 with §2B1.1; (2) consolidates §2B6.1 with §2B1.1, and adds an application note providing that more than minimal planning is deemed present when the offense involved altering or removing an automobile or automobile part identification number or trafficking in an automobile or automobile part with an altered or obliterated identification number; and (3) consolidates §2H3.3 with §2B1.1;

(D) consolidates §§2C1.2 and 2C1.6 and adds an application note to clarify that the unlawful payment involved need not be a monetary payment;

(E) consolidates §§2C1.3, 2C1.4, and 2C1.5, and provides an option for a cross reference to §2C1.1 or §2C1.2 to apply on the basis of underlying conduct;

(F) consolidates §§2D1.9 and 2D1.10;

(G) consolidates §§2D2.1 and 2D2.2, and adds a specific offense characteristic of two levels if the offense involved acquiring a controlled substance from a legally authorized source by misrepresentation, forgery, fraud, deception, or subterfuge;

(H) consolidates §§2D3.1 and 2D3.2;

(I) consolidates §§2E1.2 and 2E1.3;

(J)(1) consolidates §§2E2.1 and 2B3.2; (2) provides a specific offense characteristic of two levels for extortionate extension of credit and collecting an extension of credit by extortionate means; and (3) amends Application Note 1 to provide that in cases of extortionate extension of credit and collecting an extension of credit by extortionate means, subsection (b)(2) does not apply to the demand for repayment of principal or interest in the case of a loan;

(K)(1) consolidates §§2E5.3 and 2F1.1; and (2) adds a cross reference in §2F1.1 to apply another offense guideline if the offense is addressed more specifically by that guideline;

(L)(1) consolidates §§2J1.2 and 2J1.3; (2) adds an application note to §2J1.2 to clarify that the criminal offense the investigation or prosecution of which was obstructed need not have been specifically charged or resulted in a conviction in order for the cross reference to §2X3.1 to apply; (3) adds an application note to reemphasize that the defendant's conduct need not constitute an offense of accessory after the fact in order for the cross reference to §2X3.1 to apply; and (4) issue for comment regarding application of the special instruction in §2J1.3(d)(1) to obstructions;

(M) consolidates §§2K1.1 and 2K1.6;

(N) consolidates §§2L2.2 and 2L2.5;

(M)(1) consolidates §§2K1.1 and 2K1.6; and (2) adds a cross reference in §2K1.1 to apply §2K1.3 if the offense reflected an effort to conceal a substantive offense;

(N) consolidates §§2L2.2 and 2L2.5;

(O)(1) consolidates §§2M2.1 and 2M2.3; and (2) provides an option in an application note explaining the circumstances under which a departure may be warranted;

(P) deletes §2M3.4;

(Q) consolidates §§2M3.5 and 2M6.2;

(R) consolidates §§2N3.1 and 2F1.1;

(S) consolidates §§2T1.1 and 2T1.6; and

(T) consolidates §§2E4.1, 2T2.1 and 2T2.2.

**1997 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES,  
POLICY STATEMENTS, AND OFFICIAL COMMENTARY**

**I. Emergency Amendments**

**1. Synopsis of Proposed Amendment:** This amendment implements section 302 of the Comprehensive Methamphetamine Control Act of 1996. That section raises the statutory maximum penalties under 21 U.S.C. §§ 841(d) and 960(d) from ten to twenty years' imprisonment. The Act also instructs the Commission to increase by at least two levels the offense levels for offenses involving list I chemicals under 21U.S.C. §§ 841(d)(1) and (2) and 960(d)(1) and (3). These offenses involve the possession and importation of listed chemicals knowing, or having reasonable cause to believe, the chemicals will be used to unlawfully manufacture a controlled substance. The Act requires that the offense levels be calculated proportionately on the basis of the quantity of controlled substance that reasonably could be manufactured in a clandestine setting using the quantity of list I chemical possessed, distributed, imported, or exported.

Current Operation of the Guidelines: Offenses involving violations of the above statutes are covered under §2D1.11 (Unlawfully, Distributing, Importing, Exporting, or Possessing a Listed Chemical). This guideline uses a Chemical Quantity Table to determine the base offense level. The guideline also has a cross reference to §2D1.1 (Unlawfully Manufacturing, Importing, Exporting, or Trafficking) for cases involving the actual manufacture, or attempt to manufacture, a controlled substance.

The Chemical Quantity Table was developed in two steps. First, the amount of listed chemical needed to produce a quantity of controlled substance in the Drug Quantity Table in §2D1.1 was determined. The amount of listed chemical was based on 50% of theoretical yield. The 50% figure was used because, after much study, this figure was determined to be a fair estimate of the amount of controlled substance that typically could be produced in a clandestine laboratory.

Second, the offense level in §2D1.11 was adjusted downward by eight levels from the level in the Drug Quantity Table in §2D1.1. There were several reasons for these adjustments. One, the listed chemical offenses involved an intent to manufacture a controlled substance, not the actual manufacture, or attempt to manufacture, a controlled substance. For cases involving an actual or attempted manufacture of a controlled substance, §2D1.11 contains a cross reference to §2D1.1. Another reason for the reduction in offense level from the offense levels in §2D1.1 was the fact that statutes covering listed chemicals had maximum sentences of ten years' imprisonment, whereas some of the controlled substance offenses had maximum sentences of life imprisonment. If the offense level was not reduced in §2D1.11, almost all of the cases would have resulted in sentences at or exceeding the statutory maximum. A third reason was that it is more difficult to make an accurate determination of the amount of finished product based on only one listed chemical as opposed to several listed chemicals and/or lab equipment. By not reducing the offense level, there would have been the possibility that the person who had only one precursor would get a higher offense level than someone who actually manufactured the controlled substance.

The proposed amendment raises the penalties for list I chemicals by two levels. The top of the Chemical Quantity Table for list I chemicals will now be at level 30. The offense level for list II chemicals remains the same. With the new statutory maximum of 20 years, the guidelines will now be able to better take into account aggravating adjustments such as those for role in the offense. Additionally, the increased statutory maximum will allow for higher sentences for cases convicted under this statute that involve the actual manufacture of a controlled substance.

**§2D1.11. Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical; Attempt or Conspiracy**

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**(d) CHEMICAL QUANTITY TABLE\***

<b>Listed Chemicals and Quantity</b>	<b>Base Offense Level</b>
<p>(1) <u>List I Chemicals</u>            17.8 KG or more of Benzaldehyde;            20 KG or more of Benzyl Cyanide;            20 KG or more of Ephedrine;            200 G or more of Ergonovine;            400 G or more of Ergotamine;            20 KG or more of Ethylamine;            44 KG or more of Hydriodic Acid;            320 KG or more of Isoafrole;            4 KG or more of Methylamine;            500 KG or more of N-Methylephedrine;            500 KG or more of N-Methylpseudoephedrine;            12.6 KG or more of Nitroethane;            200 KG or more of Norpseudoephedrine;            20 KG or more of Phenylacetic Acid;            200 KG or more of Phenylpropanolamine;            10 KG or more of Piperidine;            320 KG or more of Piperonal;            1.6 KG or more of Propionic Anhydride;            20 KG or more of Pseudoephedrine;            320 KG or more of Safrole;            400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;</p>	<b>Level 30</b>
<p>(2) <u>List I Chemicals</u>  <del>17.8 KG or more of Benzaldehyde;</del>  <del>20 KG or more of Benzyl Cyanide;</del>  <del>20 KG or more of Ephedrine;</del>  <del>200 G or more of Ergonovine;</del>  <del>400 G or more of Ergotamine;</del>  <del>20 KG or more of Ethylamine;</del>  <del>44 KG or more of Hydriodic Acid;</del>  <del>320 KG or more of Isoafrole;</del>  <del>4 KG or more of Methylamine;</del></p>	<b>Level 28</b>

~~500 KG or more of N-Methylephedrine;~~  
~~500 KG or more of N-Methylpseudoephedrine;~~  
~~12.6 KG or more of Nitroethane;~~  
~~200 KG or more of Norpseudoephedrine;~~  
~~20 KG or more of Phenylacetic Acid;~~  
~~200 KG or more of Phenylpropanolamine;~~  
~~10 KG or more of Piperidine;~~  
~~320 KG or more of Piperonal;~~  
~~1.6 KG or more of Propionic Anhydride;~~  
~~20 KG or more of Pseudoephedrine;~~  
~~320 KG or more of Safrole;~~  
~~400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone;~~  
 At least 5.3 KG but less than 17.8 KG of Benzaldehyde;  
 At least 6 KG but less than 20 KG of Benzyl Cyanide;  
 At least 6 KG but less than 20 KG of Ephedrine;  
 At least 60 G but less than 200 G of Ergonovine;  
 At least 120 G but less than 400 G of Ergotamine;  
 At least 6 KG but less than 20 KG of Ethylamine;  
 At least 13.2 KG but less than 44 KG of Hydriodic Acid;  
 At least 96 KG but less than 320 KG of Isoafrole;  
 At least 1.2 KG but less than 4 KG of Methylamine;  
 At least 150 KG but less than 500 KG of N-Methylephedrine;  
 At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;  
 At least 3.8 KG but less than 12.6 KG of Nitroethane;  
 At least 60 KG but less than 200 KG of Norpseudoephedrine;  
 At least 6 KG but less than 20 KG of Phenylacetic Acid;  
 At least 60 KG but less than 200 KG of Phenylpropanolamine;  
 At least 3 KG but less than 10 KG of Piperidine;  
 At least 96 KG but less than 320 KG of Piperonal;  
 At least 480 G but less than 1.6 KG of Propionic Anhydride;  
 At least 6 KG but less than 20 KG of Pseudoephedrine;  
 At least 96 KG but less than 320 KG of Safrole;  
 At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

11 KG or more of Acetic Anhydride;  
 1175 KG or more of Acetone;  
 20 KG or more of Benzyl Chloride;  
 1075 KG or more of Ethyl Ether;  
 1200 KG or more of Methyl Ethyl Ketone;  
 10 KG or more of Potassium Permanganate;  
 1300 KG or more of Toluene.

(3) List I Chemicals

~~At least 5.3 KG but less than 17.8 KG of Benzaldehyde;~~  
~~At least 6 KG but less than 20 KG of Benzyl Cyanide;~~  
~~At least 6 KG but less than 20 KG of Ephedrine;~~  
~~At least 60 G but less than 200 G of Ergonovine;~~  
~~At least 120 G but less than 400 G of Ergotamine;~~  
~~At least 6 KG but less than 20 KG of Ethylamine;~~  
~~At least 13.2 KG but less than 44 KG of Hydriodic Acid;~~

**Level 26**

- ~~At least 96 KG but less than 320 KG of Isoafrole;~~
- ~~At least 1.2 KG but less than 4 KG of Methylamine;~~
- ~~At least 150 KG but less than 500 KG of N-Methylephedrine;~~
- ~~At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;~~
- ~~At least 3.8 KG but less than 12.6 KG of Nitroethane;~~
- ~~At least 60 KG but less than 200 KG of Norpseudoephedrine;~~
- ~~At least 6 KG but less than 20 KG of Phenylacetic Acid;~~
- ~~At least 60 KG but less than 200 KG of Phenylpropanolamine;~~
- ~~At least 3 KG but less than 10 KG of Piperidine;~~
- ~~At least 96 KG but less than 320 KG of Piperonal;~~
- ~~At least 480 G but less than 1.6 KG of Propionic Anhydride;~~
- ~~At least 6 KG but less than 20 KG of Pseudoephedrine;~~
- ~~At least 96 KG but less than 320 KG of Safrole;~~
- ~~At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;~~
- At least 1.8 KG but less than 5.3 KG of Benzaldehyde;
- At least 2 KG but less than 6 KG of Benzyl Cyanide;
- At least 2 KG but less than 6 KG of Ephedrine;
- At least 20 G but less than 60 G of Ergonovine;
- At least 40 G but less than 120 G of Ergotamine;
- At least 2 KG but less than 6 KG of Ethylamine;
- At least 4.4 KG but less than 13.2 KG of Hydriodic Acid;
- At least 32 KG but less than 96 KG of Isoafrole;
- At least 400 G but less than 1.2 KG of Methylamine;
- At least 50 KG but less than 150 KG of N-Methylephedrine;
- At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;
- At least 1.3 KG but less than 3.8 KG of Nitroethane;
- At least 20 KG but less than 60 KG of Norpseudoephedrine;
- At least 2 KG but less than 6 KG of Phenylacetic Acid;
- At least 20 KG but less than 60 KG of Phenylpropanolamine;
- At least 1 KG but less than 3 KG of Piperidine;
- At least 32 KG but less than 96 KG of Piperonal;
- At least 160 G but less than 480 G of Propionic Anhydride;
- At least 2 KG but less than 6 KG of Pseudoephedrine;
- At least 32 KG but less than 96 KG of Safrole;
- At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

At least 3.3 KG but less than 11 KG of Acetic Anhydride;  
At least 352.5 KG but less than 1175 KG of Acetone;  
At least 6 KG but less than 20 KG of Benzyl Chloride;  
At least 322.5 KG but less than 1075 KG of Ethyl Ether;  
At least 360 KG but less than 1200 KG of Methyl Ethyl Ketone;  
At least 3 KG but less than 10 KG of Potassium Permanganate;  
At least 390 KG but less than 1300 KG of Toluene.

(4) List I Chemicals

**Level 24**

~~At least 1.8 KG but less than 5.3 KG of Benzaldehyde;~~  
~~At least 2 KG but less than 6 KG of Benzyl Cyanide;~~  
~~At least 2 KG but less than 6 KG of Ephedrine;~~  
~~At least 20 G but less than 60 G of Ergonovine;~~  
~~At least 40 G but less than 120 G of Ergotamine;~~  
~~At least 2 KG but less than 6 KG of Ethylamine;~~  
~~At least 4.4 KG but less than 13.2 KG of Hydriodic Acid;~~  
~~At least 32 KG but less than 96 KG of Isoafrole;~~  
~~At least 400 G but less than 1.2 KG of Methylamine;~~  
~~At least 50 KG but less than 150 KG of N-Methylephedrine;~~  
~~At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;~~  
~~At least 1.3 KG but less than 3.8 KG of Nitroethane;~~  
~~At least 20 KG but less than 60 KG of Norpseudoephedrine;~~  
~~At least 2 KG but less than 6 KG of Phenylacetic Acid;~~  
~~At least 20 KG but less than 60 KG of Phenylpropanolamine;~~  
~~At least 1 KG but less than 3 KG of Piperidine;~~  
~~At least 32 KG but less than 96 KG of Piperonal;~~  
~~At least 160 G but less than 480 G of Propionic Anhydride;~~  
~~At least 2 KG but less than 6 KG of Pseudoephedrine;~~  
~~At least 32 KG but less than 96 KG of Safrole;~~  
~~At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;~~  
At least 1.2 KG but less than 1.8 KG of Benzaldehyde;  
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;  
At least 1.4 KG but less than 2 KG of Ephedrine;  
At least 14 G but less than 20 G of Ergonovine;  
At least 28 G but less than 40 G of Ergotamine;  
At least 1.4 KG but less than 2 KG of Ethylamine;  
At least 3.08 KG but less than 4.4 KG of Hydriodic Acid;  
At least 22.4 KG but less than 32 KG of Isoafrole;  
At least 280 G but less than 400 G of Methylamine;  
At least 35 KG but less than 50 KG of N-Methylephedrine;  
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;  
At least 879 G but less than 1.3 KG of Nitroethane;  
At least 14 KG but less than 20 KG of Norpseudoephedrine;  
At least 1.4 KG but less than 2 KG of Phenylacetic Acid;  
At least 14 KG but less than 20 KG of Phenylpropanolamine;  
At least 700 G but less than 1 KG of Piperidine;  
At least 22.4 KG but less than 32 KG of Piperonal;  
At least 112 G but less than 160 G of Propionic Anhydride;  
At least 1.4 KG but less than 2 KG of Pseudoephedrine;  
At least 22.4 KG but less than 32 KG of Safrole;  
At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

At least 1.1 KG but less than 3.3 KG of Acetic Anhydride;  
At least 117.5 KG but less than 352.5 KG of Acetone;  
At least 2 KG but less than 6 KG of Benzyl Chloride;  
At least 107.5 KG but less than 322.5 KG of Ethyl Ether;  
At least 120 KG but less than 360 KG of Methyl Ethyl Ketone;  
At least 1 KG but less than 3 KG of Potassium Permanganate;  
At least 130 KG but less than 390 KG of Toluene.

(5) List I Chemicals

**Level 22**

~~At least 1.2 KG but less than 1.8 KG of Benzaldehyde;~~  
~~At least 1.4 KG but less than 2 KG of Benzyl Cyanide;~~  
~~At least 1.4 KG but less than 2 KG of Ephedrine;~~  
~~At least 14 G but less than 20 G of Ergonovine;~~  
~~At least 28 G but less than 40 G of Ergotamine;~~  
~~At least 1.4 KG but less than 2 KG of Ethylamine;~~  
~~At least 3.08 KG but less than 4.4 KG of Hydriodic Acid;~~  
~~At least 22.4 KG but less than 32 KG of Isoafrole;~~  
~~At least 280 G but less than 400 G of Methylamine;~~  
~~At least 35 KG but less than 50 KG of N-Methylephedrine;~~  
~~At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;~~  
~~At least 879 G but less than 1.3 KG of Nitroethane;~~  
~~At least 14 KG but less than 20 KG of Norpseudoephedrine;~~  
~~At least 1.4 KG but less than 2 KG of Phenylacetic Acid;~~  
~~At least 14 KG but less than 20 KG of Phenylpropanolamine;~~  
~~At least 700 G but less than 1 KG of Piperidine;~~  
~~At least 22.4 KG but less than 32 KG of Piperonal;~~  
~~At least 112 G but less than 160 G of Propionic Anhydride;~~  
~~At least 1.4 KG but less than 2 KG of Pseudoephedrine;~~  
~~At least 22.4 KG but less than 32 KG of Safrole;~~  
~~At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone~~  
At least 712 G but less than 1.2 KG of Benzaldehyde;  
At least 800 G but less than 1.4 KG of Benzyl Cyanide;  
At least 800 G but less than 1.4 KG of Ephedrine;  
At least 8 G but less than 14 G of Ergonovine;  
At least 16 G but less than 28 G of Ergotamine;  
At least 800 G but less than 1.4 KG of Ethylamine;  
At least 1.76 KG but less than 3.08 KG of Hydriodic Acid;  
At least 12.8 KG but less than 22.4 KG of Isoafrole;  
At least 160 G but less than 280 G of Methylamine;  
At least 20 KG but less than 35 KG of N-Methylephedrine;  
At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;  
At least 503 G but less than 879 G of Nitroethane;  
At least 8 KG but less than 14 KG of Norpseudoephedrine;  
At least 800 G but less than 1.4 KG of Phenylacetic Acid;  
At least 8 KG but less than 14 KG of Phenylpropanolamine;  
At least 400 G but less than 700 G of Piperidine;  
At least 12.8 KG but less than 22.4 KG of Piperonal;  
At least 64 G but less than 112 G of Propionic Anhydride;  
At least 800 G but less than 1.4 KG of Pseudoephedrine;  
At least 12.8 KG but less than 22.4 KG of Safrole;  
At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

At least 726 G but less than 1.1 KG of Acetic Anhydride;  
At least 82.25 KG but less than 117.5 KG of Acetone;  
At least 1.4 KG but less than 2 KG of Benzyl Chloride;  
At least 75.25 KG but less than 107.5 KG of Ethyl Ether;  
At least 84 KG but less than 120 KG of Methyl Ethyl Ketone;  
At least 700 G but less than 1 KG of Potassium Permanganate;  
At least 91 KG but less than 130 KG of Toluene.

(6) List I Chemicals

**Level 20**

~~At least 712 G but less than 1.2 KG of Benzaldehyde;~~  
~~At least 800 G but less than 1.4 KG of Benzyl Cyanide;~~  
~~At least 800 G but less than 1.4 KG of Ephedrine;~~  
~~At least 8 G but less than 14 G of Ergonovine;~~  
~~At least 16 G but less than 28 G of Ergotamine;~~  
~~At least 800 G but less than 1.4 KG of Ethylamine;~~  
~~At least 1.76 KG but less than 3.08 KG of Hydriodic Acid;~~  
~~At least 12.8 KG but less than 22.4 KG of Isoafrole;~~  
~~At least 160 G but less than 280 G of Methylamine;~~  
~~At least 20 KG but less than 35 KG of N-Methylephedrine;~~  
~~At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;~~  
~~At least 503 G but less than 879 G of Nitroethane;~~  
~~At least 8 KG but less than 14 KG of Norpseudoephedrine;~~  
~~At least 800 G but less than 1.4 KG of Phenylacetic Acid;~~  
~~At least 8 KG but less than 14 KG of Phenylpropanolamine;~~  
~~At least 400 G but less than 700 G of Piperidine;~~  
~~At least 12.8 KG but less than 22.4 KG of Piperonal;~~  
~~At least 64 G but less than 112 G of Propionic Anhydride;~~  
~~At least 800 G but less than 1.4 KG of Pseudoephedrine;~~  
~~At least 12.8 KG but less than 22.4 KG of Safrole;~~  
~~At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;~~  
At least 178 G but less than 712 G of Benzaldehyde;  
At least 200 G but less than 800 G of Benzyl Cyanide;  
At least 200 G but less than 800 G of Ephedrine;  
At least 2 G but less than 8 G of Ergonovine;  
At least 4 G but less than 16 G of Ergotamine;  
At least 200 G but less than 800 G of Ethylamine;  
At least 440 G but less than 1.76 KG of Hydriodic Acid;  
At least 3.2 KG but less than 12.8 KG of Isoafrole;  
At least 40 G but less than 160 G of Methylamine;  
At least 5 KG but less than 20 KG of N-Methylephedrine;  
At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;  
At least 126 G but less than 503 G of Nitroethane;  
At least 2 KG but less than 8 KG of Norpseudoephedrine;  
At least 200 G but less than 800 G of Phenylacetic Acid;  
At least 2 KG but less than 8 KG of Phenylpropanolamine;  
At least 100 G but less than 400 G of Piperidine;  
At least 3.2 KG but less than 12.8 KG of Piperonal;  
At least 16 G but less than 64 G of Propionic Anhydride;  
At least 200 G but less than 800 G of Pseudoephedrine;  
At least 3.2 KG but less than 12.8 KG of Safrole;  
At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

At least 440 G but less than 726 G of Acetic Anhydride;  
At least 47 KG but less than 82.25 KG of Acetone;  
At least 800 G but less than 1.4 KG of Benzyl Chloride;  
At least 43 KG but less than 75.25 KG of Ethyl Ether;  
At least 48 KG but less than 84 KG of Methyl Ethyl Ketone;  
At least 400 G but less than 700 G of Potassium Permanganate;  
At least 52 KG but less than 91 KG of Toluene.

(7) List I Chemicals

**Level 18**

~~At least 178 G but less than 712 G of Benzaldehyde;~~  
~~At least 200 G but less than 800 G of Benzyl Cyanide;~~  
~~At least 200 G but less than 800 G of Ephedrine;~~  
~~At least 2 G but less than 8 G of Ergonovine;~~  
~~At least 4 G but less than 16 G of Ergotamine;~~  
~~At least 200 G but less than 800 G of Ethylamine;~~  
~~At least 440 G but less than 1.76 KG of Hydriodic Acid;~~  
~~At least 3.2 KG but less than 12.8 KG of Isoafrole;~~  
~~At least 40 G but less than 160 G of Methylamine;~~  
~~At least 5 KG but less than 20 KG of N-Methylephedrine;~~  
~~At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;~~  
~~At least 126 G but less than 503 G of Nitroethane;~~  
~~At least 2 KG but less than 8 KG of Norpseudoephedrine;~~  
~~At least 200 G but less than 800 G of Phenylacetic Acid;~~  
~~At least 2 KG but less than 8 KG of Phenylpropanolamine;~~  
~~At least 100 G but less than 400 G of Piperidine;~~  
~~At least 3.2 KG but less than 12.8 KG of Piperonal;~~  
~~At least 16 G but less than 64 G of Propionic Anhydride;~~  
~~At least 200 G but less than 800 G of Pseudoephedrine;~~  
~~At least 3.2 KG but less than 12.8 KG of Safrole;~~  
~~At least 4 KG but less than 16 KG of 3, 4-Methylenedioxyphenyl-2-propanone;~~  
At least 142 G but less than 178 G of Benzaldehyde;  
At least 160 G but less than 200 G of Benzyl Cyanide;  
At least 160 G but less than 200 G of Ephedrine;  
At least 1.6 G but less than 2 G of Ergonovine;  
At least 3.2 G but less than 4 G of Ergotamine;  
At least 160 G but less than 200 G of Ethylamine;  
At least 352 G but less than 440 G of Hydriodic Acid;  
At least 2.56 KG but less than 3.2 KG of Isoafrole;  
At least 32 G but less than 40 G of Methylamine;  
At least 4 KG but less than 5 KG of N-Methylephedrine;  
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;  
At least 100 G but less than 126 G of Nitroethane;  
At least 1.6 KG but less than 2 KG of Norpseudoephedrine;  
At least 160 G but less than 200 G of Phenylacetic Acid;  
At least 1.6 KG but less than 2 KG of Phenylpropanolamine;  
At least 80 G but less than 100 G of Piperidine;  
At least 2.56 KG but less than 3.2 KG of Piperonal;  
At least 12.8 G but less than 16 G of Propionic Anhydride;  
At least 160 G but less than 200 G of Pseudoephedrine;  
At least 2.56 KG but less than 3.2 KG of Safrole;  
At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

At least 110 G but less than 440 G of Acetic Anhydride;  
At least 11.75 KG but less than 47 KG of Acetone;  
At least 200 G but less than 800 G of Benzyl Chloride;  
At least 10.75 KG but less than 43 KG of Ethyl Ether;  
At least 12 KG but less than 48 KG of Methyl Ethyl Ketone;  
At least 100 G but less than 400 G of Potassium Permanganate;  
At least 13 KG but less than 52 KG of Toluene.

(8) List I Chemicals

**Level 16**

~~At least 142 G but less than 178 G of Benzaldehyde;~~  
~~At least 160 G but less than 200 G of Benzyl Cyanide;~~  
~~At least 160 G but less than 200 G of Ephedrine;~~  
~~At least 1.6 G but less than 2 G of Ergonovine;~~  
~~At least 3.2 G but less than 4 G of Ergotamine;~~  
~~At least 160 G but less than 200 G of Ethylamine;~~  
~~At least 352 G but less than 440 G of Hydriodic Acid;~~  
~~At least 2.56 KG but less than 3.2 KG of Isoafrole;~~  
~~At least 32 G but less than 40 G of Methylamine;~~  
~~At least 4 KG but less than 5 KG of N-Methylephedrine;~~  
~~At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;~~  
~~At least 100 G but less than 126 G of Nitroethane;~~  
~~At least 1.6 KG but less than 2 KG of Norpseudoephedrine;~~  
~~At least 160 G but less than 200 G of Phenylacetic Acid;~~  
~~At least 1.6 KG but less than 2 KG of Phenylpropanolamine;~~  
~~At least 80 G but less than 100 G of Piperidine;~~  
~~At least 2.56 KG but less than 3.2 KG of Piperonal;~~  
~~At least 12.8 G but less than 16 G of Propionic Anhydride;~~  
~~At least 160 G but less than 200 G of Pseudoephedrine;~~  
~~At least 2.56 KG but less than 3.2 KG of Safrole;~~  
~~At least 3.2 KG but less than 4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;~~  
At least 107 G but less than 142 G of Benzaldehyde;  
At least 120 G but less than 160 G of Benzyl Cyanide;  
At least 120 G but less than 160 G of Ephedrine;  
At least 1.2 G but less than 1.6 G of Ergonovine;  
At least 2.4 G but less than 3.2 G of Ergotamine;  
At least 120 G but less than 160 G of Ethylamine;  
At least 264 G but less than 352 G of Hydriodic Acid;  
At least 1.92 KG but less than 2.56 KG of Isoafrole;  
At least 24 G but less than 32 G of Methylamine;  
At least 3 KG but less than 4 KG of N-Methylephedrine;  
At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;  
At least 75 G but less than 100 G of Nitroethane;  
At least 1.2 KG but less than 1.6 KG of Norpseudoephedrine;  
At least 120 G but less than 160 G of Phenylacetic Acid;  
At least 1.2 KG but less than 1.6 KG of Phenylpropanolamine;  
At least 60 G but less than 80 G of Piperidine;  
At least 1.92 KG but less than 2.56 KG of Piperonal;  
At least 9.6 G but less than 12.8 G of Propionic Anhydride;  
At least 120 G but less than 160 G of Pseudoephedrine;  
At least 1.92 KG but less than 2.56 KG of Safrole;  
At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

At least 88 G but less than 110 G of Acetic Anhydride;  
At least 9.4 KG but less than 11.75 KG of Acetone;  
At least 160 G but less than 200 G of Benzyl Chloride;  
At least 8.6 KG but less than 10.75 KG of Ethyl Ether;  
At least 9.6 KG but less than 12 KG of Methyl Ethyl Ketone;  
At least 80 G but less than 100 G of Potassium Permanganate;  
At least 10.4 KG but less than 13 KG of Toluene.

(9) List I Chemicals

- 3.6 KG or more of Anthranilic Acid;
- ~~At least 107 G but less than 142 G of Benzaldehyde;~~
- ~~At least 120 G but less than 160 G of Benzyl Cyanide;~~
- ~~At least 120 G but less than 160 G of Ephedrine;~~
- ~~At least 1.2 G but less than 1.6 G of Ergonovine;~~
- ~~At least 2.4 G but less than 3.2 G of Ergotamine;~~
- ~~At least 120 G but less than 160 G of Ethylamine;~~
- ~~At least 264 G but less than 352 G of Hydriodic Acid;~~
- ~~At least 1.92 KG but less than 2.56 KG of Isoafrole;~~
- ~~At least 24 G but less than 32 G of Methylamine;~~
- 4.8 KG or more of N-Acetylanthranilic Acid;
- ~~At least 3 KG but less than 4 KG of N-Methylephedrine;~~
- ~~At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;~~
- ~~At least 75 G but less than 100 G of Nitroethane;~~
- ~~At least 1.2 KG but less than 1.6 KG of Norpseudoephedrine;~~
- ~~At least 120 G but less than 160 G of Phenylacetic Acid;~~
- ~~At least 1.2 KG but less than 1.6 KG of Phenylpropanolamine;~~
- ~~At least 60 G but less than 80 G of Piperidine;~~
- ~~At least 1.92 KG but less than 2.56 KG of Piperonal;~~
- ~~At least 9.6 G but less than 12.8 G of Propionic Anhydride;~~
- ~~At least 120 G but less than 160 G of Pseudoephedrine;~~
- ~~At least 1.92 KG but less than 2.56 KG of Safrole;~~
- ~~At least 2.4 KG but less than 3.2 KG of 3, 4-Methylenedioxyphenyl-2-propanone;~~
- At least 2.7 KG but less than 3.6 KG of Anthranilic Acid;
- At least 80.25 G but less than 107 G of Benzaldehyde;
- At least 90 G but less than 120 G of Benzyl Cyanide;
- At least 90 G but less than 120 G of Ephedrine;
- At least 900 MG but less than 1.2 G of Ergonovine;
- At least 1.8 G but less than 2.4 G of Ergotamine;
- At least 90 G but less than 120 G of Ethylamine;
- At least 198 G but less than 264 G of Hydriodic Acid;
- At least 1.44 G but less than 1.92 KG of Isoafrole;
- At least 18 G but less than 24 G of Methylamine;
- At least 3.6 KG but less than 4.8 KG of N-Acetylanthranilic Acid;
- At least 2.25 KG but less than 3 KG of N-Methylephedrine;
- At least 2.25 KG but less than 3 KG of N-Methylpseudoephedrine;
- At least 56.25 G but less than 75 G of Nitroethane;
- At least 900 G but less than 1.2 KG of Norpseudoephedrine;
- At least 90 G but less than 120 G of Phenylacetic Acid;
- At least 900 G but less than 1.2 KG of Phenylpropanolamine;
- At least 45 G but less than 60 G of Piperidine;
- At least 1.44 KG but less than 1.92 KG of Piperonal;
- At least 7.2 G but less than 9.6 G of Propionic Anhydride;
- At least 90 G but less than 120 G of Pseudoephedrine;
- At least 1.44 G but less than 1.92 KG of Safrole;
- At least 1.8 KG but less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

- At least 66 G but less than 88 G of Acetic Anhydride;
- At least 7.05 KG but less than 9.4 KG of Acetone;
- At least 120 G but less than 160 G of Benzyl Chloride;

At least 6.45 KG but less than 8.6 KG of Ethyl Ether;  
At least 7.2 KG but less than 9.6 KG of Methyl Ethyl Ketone;  
At least 60 G but less than 80 G of Potassium Permanganate;  
At least 7.8 KG but less than 10.4 KG of Toluene.

(10) List I Chemicals

**Level 12**

~~Less than 3.6 KG of Anthranilic Acid;~~  
~~Less than 107 G of Benzaldehyde;~~  
~~Less than 120 G of Benzyl Cyanide;~~  
~~Less than 120 G of Ephedrine;~~  
~~Less than 1.2 G of Ergonovine;~~  
~~Less than 2.4 G of Ergotamine;~~  
~~Less than 120 G of Ethylamine;~~  
~~Less than 264 G of Hydriodic Acid;~~  
~~Less than 1.92 KG of Isoafrole;~~  
~~Less than 24 G of Methylamine;~~  
~~Less than 4.8 KG of N-Acetylanthranilic Acid;~~  
~~Less than 3 KG of N-Methylephedrine;~~  
~~Less than 3 KG of N-Methylpseudoephedrine;~~  
~~Less than 75 G of Nitroethane;~~  
~~Less than 1.2 KG of Norpseudoephedrine;~~  
~~Less than 120 G of Phenylacetic Acid;~~  
~~Less than 1.2 KG of Phenylpropanolamine;~~  
~~Less than 60 G of Piperidine;~~  
~~Less than 1.92 KG of Piperonal;~~  
~~Less than 9.6 G of Propionic Anhydride;~~  
~~Less than 120 G of Pseudoephedrine;~~  
~~Less than 1.92 KG of Safrole;~~  
~~Less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;~~  
Less than 2.7 KG of Anthranilic Acid;  
Less than 80.25 G of Benzaldehyde  
Less than 90 G of Benzyl Cyanide;  
Less than 90 G of Ephedrine;  
Less than 900 MG of Ergonovine;  
Less than 1.8 G of Ergotamine;  
Less than 90 G of Ethylamine;  
Less than 198 G of Hydriodic Acid;  
Less than 1.44 G of Isoafrole;  
Less than 18 G of Methylamine;  
Less than 3.6 KG of N-Acetylanthranilic Acid;  
Less than 2.25 KG of N-Methylephedrine;  
Less than 2.25 KG of N-Methylpseudoephedrine;  
Less than 56.25 G of Nitroethane;  
Less than 900 G of Norpseudoephedrine;  
Less than 90 G of Phenylacetic Acid;  
Less than 900 G of Phenylpropanolamine;  
Less than 45 G of Piperidine;  
Less than 1.44 KG of Piperonal;  
Less than 7.2 G of Propionic Anhydride;  
Less than 90 G of Pseudoephedrine;  
Less than 1.44 G of Safrole;

Less than 1.8 KG of 3, 4-Methylenedioxyphenyl-2-propanone;

List II Chemicals

Less than 66 G of Acetic Anhydride;  
Less than 7.05 KG of Acetone;  
Less than 120 G of Benzyl Chloride;  
Less than 6.45 KG of Ethyl Ether;  
Less than 7.2 KG of Methyl Ethyl Ketone;  
Less than 60 G of Potassium Permanganate;  
Less than 7.8 KG of Toluene.

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Commentary

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4. *When two or more list I chemicals are used together in the same manufacturing process, calculate the offense level for each separately and use the quantity that results in the greatest base offense level. In any other case, the quantities should be added together (using the List I Chemical Equivalency Table) for the purpose of calculating the base offense level.*

Examples:

- (a) *The defendant was in possession of five kilograms of ephedrine and ~~three kilograms~~ 300 grams of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. Therefore, the base offense level for each listed chemical is calculated separately and the list I chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of ~~24~~26; 300 grams of hydriodic acid result in a base offense level of ~~14~~16. In this case, the base offense level would be ~~24~~26.*

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**2. Synopsis of Proposed Amendment:** This amendment implements section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Section 203 directs the Commission to amend the guidelines for offenses related to smuggling, transporting, or harboring illegal aliens. The legislation directs the Commission to:

“(A) increase the base offense level for such offenses at least 3 offense levels above the applicable level in effect on the date of the enactment of this Act;

(B) review the sentencing enhancement for the number of aliens involved (U.S.S.G 2L1.1(b)(2)), and increase the sentencing enhancement by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act;

(C) impose an appropriate sentencing enhancement upon an offender with 1 prior felony conviction arising out of a separate and prior prosecution for an offense that involved the

same or similar underlying conduct as the current offense, to be applied in addition to any sentencing enhancement that would otherwise apply pursuant to the calculation of the defendant's criminal history category; . . . [and an additional enhancement for 2 or more priors];

(E) impose an appropriate sentencing enhancement on a defendant who, in the course of committing an offense described in this subsection (i) murders or otherwise causes death, bodily injury, or serious bodily injury to a defendant; (ii) uses or brandishes a firearm or other dangerous weapon; or (iii) engages in conduct that consciously or recklessly places another in serious danger of death or serious bodily injury;

(F) consider whether a downward adjustment is appropriate if the offense is a first offense and involves the smuggling only of the alien's spouse or child . . .”

The amendment provides for a higher base offense level as required by the legislation. In addition, the amendment provides for new specific offense characteristics outlined in the legislation and adjusts the current specific offense characteristics as directed by the legislation. Finally, the amendment provides for clarifying commentary.

**§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien**

(a) Base Offense Level:

- (1) ~~20~~**[23-25]**, if the defendant was convicted under 8 U.S.C. § 1327 of a violation involving an alien who previously was deported after a conviction for an aggravated felony; or
- (2) ~~9~~**[12-14]**, otherwise.

(b) Specific Offense Characteristics

~~(1) If the defendant committed the offense other than for profit and the base offense level is determined under subsection (a)(2), decrease by 3 levels.~~

(1) **If the offense involves the smuggling, transporting, or harboring only of the defendant's spouse or child, decrease by [2-3] levels.**

(2) If the offense involved the smuggling, transporting, or harboring of ~~six~~ **three** or more unlawful aliens, increase as follows:

	<u>Number of Unlawful Aliens Smuggled, Transported, or Harbored</u>	<u>Increase in Level</u>
(A)	3-5	add <b>1</b>
<del>(A)</del> <b>(B)</b>	<del>6-24</del> <b>11</b>	add <del>2</del> <b>3</b>
<del>(C)</del> <b>(C)</b>	<del>12-24</del>	add <b>5</b>
<del>(B)</del> <b>(D)</b>	25-99	add <del>4</del> <b>7</b>

(EE) 100 or more add **69**.

- (3) ~~If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, and the offense level determined above is less than level 8, increase to level 8.~~ **[Option 1: If the defendant committed the instant offense subsequent to sustaining (A) one conviction for an immigration and naturalization offense, increase by 2 levels; or (B) two convictions for immigration and naturalization offenses each arising out of separate prosecutions, increase by 4 levels.]**

**[Option 2: If the defendant at the time of sentencing had been previously convicted of (A) one immigration and naturalization offense arising out of a separate and prior prosecution, increase by 2 levels; or (B) two immigration and naturalization offenses each arising out of separate prosecutions, increase by 4 levels.]**

- (4) If the offense involved a dangerous weapon [or recklessly creating a substantial risk of death or serious bodily injury], apply the greatest:

(A) If [the defendant discharged a firearm] [a firearm was discharged], increase by **6** levels, but if the resulting offense level is less than level **[22-24]**, increase to level **[22-24]**;

(B) if [the defendant brandished or otherwise used a dangerous weapon (including a firearm),] [a dangerous weapon (including a firearm) was brandished or otherwise used,] increase by 4 levels, but if the resulting offense level is less than level [20-22], increase to level [20-22];

(C) if a dangerous weapon (including a firearm) was possessed, increase by 2 levels, but if the resulting offense level is less than level [18-20], increase to level [18-20];

**[Option 1:** (D) if the offense involved recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels, but if the resulting offense level is less than level [18-20], increase to level [18-20]].

**[Option 2:**

(5) If the offense involved recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels, but if the resulting offense level is less than level [18-20], increase to level [18-20]].

(6) If any person died or sustained bodily injury as a result of the offense, increase the offense level accordingly:

- |     |   |        |   |
|-----|---|--------|---|
| (1) | Bodily Injury                               | add    | 2 |
|     |   | levels |   |
| (2) | Serious Bodily Injury                       | add    | 4 |
|     |   | levels |   |
| (3) | Permanent or Life-Threatening Bodily Injury | add    | 6 |
|     |   | levels |   |
| (4) | Death                                       | add    | 8 |
|     |   | levels |   |

[(7) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by [2-4] levels.]

(c) Cross Reference

If any person was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the special maritime and territorial jurisdiction of the United States, apply the appropriate murder guideline from Chapter Two, Part A, Subpart 1.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1324(a), 1327. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"For profit" means for financial gain or commercial advantage, but this definition does not include a defendant who commits the offense solely in return for his own entry or transportation. The "number of unlawful aliens smuggled, transported, or harbored" does not include the defendant.*
2. *For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others.*
3. *For the purposes of §3B1.2 (Mitigating Role), a defendant who commits the offense solely in return for his own entry or transportation is not entitled to a reduction for a minor or minimal role. This is because the reduction at §2L1.1(b)(1) applies to such a defendant.*
4. *Where the defendant smuggled, transported, or harbored an alien knowing that the alien intended to enter the United States to engage in subversive activity, drug trafficking, or other serious criminal behavior, an upward departure may be warranted.*
5. *If the offense involved ~~dangerous or inhumane treatment, death or bodily injury, possession of a dangerous weapon, or substantially more than 100~~ **more than 400** aliens, an upward departure may be warranted.*
6. *"Aggravated felony" is defined in the Commentary to §2L1.2 (Unlawfully Entering or Remaining in the United States).*
- [7. *Under subsections (b)(4)(A) and (b)(4)(B), the defendant is accountable if (A) the defendant discharges, brandishes, or otherwise uses a firearm, or (B) another person discharges, brandishes, or otherwise uses a firearm and the defendant is aware of the presence of the firearm. Under subsection (b)(4)(C), the defendant is accountable if the defendant or another person possesses a dangerous weapon during the offense.]*
8. *Prior felony conviction(s) resulting in an adjustment under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*
9. *Reckless conduct triggering the adjustment from subsection [Option 1: (b)(4)(D)] [Option 2: (b)(5)] can vary widely. Such conduct may include, but is not limited to, transporting persons in the trunk or engine compartment of a motor vehicle, carrying substantially more passengers than the rated capacity of a motor vehicle or vessel, or harboring persons in a crowded, dangerous, or inhumane condition. If the reckless conduct triggering the adjustment in subsection [Option 1: (b)(4)(D)] [Option 2: (b)(5)] includes only conduct related to fleeing from a law enforcement officer, do not apply an adjustment from §3C1.2 (Reckless Endangerment During Flight). [Do not apply the adjustment in subsection (b)(4)(D) if the reckless conduct that created a substantial risk of death or serious bodily injury includes only conduct related to weapon possession or use.]*

10. An “immigration and naturalization offense” means any offense covered by Chapter Two, Part L.
11. For purposes of this section, the term “child” is defined at section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)) and “spouse” is defined at section 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

*Background:* This section includes the most serious immigration offenses covered under the Immigration Reform and Control Act of 1986. ~~A specific offense characteristic provides a reduction if the defendant did not commit the offense for profit. The offense level increases with the number of unlawful aliens smuggled, transported, or harbored.~~ In large scale **smuggling or harboring** cases, an additional adjustment from §3B1.1 (Aggravating Role) typically will apply to the most culpable defendants.

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**3. Synopsis of Proposed Amendment:** This amendment implements section 211 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Section 211 directs the Commission to amend the guidelines for offenses related to the fraudulent use of government issued documents. The Commission is directed to:

“(A) increase the base offense level for such offenses at least 2 offense levels above the level in effect on the date of the enactment of this Act;

(B) review the sentencing enhancement for the number of documents or passports involved (U.S.S.G. 2L2.1(b)(2)), and increase the upward enhancement by at least 50 percent above the applicable enhancement in effect on the date of the enactment of this Act;

(C) impose an appropriate sentencing enhancement upon an offender with 1 prior felony conviction arising out of a separate and prior prosecution for an offense that involved the same or similar underlying conduct as the current offense, to be applied in addition to any sentencing enhancement that would otherwise apply pursuant to the calculation of the defendant’s criminal history category; . . . [and an additional enhancement for 2 or more priors];”

The amendment provides for a higher base offense level as required by the legislation. In addition, the amendment provides for a new specific offense characteristic for defendants who have one or more prior convictions for the same or similar conduct -- as outlined in the legislation -- and adjusts the current specific offense characteristics as directed by the legislation and consistent with other guidelines. Finally, the amendment provides for clarifying commentary.

§2L2.1.

**Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status, or a United States Passport; False Statement in Respect to the Citizenship or Immigration Status of Another; Fraudulent Marriage to Assist Alien to Evade Immigration Law**

- (a) Base Offense Level: **9[11-13]**
- (b) Specific Offense Characteristics

(1) **[Option 1: If the defendant committed the offense other than for profit and had not been convicted of an immigration and naturalization offense prior to the commission of the instant offense, decrease by 3 levels.]**

**[Option 2: If the offense involves documents only related to the defendant's spouse or child, decrease by [2-3] levels.**

(2) If the offense involved ~~six~~ **three** or more documents or passports, increase as follows:

	<u>Number of Documents/Passports</u>	<u>Increase in Level</u>
(A)	3-5	add <b>1</b>
( <del>AB</del> )	6- <del>24</del> <b>11</b>	add <b>2</b> <del>3</del>
(C)	12-24	add <b>5</b>
( <del>BD</del> )	25-99	add <b>4</b> <del>7</del>
( <del>CE</del> )	100 or more	add <b>6</b> <del>9</del> .

(3) If the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws, increase by **4** levels.

(4) **[Option 1: If the defendant committed the instant offense subsequent to sustaining (A) one conviction for an immigration and naturalization offense, increase by 2 levels; or (B) two convictions for immigration and naturalization offenses each arising out of separate prosecutions, increase by 4 levels.**

**[Option 2: If the defendant at the time of sentencing had been previously convicted of (A) one immigration and naturalization offense arising out of a separate and prior prosecution, increase by 2 levels; or (B) two immigration and naturalization offenses each arising out of separate prosecutions, increase by 4 levels.]**

Commentary

Statutory Provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (4), 1325(b), (c); 18 U.S.C. §§ 1015, 1028, 1425-1427, 1542, 1544, 1546. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. "For profit" means for financial gain or commercial advantage.
2. Where it is established that multiple documents are part of a set intended for use by a single person, treat the documents as one set.
3. Subsection (b)(3) provides an enhancement if the defendant knew, believed, or had reason to believe that a passport or visa was to be used to facilitate the commission of a felony offense, other than an offense involving violation of the immigration laws. If the knew, believed, or had reason to believe that felony offense to be committed was of an especially serious type, an upward departure may be warranted.
4. Prior felony conviction(s) resulting in an adjustment under subsection (b)(4) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).
5. An "immigration and naturalization offense" means any offense covered by Chapter Two, Part L.
6. For purposes of this section, the term "child" is defined at section 101(b)(1) of the Immigration and Nationality Act (8 U.S.C. § 1101(b)(1)) and "spouse" is defined at section 101(a)(35) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(35)).

**§2L2.2. Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport**

- (a) Base Offense Level: **6[8-10]**
- (b) Specific Offense Characteristics
  - (1) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by **2** levels.
  - (2) **[Option 1: If the defendant committed the instant offense subsequent to sustaining (A) one conviction for an immigration and naturalization offense, increase by 2 levels; or (B) two convictions for immigration and naturalization offenses each arising out of separate prosecutions, increase by 4 levels.**

[**Option 2:** If the defendant at the time of sentencing had been previously convicted of (A) one immigration and naturalization offense arising out of a separate and prior prosecution, increase by **2** levels; or (B) two immigration and naturalization offenses each arising out of separate prosecutions, increase by **4** levels.]

(c) Cross Reference

- (1) If the defendant used a passport or visa in the commission or attempted commission of a felony offense, other than an offense involving violation of the immigration laws, apply --
- (A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above; or
- (B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (5), 1325(b), (c); 18 U.S.C. §§ 911, 1015, 1028, 1423-1426, 1542-1544, 1546.

Application Notes:

1. *For the purposes of Chapter Three, Part D (Multiple Counts), a conviction for unlawfully entering or remaining in the United States (§2L1.2) arising from the same course of conduct is treated as a closely related count, and is therefore grouped with an offense covered by this guideline.*
2. *Prior felony conviction(s) resulting in an adjustment under subsection (b)(2) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*
3. *An “immigration and naturalization offense” means any offense covered by Chapter Two, Part L.*

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**4(A). Synopsis of Proposed Amendment:** This amendment implements section 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Section 218 directs the Commission to review the guideline for peonage, involuntary servitude and slave trade offenses and amend the guideline, as necessary, to:

“(A) reduce or eliminate any unwarranted disparity . . . between the sentences for peonage, involuntary servitude, and slave trade offenses, and the sentences for kidnapping offenses and alien smuggling;

(B) ensure that the applicable guidelines for defendants convicted of peonage, involuntary servitude, and slave trade offenses are sufficiently stringent to deter such offenses and adequately reflect the heinous nature of such offenses; and

(C) ensure that the guidelines reflect the general appropriateness of enhanced sentences for defendants whose peonage, involuntary servitude, or slave trade offenses involve, (i) a large number of victims; (ii) the use or threatened use of a dangerous weapon; or (iii) a prolonged period of peonage or involuntary servitude.”

**§2H4.1. Peonage, Involuntary Servitude, and Slave Trade**

(a) Base Offense Level (~~Apply the greater~~):

(1) ~~15~~**[18-24]**; or

~~(2) 2 plus the offense level applicable to any underlying offense.~~

(b) **Specific Offense Characteristics**

(1) (A) If any victim sustained permanent or life-threatening bodily injury, increase by **[4-6]** levels; (B) if any victim sustained serious bodily injury, increase by **[2-4]** levels.

(2) If a dangerous weapon was used, increase by **[2-4]** levels.

(3) If any victim was held in a condition of servitude or peonage for (A) more than one year, increase by **[3-5]** levels; (B) between 180 days and one year, increase by **[2-4]** levels; (C) more than thirty days but less than 180 days, increase by **[1-3]** level.

(4) If any other offense was committed during the commission of or in connection with the servitude, peonage, or slave trade offense, increase to the greater of:

(A) **2** plus the offense level as determined above, or

(B) **2** plus the offense level from the offense guideline applicable to that other offense, but in no event greater than level **43**.

## Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 1581-1588.

Application Notes:

1. ~~"Offense level applicable to the underlying offense" is explained in the Commentary to §2H1.1~~ Under subsection (b)(4), "any other offense . . . committed during the commission of or in connection with the servitude, peonage, or slave trade offense" means any conduct that constitutes an offense under federal, state, or local law (other than an offense that is itself covered under Chapter Two, Part H, Subpart 4). See the Commentary in §2H1.1 for an explanation of how to treat a count of conviction which sets forth more than one "other" offense.
2. Definitions of "serious bodily injury" and "permanent or life-threatening bodily injury" are found in the Commentary to §1B1.1 (Application Instructions).
3. "A dangerous weapon was used" means that a firearm was discharged, or a "firearm" or "dangerous weapon" was "otherwise used" (as defined in the Commentary to §1B1.1 (Application Instructions)).
4. If the offense involved the holding of more than 10 victims in a condition of involuntary servitude or peonage, an upward departure may be warranted.

Background: This section covers statutes that prohibit peonage, involuntary servitude, and slave trade. For purposes of deterrence and just punishment, the minimum base offense level is ~~15~~**[18-24]**. However, these offenses frequently involve other serious offenses. In such cases, the offense level will be increased under ~~§2H4.1(a)(2)~~.

**(B). Issue for Comment:** Section 218 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 directs the Commission to ensure that the guidelines reflect the general appropriateness of enhanced sentences for defendants whose peonage, involuntary servitude, or slave trade offenses involve a large number of victims. The Commission seeks comment on whether the current enhancements provided under the guidelines' multiple count provisions are sufficient to ensure appropriately enhanced sentences when peonage, involuntary servitude, or slave trade offenses involve a large number of victims or whether a new specific offense characteristic for a large number of victims is needed.

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## II. Non-Emergency Amendments

**5. Synopsis of Proposed Amendment:** This amendment proposes to make permanent the emergency amendment promulgated by the Commission to implement section 730 of the Antiterrorism and Effective Death Penalty Act of 1996. That section gave the Commission emergency authority, under section 21(a) of the Sentencing Act of 1987, to amend the sentencing guidelines so that the Chapter Three adjustment in §3A1.4, relating to international terrorism, applies more broadly to federal crimes of terrorism, as defined in section 2332b(g) of Title 18, United States Code. By vote of the Commission, the emergency amendment became effective November 1, 1996. However, under the terms of section 21(a) of the

Sentencing Act of 1987, the emergency amendment will no longer be in effect after submission of the next report to Congress under 28 U.S.C. § 994(p) unless in the next report, the Commission submits (and Congress does not disapprove) an amendment to make it permanent.

**§3A1.4. International Terrorism**

- (a) If the offense is a felony that involved, or was intended to promote, ~~international~~ a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.
- (b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

Commentary

Application Notes:

- 1. Subsection (a) increases the offense level if the offense involved, or was intended to promote, ~~international~~ a federal crime of terrorism. "~~International~~ Federal crime of terrorism" is defined at 18 U.S.C. § ~~2331~~2332b(g).
- 2. Under subsection (b), if the defendant's criminal history category as determined under Chapter Four (Criminal History and Criminal Livelihood) is less than Category VI, it shall be increased to Category VI.

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**6. Synopsis of Proposed Amendment:** This is a two-part amendment to §1B1.1 (Application Instructions). First, the amendment corrects a technical error in §1B1.1(b). Second, the amendment expands the definition of "offense" to specify what is meant by the term "instant offense." This term is used to distinguish the current or "instant" offense from prior criminal offenses. Currently, this term is not defined and has repeatedly raised questions about its application. This amendment defines this term to mean the offense of conviction and relevant conduct, unless a different meaning is expressly stated or is otherwise clear from the context.

Two conforming amendments are necessary. The first conforming amendment adds commentary defining the term "instant offense" in relation to §3C1.1. Section 3C1.1 requires more extensive commentary regarding this term because of the variety of situations covered by this guideline. The second conforming amendment makes explicit that, with respect to §§4B1.1 and 4B1.2, the "instant offense" is the offense of conviction. Currently, §4B1.1 expressly states this in (2) but not in (1).

**§1B1.1. Application Instructions**

\* \* \*

- (b) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the

particular guideline in Chapter Two in the order listed.

\* \* \*

Commentary

Application Notes:

1. *The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):*

\* \* \*

(1) *"Offense" means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context. The term "instant" is used in connection with "offense" when, in the context, it is necessary to distinguish the current or "instant" offense from prior criminal offenses.*

\* \* \*

Conforming Amendments:

**§3C1.1. Obstructing or Impeding the Administration of Justice**

\* \* \*

Commentary

Application Notes:

\* \* \*

8. *"During the investigation or prosecution of the instant offense" means during, and in relation to, the investigation or prosecution of the federal offense of which the defendant is convicted and any offense or related civil violation, committed by the defendant or another person, that was part of the same investigation or prosecution, whether or not such offense resulted in conviction or such violation resulted in the imposition of civil penalties. It is not necessary that the obstructive conduct pertain to the particular count of which the defendant was convicted.*

*"During the sentencing of the instant offense" means during, and in relation to, the sentencing phase of the process, including the preparation of the presentence report.*

\* \* \*

**§4B1.1. Career Offender**

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, ~~the defendant committed the instant offense of conviction,~~ (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior

felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

\* \* \*

**§4B1.2. Definitions of Terms Used in Section 4B1.1**

\* \* \*

- (3) The term "two prior felony convictions" means (A) the defendant committed the instant offense of **conviction** subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

\* \* \*

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**7. Synopsis of Proposed Amendment:** This amendment amends §1B1.2 (Applicable Guidelines) and the Statutory Index to clarify that, except as otherwise provided in the Introduction to the Statutory Index, the Statutory Index will specify the Chapter Two offense guideline most applicable to an offense of conviction.

§1B1.2. Applicable Guidelines

\* \* \*

Commentary

Application Notes:

1. *This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). As a general rule, the court is to use the guideline section from Chapter Two most applicable to the offense of conviction. ~~The Statutory Index (Appendix A) provides a listing to assist in this determination.~~ Except as otherwise provided in the Introduction to the Statutory Index, the Statutory Index specifies the offense guideline section(s) in Chapter Two most applicable to the offense of conviction. When a particular statute proscribes only a single type of criminal conduct, the offense of conviction and the conduct proscribed by the statute will coincide, and there will be only one guideline referenced in the Statutory Index. When a particular statute proscribes a variety of conduct that might constitute the subject of different offense guidelines, more than one offense guideline section may be referenced in the Statutory Index for that particular statute and the court will determine which of the referenced guideline sections applies based upon the nature of the offense conduct charged in the count of which the defendant was convicted.*

\* \* \*

**APPENDIX A - STATUTORY INDEX**

**INTRODUCTION**

This index specifies the guideline section or sections ordinarily applicable to the statute of conviction. Therefore, as a general rule, when determining the guideline section from Chapter Two most applicable to the offense of conviction for purposes of §1B1.2, use the guideline referenced for that statute in this index. If more than one guideline section is referenced for the particular statute, use the guideline most appropriate for the nature of the offense conduct charged in the count of which the defendant was convicted. ~~If, in an atypical case, the guideline section indicated for the statute of conviction is inappropriate because of the particular conduct involved, use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted. (See §1B1.2.)~~ If the offense involved a conspiracy, attempt, or solicitation, refer to §2X1.1 as well as the guideline referenced for the substantive offense.

~~If the offense involved a conspiracy, attempt, or solicitation, refer to §2X1.1 as well as the guideline for the substantive offense.~~

~~For those offenses not listed in this index, the most analogous guideline is to be applied. (See §2X5.1.)~~

However, there are exceptions to the general rule set forth above. If the statute of conviction (1) is not listed in this index; or (2) is listed in this index but the guideline section referenced for that statute is no longer appropriate to cover the offense conduct charged because of changes in law not yet reflected in this index, use the most analogous guideline. (See §2X5.1.)

The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor

or an infraction. (See §1B1.9.)

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**8. Synopsis of Proposed Amendment:** This amendment incorporates into §1B1.3 (Relevant Conduct) the holding in United States v. Hill, 79 F.3d 1477 (6th Cir. 1996), that when two controlled substance transactions are conducted more than one year apart, the fact that the same controlled substance was involved in both transactions is insufficient, without more, to demonstrate that the transactions were part of the "same course of conduct" or "common scheme or plan".

**§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**

\* \* \*

Commentary

Application Notes:

\* \* \*

9.

\* \* \*

(B) Same course of conduct. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. ~~For example, where~~ If the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. *For example, if two controlled substance transactions are conducted more than one year apart, the fact that the transactions involved the same controlled substance, without more information, is insufficient to show that they are part of the same course of conduct or common scheme or plan.* The nature of the offenses may also be a relevant consideration (e.g., a defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).

\* \* \*

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**9. Synopsis of Proposed Amendment:** This amendment addresses the issue of whether acquitted conduct may be considered for sentencing purposes. Option 1 of this amendment

excludes the use of acquitted conduct as a basis for determining the guideline range. Option 1 has two suboptions, either or both of which could be added. Option 1(A) adds language, in the guideline and application note, providing that acquitted conduct shall be considered if established independently of evidence admitted at trial. Option 1(B) invites the use of acquitted conduct as a basis for upward departure

Option 2 is derived from a “compromise” proposal suggested several years ago by the Commission’s Practitioners’ Advisory Group. It excludes acquitted conduct from consideration in determining the guideline range unless such conduct is established by the “clear and convincing” standard, rather than the less exacting “preponderance of the evidence” standard generally applicable to the determination of relevant conduct.

Option 3 expressly provides what currently is arguably implicit in the relevant conduct guideline: that acquitted conduct should be evaluated using the same standards as any other form of unconvicted conduct and included in determining the guideline range if those standards are met. However, the amended commentary invites a discretionary downward departure to exclude such conduct if the use of that conduct to enhance the sentence raises substantial concerns of fundamental fairness. It also states what should be the obvious appropriate floor for such a downward departure.

Option 1A:

**§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**

\* \* \*

- (c) Acquitted conduct, *i.e.*, conduct necessarily rejected by the trier of fact in finding the defendant not guilty of a charge, shall not be considered relevant conduct under this section unless it is independently established by evidence not admitted at trial.

Commentary

\* \* \*

Application Notes:

\* \* \*

- 10. *Subsection (c) provides that conduct (i.e., acts and omissions) of which the defendant has been acquitted after trial [ordinarily] shall not be considered in determining the guideline range. In applying this provision, the court should be mindful that evidence not admissible at trial properly may be considered at sentencing and that application of the guidelines often may involve determinations somewhat different from those necessary for conviction of an offense. For example, the factors necessary to establish the enhancement in §2D1.1(b)(1) for possession of a weapon in a controlled substance offense are different from the elements necessary to find a defendant guilty of using or carrying a firearm in connection with that offense, in violation of 18 U.S.C. § 924(c); therefore, an acquittal of that offense would not necessarily foreclose the application of the weapon enhancement. Moreover, even if the defendant is acquitted of a charge under 18 U.S.C. § 924(c), the*

*weapon enhancement in §2D1.1(b)(1) may apply if, for example, another person possessed a weapon as part of jointly undertaken criminal activity with the defendant and the possession of the weapon was reasonably foreseeable.*

~~1011.~~

\* \* \*

Option 1B:

**§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**

\* \* \*

- (c) Acquitted conduct, i.e., conduct necessarily rejected by the trier of fact in finding the defendant not guilty of a charge, shall not be considered relevant conduct under this section.

Commentary

\* \* \*

Application Notes:

10. *Subsection (c) provides that conduct (i.e., acts and omissions) of which the defendant has been acquitted after trial shall not be considered in determining the guideline range. In applying this provision, the court should be mindful that application of the guidelines often may involve determinations somewhat different from those necessary for conviction of an offense. For example, the factors necessary to establish the enhancement in §2D1.1(b)(1) for possession of a weapon in a controlled substance offense are different from the elements necessary to find a defendant guilty of using or carrying a firearm in connection with that offense, in violation of 18 U.S.C. § 924(c); therefore, an acquittal of that offense would not necessarily foreclose the application of the weapon enhancement. Moreover, even if the defendant is acquitted of a charge under 18 U.S.C. § 924(c), the weapon enhancement in §2D1.1(b)(1) may apply if, for example, another person possessed a weapon as part of jointly undertaken criminal activity with the defendant and the possession of the weapon was reasonably foreseeable. Although acquitted conduct may not be used in determining the guideline range, such conduct may provide a basis for an upward departure.*

~~1011.~~

\* \* \*

Option 2:

**§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**

\* \* \*

- (c) Acquitted conduct, *i.e.*, conduct necessarily rejected by the trier of fact in finding the defendant not guilty of a charge, shall not be considered relevant conduct under this section unless such conduct is established by clear and convincing evidence.

Commentary

\* \* \*

Application Notes:

- 10 . Subsection (c) provides that conduct (*i.e.*, acts and omissions) of which the defendant has been acquitted after trial shall not be considered in determining the guideline range unless, considering the evidence admitted at trial and any additional evidence presented at sentencing, such conduct is established by clear and convincing proof.

*In determining whether conduct necessarily was rejected by an acquittal, the court should be mindful that application of the guidelines often may involve determinations different from those necessary for conviction of an offense. For example, the factors necessary to establish the enhancement in §2D1.1(b)(1) for possession of a weapon in a controlled substance offense are different from the elements necessary to find a defendant guilty of using or carrying a firearm in connection with that offense, in violation of 18 U.S.C. § 924(c); therefore, an acquittal of that offense would not necessarily foreclose the application of the weapon enhancement. Moreover, even if the defendant is acquitted of a charge under 18 U.S.C. § 924(c), the weapon enhancement in §2D1.1(b)(1) may apply if, for example, another person possessed a weapon as part of jointly undertaken criminal activity with the defendant and the possession of the weapon was reasonably foreseeable.*

~~10.11.~~

\* \* \*

Option 3:

**§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**

\* \* \*

Commentary

\* \* \*

Application Notes:

- 10 . Acquitted conduct, *i.e.*, conduct necessarily rejected by the trier of fact in finding the defendant not guilty of a charge, shall be considered under this section if it otherwise qualifies as relevant conduct within the meaning of this section. However, if the court

*determines that, considering the totality of circumstances, the use of such conduct as a sentencing enhancement raises substantial concerns of fundamental fairness, a downward departure may be considered. Such a downward departure should not result, in the absence of other appropriate factors, in a sentence lower than the minimum sentence in the guideline range that would apply if such conduct were not considered.*

~~10.11.~~

\* \* \*

---

**10. Synopsis of Proposed Amendment:** This amendment simplifies the operation of Chapter Two cross references in two ways: (1) by amending §1B1.5 (Interpretation of References to Other Offense Guidelines) to provide that only Chapter Two offense levels (not Chapter Two offense levels and Chapter Three adjustments) must be considered in determining whether a cross reference will result in a greater offense level than that provided in the Chapter Two guideline that contains the cross reference provision; and, (2) by amending §2X1.1 (Attempt, Solicitation, or Conspiracy) to replace the 3-level reduction for certain offenses involving attempts, solicitation and, conspiracy with a downward departure provision. This amendment also corrects a technical error in Application Note 1 of §1B1.5.

**A) Amendment of §1B1.5**—Approximately 32 guideline subsections involving numerous cross references contain a requirement that the cross reference applies only if it results in the greater offense level. Currently, to determine the "greater offense level," a comparison is required taking into account both the Chapter Two offense levels and any applicable Chapter Three adjustments. The inclusion of the Chapter Three adjustments in the comparison significantly increases the complexity of this task.

This amendment simplifies the guidelines by restricting the comparison to the Chapter Two offense levels, unless a different procedure is expressly specified. The amendment, together with existing guideline language, provides a different procedure with respect to §§2C1.1, 2C1.7, 2E1.1, and 2E1.2 because they are the only four offense guidelines in which the inclusion of Chapter Three adjustments in the comparison is likely to make a difference. Although it is possible that there may be a difference under some other guideline section under some unusual circumstance, such differences will occur extremely rarely, if at all.

Sections 2E1.1 and 2E1.2 currently expressly provide for a comparison (of the offense level applicable to the underlying activity and the alternative base offense level) including Chapter Three adjustments. There may be cases, for example, in which abuse of a position of trust is accounted for in the offense level applicable to the underlying racketeering activity. If Chapter Three adjustments (including §3B1.3 (Abuse of Position of Trust or Use of Special Skill)) are not included in the comparison, then abuse of a position of trust would be taken into account only in the offense level applicable to the underlying activity and not with respect to the alternative base offense level.

Likewise, §§2C1.1 and 2C1.7 currently do not expressly provide for a comparison including Chapter Three adjustments, although under current §1B1.5 such a comparison is called for. Cases under §§2C1.1 and 2C1.7 would have a different result using a Chapter Two comparison versus a Chapter Two and Three comparison only where the Chapter Two

offense level from §2C1.1 or §2C1.7 was the same as that for the underlying offense, and a 2-level adjustment from §3B1.3 would apply to the underlying offense (an adjustment from §3B1.3 does not apply to an offense level from §2C1.1 or §2C1.7). In such case, a 2-level difference would result: the conduct qualifying for an adjustment under §3B1.3 would already be taken into account under §§2C1.1 and 2C1.7 but would not be taken into account in the comparison of the offense level from the underlying offense because the Chapter Three adjustment would not be included. However, such cases should occur relatively infrequently. In FY 1995, there were 220 cases sentenced under §2C1.1 altogether and 26 cases sentenced under §2C1.7.

To address the cases described above, this amendment requires, as an express exception to the general rule provided for in the amendment, that the comparisons made in §§2C1.1, 2C1.7, 2E1.1, and 2E1.2 include Chapter Three adjustments. Application notes are added to §§2C1.1 and 2C1.7 expressly requiring a Chapter Three comparison (and the application notes in §§2E1.1 and 2E1.2 that require the same are retained), without any substantive change.

**B) Amendment of §2X1.1**—This amendment also proposes deletion of the 3-level reduction under §2X1.1(b)(1), (2), or (3), for attempts, conspiracies, or solicitations not covered by a specific offense guideline, in which the defendant has not completed all the acts necessary for the substantive offense and was not “about to complete all such acts but for the apprehension or interruption by some similar event beyond the defendant’s control.” In place of the 3-level reduction, this amendment provides for the possibility of a downward departure under such circumstances. The arguments for eliminating the provisions are: (1) a large number of cases that go to §2X1.1 theoretically are required to be considered for the reduction, but only a small number qualify for it; (2) on its face the provision should be expected to apply rarely; and (3) the concerns manifested in the provisions can be dealt with adequately through departure. On the other hand, if the 3-level reduction is replaced by a departure provision, in the rare case when the requirements for a reduction under subsection (b) are met, the defendant will not have a right to the reduction but must rely on the sentencing judge’s exercise of the discretion to depart.

In FY 1995 there were 1,568 cases in which the highest guideline applied was §2X1.1(a). Of these, 33 (or 2%) received the 3-level reduction under subsection (b) (17 for attempt, 13 for conspiracy, and 3 for solicitation). The affirmance rate of appeals of these findings has been very high (90.5% in FY 1995, 85% in FY 1994, and 94.4% in FY 1993).

§1B1.5. Interpretation of References to Other Offense Guidelines

\* \* \*

- (d) A reference to another guideline under subsection (a) or (b)(1) above may direct that it be applied only if it results in the greater offense level. In such case, the greater offense level means the greater final offense level (~~i.e., the greater offense level taking into account both the Chapter Two offense level and any applicable Chapter Three adjustments~~) **Chapter Two offense level, except as otherwise expressly provided.**

Commentary

Application Notes:

1. *References to other offense guidelines are most frequently designated “Cross References,” but may also appear in the portion of the guideline entitled “Base Offense Level” (e.g., §§2D1.2(a)(1), **and** (2), ~~and 2H1.1(a)(1)~~; or “Specific Offense Characteristics” (e.g., §2A4.1(b)(7)). These references may be to a specific guideline, or may be more general (e.g., to the guideline for the “underlying offense”). Such references incorporate the specific offense characteristics, cross references, and special instructions as well as the base offense level. For example, if the guideline reads “2 plus the offense level from §2A2.2 (Aggravated Assault),” the user would determine the offense level from §2A2.2, including any applicable adjustments for planning, weapon use, degree of injury and motive, then increase by 2 levels.*
2. *A reference to another guideline may direct that such reference is to be used only if it results in a greater offense level. In such cases, the greater offense level means the ~~greater final offense level (i.e., the greater offense level taking into account both~~**only** the Chapter Two offense level ~~and any applicable Chapter Three adjustments~~). ~~Although the offense guideline that results in the greater offense level under Chapter Two will most frequently result in the greater final offense level, this will not always be the case. If, for example, a role or abuse of trust adjustment applies to the cross-referenced offense guideline, but not to the guideline initially applied, the greater Chapter Two offense level may not necessarily result in a greater final offense level.~~ **, unless the offense guideline expressly provides for consideration of both the Chapter Two offense level and applicable Chapter Three adjustments. For situations in which a comparison involving both Chapters Two and Three is necessary, see the Commentary to §§2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe); 2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials); 2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations); and 2E1.2 (Interstate or Foreign Travel or Transportation in Aid of Racketeering Enterprise).***

\* \* \*

Conforming Amendments:

§2C1.1. **Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right**

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

7. *For the purposes of determining whether to apply the cross references in this section, the "resulting offense level" means the greater final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A-D).*

\* \* \*

§2C1.7. **Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions**

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

6. *For the purposes of determining whether to apply the cross references in this section, the "resulting offense level" means the greater final offense level (i.e., the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A-D).*

\* \* \*

§2X1.1. **Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)**

- (a) Base Offense Level: The base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty.

~~(b) — Specific Offense Characteristics~~

- ~~(1) — If an attempt, decrease by 3 levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control.~~
- ~~(2) — If a conspiracy, decrease by 3 levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control.~~
- ~~(3) — (A) — If a solicitation, decrease by 3 levels unless the person solicited to commit or aid the substantive offense completed all the acts he believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the person was about to complete all such acts but for apprehension or interruption by some similar event beyond such person's control.~~
  - ~~(B) — If the statute treats solicitation of the substantive offense identically with the substantive offense, do not apply subdivision (A) above; i.e., the offense level for solicitation is the same as that for the substantive offense.~~

~~(c)(b)~~

~~\* \* \*~~

~~Commentary~~

~~\* \* \*~~

Application Notes:

~~\* \* \*~~

- ~~4. In certain cases, the participants may have completed (or have been about to complete but for apprehension or interruption) all of the acts necessary for the successful completion of part, but not all, of the intended offense. In such cases, the offense level for the count (or group of closely related multiple counts) is whichever of the following is greater: the offense level for the intended offense minus 3 levels (under §2X1.1(b)(1), (b)(2), or (b)(3)(A)), or the offense level for the part of the offense for which the necessary acts were completed (or about to be completed but for apprehension or interruption). For example, where the intended offense was the theft of \$800,000 but the participants completed (or were about to complete) only the acts necessary to steal \$30,000, the offense level is the offense level for the theft of \$800,000 minus 3 levels, or the offense level for the theft of \$30,000, whichever is greater.~~

~~In the case of multiple counts that are not closely related counts, whether the 3-level reduction under §2X1.1(b)(1), (b)(2), or (b)(3)(A) applies is determined separately for each count.~~

4. *This guideline applies to attempts, solicitations, or conspiracies that are not covered by a specific offense guideline. In cases to which this guideline applies, a downward departure of up to three levels may be warranted if the defendant is arrested well before the defendant or any co-conspirator has completed the acts necessary for the substantive offense. A downward departure would not be appropriate under this section in cases in which the defendant or a co-conspirator completed all the acts such person believed necessary for successful completion of the substantive offense or the circumstances demonstrate that the person was about to complete all such acts but for apprehension or interruption by some similar event beyond the person's control. A downward departure also would not be appropriate in cases involving solicitation if the statute treats solicitation of the substantive offense identically with the substantive offense, i.e., the offense level in such cases should be the same as that for the substantive offense.*

~~Background: In most prosecutions for conspiracies or attempts, the substantive offense was substantially completed or was interrupted or prevented on the verge of completion by the intercession of law enforcement authorities or the victim. In such cases, no reduction of the offense level is warranted. Sometimes, however, the arrest occurs well before the defendant or any co-conspirator has completed the acts necessary for the substantive offense. Under such circumstances, a reduction of 3 levels is provided under §2X1.1(b)(1) or (2).~~

Conforming Amendments:

**§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)**

\* \* \*

Commentary

\* \* \*

- ~~7. In the case of a partially completed offense (e.g., an offense involving an attempted theft of \$800,000 and a completed theft of \$30,000), the offense level is to be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to 2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under §2X1.1(c)(1).~~

\* \* \*

**§2A4.1. Kidnapping, Abduction, Unlawful Restraint**

\* \* \*

Commentary

\* \* \*

5. *In the case of a conspiracy, attempt, or solicitation to kidnap, §2X1.1 (Attempt, Solicitation, or Conspiracy) requires that the court apply any adjustment that can be determined with reasonable certainty. Therefore, for example, if an offense involved conspiracy to kidnap for the purpose of committing murder, subsection (b)(7) would reference first degree murder (resulting in an offense level of 43, ~~subject to a possible 3-level reduction under §2X1.1(b)~~). Similarly, for example, if an offense involved a kidnapping during which a participant attempted to murder the victim under circumstances that would have constituted first degree murder had death occurred, the offense referenced under subsection (b)(7) would be the offense of first degree murder.*

\* \* \*

**§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

\* \* \*

Commentary

\* \* \*

- ~~9. — In the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.~~

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**11. Synopsis of Proposed Amendment:** This amendment responds to recent litigation, including a circuit conflict and inquiries regarding the operation of §1B1.10 and related statutory provisions.

The amendment clarifies Commission intent that the designation of an amendment for retroactive application to previously sentenced, imprisoned defendants authorizes only a reduction in the term of imprisonment pursuant to 18 U.S.C. § 3582(c)(2) (which, in turn speaks only to modification of a term of imprisonment) and does not open any other components of the sentence (e.g., the term of

supervised release) to modification. The amendment further clarifies that the amount of reduction in the prison sentence, subject to the constraints of the amended, reduced guideline range and the amount of time remaining to be served, is within the discretion of the court.

§1B1.10. **Retroactivity Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)**

\* \* \*

- (b) In determining whether, and to what extent, a reduction in ~~sentence~~ **the term of imprisonment** is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the ~~sentence~~ **term of imprisonment** that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, **except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.**

\* \* \*

Commentary

Application Notes:

\* \* \*

3. *The determination of whether to grant a reduction in a term of imprisonment under 18 U.S.C. § 3582(c)(2) and the amount of such reduction are within the sound discretion of the court, subject to the limitations in subsection (b).*

Background:

\* \* \*

*Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b).*

\* \* \*

*The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.*

**12. Synopsis of Proposed Amendment:** a) Source and Purpose--This amendment addresses a significant interpretive problem involving a specific offense characteristic in the theft (§2B1.1) and fraud (§2F1.1) guidelines. The problem occurs in connection with the specific offense characteristic under §§2B1.1(b)(6)(B) and 2F1.1(b)(6)(B), which provides an enhancement of four levels (approximate 50 percent increase) and a floor offense level of 24 (51-63 months for a first offender), if the offense "affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense." The proper interpretation of this language has been the subject of a number of hotline calls and some litigation (although no circuit conflict has yet resulted).

b) Number of affected cases--FY 95 monitoring data are unable to distinguish cases that received the similar enhancement for substantially jeopardizing the safety and soundness of a financial institution (under §2B1.1(b)(6)(A) and §2F1.1(b)(6)(A)) from this particular enhancement under subdivision (B). One or the other enhancement was applied in 37 (0.6%) of 6,019 fraud cases and 28 (0.9%) of 3,142 theft (§2B1.1) cases. This amendment could decrease the frequency with which this particular enhancement is given. The amendment proposes to delete the 4-level enhancement in subdivision (B), while retaining the minimum offense level of 24 (because that is all the directive requires). This could affect as many as 27 of the fraud cases (i.e., 27 of the fraud cases received a 4-level enhancement while 10 were affected by the floor of 24) and 2 of the theft cases (i.e., 2 of the 28 cases received a 4-level enhancement while 26 were affected by the floor of 24).

c) Scope of Amendment--This amendment would continue to apply the enhancement to a broader spectrum of cases than minimally required under the congressional directive. However, the commentary would state that the offense must be perpetrated against one or more financial institutions and the defendant's \$1,000,000 must be derived entirely from one or more financial institutions. The definition for "gross receipts" in the commentary would be amended to clarify that "gross receipts from the offense" includes property under the control of, or in the custody of, the financial institution for a second party, e.g., a depositor. The background commentary would also be amended to reflect the Commission's intent to implement the congressional directive more broadly.

**§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transmitting, or Possessing Stolen Property**

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

(6) If the offense--

(A) substantially jeopardized the safety and soundness of a financial institution; ~~or~~

(B) ~~affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense,~~

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

- (7) If (A) obtaining or retaining the gross receipts of one or more financial institutions was an object of the offense, (B) the defendant derived more than \$1,000,000 in gross receipts from such institutions, and (C) the offense level as determined above is less than level 24, increase to level 24.

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

- 11. For purposes of subsection (b)(7), "gross receipts" means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of such offense. See 18 U.S.C. §§ 982(a)(4), 1344. "The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(6)(B)(7), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

\* \* \*

Background:

\* \* \*

Subsections (b)(6)(A) and (b)(7) implements, in a broader form, the instructions to the Commission in section 961(m) of Public Law 101-73 and section 2507 of Public Law 101-647, respectively.

\* \* \*

**§2F1.1. Fraud and Deceit: Forgery: Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

\* \* \*

- (b) Specific Offense Characteristics

\* \* \*

- (6) If the offense=

(A) substantially jeopardized the safety and soundness of a financial institution; or

~~(B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense,~~

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

(7) If (A) obtaining or retaining the gross receipts of one or more financial institutions was an object of the offense, (B) the defendant derived more than \$1,000,000 in gross receipts from such institutions, and (C) the offense level as determined above is less than level 24, increase to level 24.

Commentary

\* \* \*

Application Notes:

\* \* \*

16. For purposes of subsection (b)(7), "gross receipts" means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of such offense. See 18 U.S.C. §§ 982(a)(4), 1344. "The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(6)(B)(7), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

\* \* \*

Background:

\* \* \*

Subsections (b)(6)(A) and (b)(7) implements, in a broader form, the instructions to the Commission in section 961(m) of Public Law 101-73 and section 2507 of Public Law 101-647, respectively.

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**13. Synopsis of Proposed Amendment:** This is a two-part amendment. First, this amendment incorporates the Sentencing Table into a new guideline at §5A1.1, in response to questions about the legal status of the Sentencing Table. By incorporating the Sentencing Table into a guideline, this amendment also uses a construct for the Sentencing Table that is consistent with the construct used for other tables in the Guidelines Manual, such as the Drug Quantity Table in §2D1.1.

Second, this amendment addresses an arguably unwarranted "cliff" in the Sentencing Table between offense levels 42 and 43. Under the current table, offense level 42 prescribes guideline ranges of 360 months to life imprisonment for each criminal history category

Offense level 43, in comparison, prescribes a guideline sentence of life for each criminal history category.

There is evidence that the Commission initially intended to preserve level 43 and its resulting life sentence requirement for the most egregious law violators; *i.e.*, those convicted of first degree murder, including felony murder, and treason. Note, for example, the wording of Application Note 1 to §2A1.1: "The Commission has concluded that in the absence of capital punishment life imprisonment is the appropriate punishment for premeditated killing." However, in providing for a sentencing table with a continuous series of offense levels, the Commission actually made it possible for those most serious categories of criminals to be subject to offense levels less than 43 (and, hence, to guideline ranges that do not require a life sentence), if mitigating guideline adjustments apply. Conversely, the continuous nature of the Sentencing Table also can result in defendants who commit less inherently serious crimes; *i.e.*, those carrying base offense levels less than 43, receiving an offense level of 43 (and, hence, a required life sentence) as a result of applicable aggravating guideline adjustments (*e.g.*, aggravating role, weapon enhancement). Prior to a 1994 amendment reducing the quantity-based offense level in the drug table from 42 to 38, this latter situation occurred more frequently than it occurs now.

Nevertheless, in those infrequent cases, when a defendant whose base offense level is less than 43 becomes subject to guideline enhancements that result in a final, adjusted offense level of 43 or more, a "mandatory" guideline sentence of life imprisonment may not be warranted. In the last several years, a number of judges have written or called the Commission to express concern about what they see as an anomalous, unwarranted "cliff" between level 42 (range of 360 months to life) and level 43 (life), particularly in the case of a very young defendant who has a remaining life expectancy exceeding 30 years. Those who have contacted the Commission about this sentencing table phenomenon have pointed out that, for younger defendants, there may be a definite qualitative as well as a quantitative difference between a sentence of 30 or more years and a non-parolable sentence of life. In some of these cases, the applicability of a guideline enhancement of one or two offense levels can turn a very lengthy, deserved sentence into a life sentence that may not be warranted and, according to some who have commented, may even raise Eighth Amendment concerns.

The second part of this amendment addresses this concern by making level 42 the offense level upper limit in the sentencing table, unless the defendant was subject to an offense level of 43 as a result of the application of §2A1.1 (First Degree Murder), §2M1.1 (Treason), or other guideline provision that elevates the offense level to level 43 because of the death of a person. In such cases, level 43 and its associated life sentence would continue to apply. This approach preserves level 43 for the most egregious cases while providing a range of 360 months to life for all other cases that reach level 42 through guideline enhancements.

This amendment can be expected to affect a relatively small number (perhaps 30-40) of cases, based on FY 1995 monitoring data. In FY 1995, 80 defendants received a final offense level of 43. Of these, 28 would not be affected because level 43 was received via §2A1.1 (First Degree Murder); (there were no §2M1.1 (Treason) cases.) Of the 52 remaining defendants at final offense level 43, 34 received a life sentence. The amendment could be expected to impact approximately this number of defendants, some of whom might still receive a life sentence because the judge elected to impose it.

**§2A1.1. First Degree Murder**

(a) Base Offense Level: **43**

Commentary

\* \* \*

Application Notes:

1. *The Commission has concluded that in the absence of capital punishment ~~life imprisonment is the appropriate punishment for premeditated killing~~ a defendant who commits premeditated murder should be sentenced at the highest offense level under the Sentencing Table (subject to any applicable adjustments from Chapter Three). However, this guideline also applies when death results from the commission of certain felonies. Life imprisonment is not necessarily appropriate in all such situations. For example, if in robbing a bank, the defendant merely passed a note to the teller, as a result of which she had a heart attack and died, a sentence of life imprisonment clearly would not be appropriate.*

\* \* \*

**PART A - SENTENCING TABLE**

**§5A1.1. Sentencing Table**

(a) The Sentencing Table used to determine the guideline range follows: **is set forth in subsection (b).**

**(b) SENTENCING TABLE  
(in months of imprisonment)**

\* \* \*

Commentary to Sentencing Table

Application Notes:

1. *The Offense Level (1-43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I-VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "Life" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24-30 months of imprisonment.*

\* \* \*

2. *In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. ~~An offense level of more than 43 is to be treated as an offense level of 43~~A total offense level of more than 42 is to be treated as an offense level of 42. However, if the final offense level is 43 or more as a result of the application of §2A1.1 (First Degree Murder), §2M1.1 (Treason), or another guideline provision (including a cross reference to §2A1.1) that increases the offense level to level 43 because the offense involved first degree murder or resulted in death, the offense level is to be treated as an offense level of 43.*

\* \* \*

---

**14. Synopsis of Proposed Amendment:** (a) Source and Purpose--This amendment addresses a split among the circuit courts regarding the application of the “express threat of death” enhancement in §2B3.1 (Robbery).

The majority, relying on the Commission’s discussion in Application Note 6, holds that the enhancement applies when the combination of the defendant’s actions and words would instill in a reasonable person in the position of the immediate victim (e.g., a bank teller) a greater amount of fear than necessary to commit the bank robbery. Pursuant to this approach, the enhancement applies even when the defendant’s statement does not indicate distinctly an intent to kill the victim; it is sufficient that the victim infers from the defendant’s conduct that a threat of death was made. See United States v. Robinson, 86 F.3d 1197, 1202 (D.C. Cir. 1996)(enhancement applies if (1) a reasonable person in the position of the immediate victim would very likely believe the defendant made a threat and the threat was to kill; and (2) the victim likely thought his life was in peril); United States v. Murray, 65 F.3d 1161, 1167 (4th Cir. 1995)(“any combination of statements, gestures, or actions that would put an ordinary victim in reasonable fear for his or her life is an express threat of death”); United States v. France, 57 F.3d 865, 868 (9th Cir. 1995)(“[a]n express threat need not be specific in order to instill the requisite level of fear in a reasonable person”); United States v. Hunn, 24 F.3d 994 (7th Cir. 1994)(combination of defendant’s note and his gesture that he was pointing a gun through his pocket at the teller would be understood by a reasonable victim as a death threat); United States v. Bell, 12 F.3d 139 (8th Cir. 1993)(upholding enhancement based on demand note’s statement “Make any sudden moves alert anyone I’ll pull the pistol in this purse and the shooting will start!”); United States v. Smith, 973 F.2d 1374, 1378 (8th Cir. 1992)(combination of threatening statements to teller and gesture that defendant had a gun instilled greater fear than necessary to commit the robbery).

The minority holds that only what the defendant does or says, not what the victim infers should be used to assess whether an express threat of death was made within the meaning of the robbery guideline. United States v. Alexander, 88 F.3d 427, 431 (6th Cir. 1996) (“a defendant’s statement must distinctly and directly indicate that the defendant intends to kill or otherwise cause the death of the victim”); United States v. Tuck, 964 F.2d 1079 (11th Cir. 1992)(same); see also United States v. Hunn, 24 F.3d at 999-1000 (Easterbrook, J, dissenting). The Sixth Circuit also held that the commentary examples and the Commission’s underlying intent at Application Note 6 are not controlling because they are inconsistent with the plain meaning of “express” in §2B3.1(b)(2)(F). United States v. Alexander, 88 F.3d at 431(referring to Stinson v. United States, 508 U.S. 36 (1993)).

(b) Policy Considerations--The major policy consideration is how strictly the Commission intends for the threat of death enhancement to apply; *i.e.*, must the defendant explicitly threaten death in order for the enhancement to apply.

(c) Number of Affected Cases--In FY 1995, the enhancement in applied in 169 out of 1,488 cases (or 11.4% of the cases) sentenced under the robbery guideline.

(d) Amendment Options--This amendment adopts the majority view and clarifies the Commission’s intent to enhance offense levels for defendants whose intimidation of the victim exceeds that amount necessary to constitute an element of a robbery offense. The amendment deletes the reference to “express” in §2B3.1(b)(2)(F) and provides for a 2-level enhancement “if a threat of death was made”.

**§2B3.1.        Robbery**

\* \* \*

(b)        Specific Offense Characteristics

\* \* \*

- (2)        (A) If a firearm was discharged, increase by 7 levels; (B) if a firearm was otherwise used, increase by 6 levels; (C) if a firearm was brandished, displayed, or possessed, increase by 5 levels; (D) if a dangerous weapon was otherwise used, increase by 4 levels; (E) if a dangerous weapon was brandished, displayed, or possessed, increase by 3 levels; or (F) if an express a threat of death was made, increase by 2 levels.

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

6.        An “express threat of death,” as used in subsection (b)(2)(F), may be in the form of an oral

or written statement, act, gesture, or combination thereof. *Accordingly, the defendant does not have to state expressly his intent to kill the victim in order for the enhancement to apply. For example, an oral or written demand using words such as "Give me the money or I will kill you", "Give me the money or I will pull the pin on the grenade I have in my pocket", "Give me the money or I will shoot you", "Give me your money or else (where the defendant draws his hand across his throat in a slashing motion)", or "Give me the money or you are dead" would constitute an express threat of death. The court should consider that the intent of the underlying this provision is to provide an increased offense level for cases in which the offender(s) engaged in conduct that would instill in a reasonable person, who is a victim of the offense, [significantly greater fear than that necessary to constitute an element of the offense of robbery a fear of death.]*

---

**15. Synopsis of Proposed Amendment:** This amendment addresses the Carjacking Correction Act of 1996. Section 2 of that Act amends 18 U.S.C. § 2119(2), which (A) makes it unlawful to take a motor vehicle by force and violence or by intimidation, with intent to cause death or serious bodily harm, and (B) provides for a term of imprisonment of not more than 25 years if serious bodily injury results. As amended by the Carjacking Correction Act of 1996, 18 U.S.C. § 2119(2) includes aggravated sexual abuse under 18 U.S.C. § 2241 and sexual abuse under 18 U.S.C. § 2242 within the meaning of “serious bodily injury”. Therefore, a defendant will be subject to the 25-year statutory maximum under 18 U.S.C. § 2119(2) if the defendant commits a carjacking and rapes the carjacking victim during the carjacking.

In addition, this amendment amends §2B3.1(b)(1) to provide cumulative enhancements if the offense involved bank robbery and carjacking. Currently, §2B3.1 provides a 2-level enhancement either for bank robbery or for carjacking; it does not provide separate enhancements for those factors.

Two options are presented. Option 1 is a fairly narrow response to the Act. It amends Application Note 1 of §2B3.1 (Robbery, Extortion, and Blackmail), the guideline which covers carjacking offenses under 18 U.S.C. § 2119 (and only that guideline) to provide that “serious bodily injury” includes aggravated sexual abuse under 18 U.S.C. § 2241 and sexual abuse under 18 U.S.C. § 2242.

Option 2 is a broader response to the Act. It expands the definition of “serious bodily injury” under §1B1.1. Option 2 makes this broader definition generally applicable to Chapter Two offense guidelines which contain a “serious bodily injury” enhancement. The sexual abuse guideline, §2A3.1, in turn is amended to make clear that, for purposes of that guideline, the “serious bodily injury” enhancement covers conduct other than aggravated sexual abuse and sexual abuse, which are inherent in the conduct covered by that guideline.

Option 2 also clarifies the guideline definition of serious bodily injury by inserting the word “protracted” immediately preceding the word “impairment”. Statutes defining serious bodily injury consistently use the term “protracted” before “impairment” (e.g., 18 U.S.C. §§ 831, 1365, 1864; 21 U.S.C. § 802). Without use of the term “protracted”, even a temporary impairment such as a “sprained wrist” would fall within the definition of serious bodily injury, as would the throwing of sand or pepper in someone’s face to temporarily impair vision

Finally, Option 2 removes two sentences of commentary that are unhelpful.

[Option 1

**§2B3.1.      Robbery**

\* \* \*

(b)      Specific Offense Characteristics

(1)      If ~~(A)~~ the property of a financial institution or post office was taken, or if the taking of such property was an object of the offense, ~~or (B) the offense involved carjacking;~~ increase by **2** levels.

\* \* \*

(5)      **If the offense involved carjacking, increase by 2 levels.**

~~(5)~~      If a firearm, destructive device, or controlled substance was taken, or if the taking of such item was an object of the offense, increase by **1** level.

~~(6)~~      \* \* \*

Commentary

\* \* \*

Application Notes:

1.      *For purposes of this guideline—*

*"Firearm," "destructive device," "dangerous weapon," "otherwise used," "brandished," "bodily injury," "serious bodily injury," "permanent or life-threatening bodily injury," "abducted," and "physically restrained" are defined in the Commentary to §1B1.1 (Application Instructions). In addition, "serious bodily injury" includes conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.*

\* \* \*

[Option 2

**§1B1.1.      Application Instructions**

\* \* \*

Commentary

Application Notes:

1. *The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):*

\* \* \*

- (b) *"Bodily injury" means any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought. As used in the guidelines, the definition of this term is somewhat different than that used in various statutes.*

\* \* \*

- (j) *"Serious bodily injury" means injury involving extreme physical pain or the **protracted** impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. As used in the guidelines, the definition of this term is somewhat different than that used in various statutes. **"Serious bodily injury" includes conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.***

\* \* \*

Conforming Amendment:

**§2A3.1. Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse**

\* \* \*

Commentary

\* \* \*

Application Notes:

1. *For purposes of this guideline—*

*"Permanent or life-threatening bodily injury", "serious bodily injury," and "abducted" are defined in the Commentary to §1B1.1 (Application Instructions). **However, for purposes of this guideline, "serious bodily injury" means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).***

2. *"The means set forth in 18 U.S.C. § 2241(a) or (b)" are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim.*

3. *Subsection (b)(3), as it pertains to a victim in the custody, care, or supervisory control of the defendant, is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this*

enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

- 43. If the adjustment in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
- 54. If the defendant was convicted (A) of more than one act of criminal sexual abuse and the counts are grouped under §3D1.2 (Groups of Closely Related Counts), or (B) of only one such act but the court determines that the offense involved multiple acts of criminal sexual abuse of the same victim or different victims, an upward departure would be warranted.
- 65. If a victim was sexually abused by more than one participant, an upward departure may be warranted. See §5K2.8 (Extreme Conduct).
- 76. If the defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense, an upward departure may be warranted.

**§2B3.1.        Robbery**

\* \* \*

(b)        Specific Offense Characteristics

- (1)        If ~~(A)~~ the property of a financial institution or post office was taken, or if the taking of such property was an object of the offense, ~~or (B) the offense involved carjacking;~~ increase by **2** levels.

\* \* \*

- (5)        If the offense involved carjacking, increase by **2** levels.

(56) If a firearm, destructive device, or controlled substance was taken, or if the taking of such item was an object of the offense, increase by 1 level.

(67) \* \* \*

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**16. Synopsis of Proposed Amendment:** This is a three-part amendment. First, this amendment addresses section 807(h) of the Antiterrorism and Effective Death Penalty Act of 1996. That section requires the Commission to amend the sentencing guidelines to provide an appropriate enhancement for a defendant convicted of an international counterfeiting offense under 18 U.S.C. § 470. The amendment adds a specific offense characteristic in §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) to provide a 2-level enhancement if the offense occurred outside the United States.

Second, this amendment moves the coverage of offenses involving altered bearer instruments of the United States from §2F1.1 (Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) to §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States). Currently, §2B5.1 covers counterfeit bearer obligations of the United States. Section 2F1.1 covers altered bearer obligations of the United States. The offense level in §2B5.1 is one level higher than sophisticated fraud (i.e., fraud and more than minimal planning) under §2F1.1 throughout the range of loss values. There are two reasons for moving offenses involving altered bearer instruments of the United States from §2F1.1 to §2B5.1: (A) theoretical consistency, and (B) simplicity of guideline operation.

(A) **Theoretical Consistency.** The higher offense level for offenses involving counterfeit bearer obligations of the United States reflects the lower level of scrutiny realistically possible in transactions involving currency and the absence of any requirement that the person passing the currency produce identification. Under this rationale, however, altered bearer obligations of the United States seem to belong with counterfeit bearer obligation of the United States, rather than with other counterfeit or altered instruments.

(B) **Simplicity of Guideline Operation.** As a practical matter, the distinction between an altered instrument and a counterfeit instrument is not always clear. For example, if a genuine one-dollar bill is bleached and a photocopy of a twenty-dollar bill made using the genuine note paper, is the resulting twenty-dollar bill a counterfeit bill or an altered bill? In one recent case, a defendant made photocopies of twenty-dollar bills, then cut out the presidential picture of genuine twenty-dollar bills and switched pictures (using the genuine picture with the photocopied bill and the photocopied picture with the otherwise genuine bill). Is the photocopied bill with the genuine presidential picture a counterfeit or an altered instrument? This amendment simplifies the guidelines by handling this conduct in the same offense guideline, thus avoiding any difference based upon such very fine distinctions.

Third, this amendment clarifies the operation of §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) in two respects to address issues raised in litigation.

It deletes a phrase in Application Note 3 concerning photocopying a note that could lead to the inappropriate conclusion that an enhancement from subsection (b)(2) does not apply even to sophisticated copying of notes. It also adds an application note to provide expressly that items clearly not intended for circulation are not counted under subsection (b)(1).

**§2B5.1. Offenses Involving Counterfeit or Altered Bearer Obligations of the United States**

\* \* \*

(b) Specific Offense Characteristics

- (1) If the face value of the counterfeit or altered items exceeded \$2,000, increase by the corresponding number of levels from the table at §2F1.1 (Fraud and Deceit).
- (2) If the defendant manufactured or produced any counterfeit or altered obligation or security of the United States, or possessed or had custody of or control over a counterfeiting device or materials used for counterfeiting, and the offense level as determined above is less than **15**, increase to **15**.

\* \* \*

- (4) If the offense was committed outside the United States, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 474-474, 476, 477, 500, 501, 1003. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline, "United States" means each of the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.
2. This guideline applies to counterfeiting or altering of United States currency and coins, food stamps, postage stamps, treasury bills, bearer bonds and other items that generally could be described as bearer obligations of the United States, i.e., that are not made out to a specific payee.
- ~~2. "Counterfeit," as used in this section, means an instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety. Offenses involving genuine instruments that have been altered are covered under §2F1.1.~~
3. For the purposes of subsection (b)(1), do not count items that clearly were not intended for circulation (e.g., items that are so defective that they are unlikely to be accepted even if subjected to only minimal scrutiny). However, partially completed items that would have been completed but for the discovery of the offense should be counted for purposes of such subsection.

34. Subsection (b)(2) does not apply to persons who ~~merely photocopy notes or otherwise produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny.~~

Background: Possession of counterfeiting devices to copy obligations (including securities) of the United States is treated as an aggravated form of counterfeiting because of the sophistication and planning involved in manufacturing counterfeit obligations and the public policy interest in protecting the integrity of government obligations. Similarly, an enhancement is provided for a defendant who *alters bearer obligations of the United States or produces*, rather than merely passes, the counterfeit items.

\* \* \*

§2F1.1. **Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Altered or Counterfeit Bearer Obligations of the United States**

\* \* \*

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**17. Synopsis of Proposed Amendment:** This amendment clarifies the operation of §§2D1.6 (Use of Communication Facility in Committing Drug Offense; Attempt or Conspiracy), 2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations), 2E1.2 (Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise), and 2E1.3 (Violent Crimes in Aid of Racketeering Activity) in a manner consistent with the operation of §1B1.2 (Applicable Guidelines) governing the selection of the offense guideline section. This amendment addresses a circuit conflict by specifying that the “underlying offense”, for purposes of these guidelines, is determined on the basis of the conduct of which the defendant was convicted. Compare United States v. McCall, 915 F.2d 811 (2d Cir. 1990) with United States v. Carozza, 4 F.3d 70 (1st Cir. 1993). In addition, this amendment deletes an application note from §§2E1.1, 2E1.2, and 2E1.3 that is unnecessary and is not included in other sections of the Guidelines Manual.

§2D1.6. **Use of Communication Facility in Committing Drug Offense**

\* \* \*

Application Notes:

1. *"Offense level applicable to the underlying offense" means the offense level determined by using the offense guideline applicable to the controlled substance offense that the defendant was convicted of using a communication facility to commit, cause, or facilitate.*
2. *Where the offense level for the underlying offense is to be determined by reference to §2D1.1, see Application Note 12 of the Commentary to §2D1.1 for guidance in determining the scale of the offense. Note that the Drug Quantity Table in §2D1.1 provides a minimum offense level of 12 where the offense involves heroin (or other Schedule I or II Opiates), cocaine (or other Schedule I or II Stimulants), cocaine base, PCP, Methamphetamine, LSD (or other Schedule I or II Hallucinogens), fentanyl, or fentanyl analogue (§2D1.1(c)(14)); and a minimum offense level of 6 otherwise (§2D1.1(c)(17)).*

\* \* \*

**§2E1.1. Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations**

\* \* \*

Commentary

\* \* \*

Application Notes:

1. ~~Where there is more than one underlying offense~~*The "offense level applicable to the underlying racketeering activity" under subsection (a)(2) means the offense level under the applicable offense guideline, as determined under the provisions of §1B1.2 (Applicable Guidelines) (i.e., on the basis of the conduct of which the defendant was convicted). In the case of more than one underlying offense (for this determination, apply the provisions of Application Note 5 of the Commentary to §1B1.2 as if in a conspiracy case), treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, and C to subsection (a)(1), and apply Chapter Three, Parts A, B, C, and D to both subsection (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.*

\* \* \*

3. ~~If the offense level for the underlying racketeering activity is less than the alternative minimum level specified (i.e., 19), the alternative minimum base offense level is to be used.~~

~~43.~~

\* \* \*

**§2E1.2. Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise**

\* \* \*

Commentary

\* \* \*

Application Notes:

1. ~~Where there is more than one underlying offense~~*The "offense level applicable to the underlying crime of violence or other unlawful activity" under subsection (a)(2) means the offense level under the applicable offense guideline, as determined under the provisions of §1B1.2 (Applicable Guidelines) (i.e., on the basis of the conduct of which the defendant was convicted). In the case of more than one underlying offense (for this determination, apply the provisions of Application Note 5 of the Commentary to §1B1.2 as if in a conspiracy case), treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.*

\* \* \*

3. ~~If the offense level for the underlying conduct is less than the alternative minimum base offense level specified (i.e., 6), the alternative minimum base offense level is to be used.~~

\* \* \*

**§2E1.3. Violent Crimes in Aid of Racketeering Activity**

\* \* \*

Commentary

\* \* \*

Application Notes:

1. *The "offense level applicable to the underlying crime or racketeering activity" under subsection (a)(2) means the offense level under the applicable offense guideline, as determined under the provisions of §1B1.2 (Applicable Guidelines)(i.e., on the basis of the conduct of which the defendant was convicted). If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.*
2. ~~If the offense level for the underlying conduct is less than the alternative minimum base offense level specified (i.e., 12), the alternative minimum base offense level is to be used.~~

\* \* \*

---

**18(A). Synopsis of Proposed Amendment:** This amendment makes the following changes to guideline §§2B1.1, 2F1.1, and 2T1.4: (1) eliminates the more-than-minimal-planning enhancement in §§2B1.1 and 2F1.1 and other guidelines, and builds a corresponding increase into the loss tables, and creates a two-level enhancement like the one in §2T1.4 for offenses involving “sophisticated means” and provides a floor of 12 in such cases; (2) increases the base offense level of §§2B1.1 (the theft guideline) and 2B1.3 (the property damage guideline) from level four to level six, and revises the loss tables in §§2B1.1, 2F1.1, and 2T4.1 (theft, fraud, and tax offenses, respectively); (3) changes the current one-level increments in the loss tables in §§2B1.1, 2F1.1, and 2T4.1 (to two-level increments or a combination of one and two-level increments); (4) increases the severity of the loss tables in §§2B1.1, 2F1.1, and 2T4.1 at higher loss amounts; (5) adds telemarketing enhancements to §§2B1.1 and 2F1.1; (6) adds a cross reference in §2F1.1 for offenses involving arson; and (7) makes conforming technical changes to other guidelines.

**(1) Elimination of More-than-Minimal-Planning Enhancement for Sophisticated Means.**

First, the amendment eliminates the specific offense characteristic for more-than-minimal planning from the theft and fraud guidelines (and other guidelines that currently have the enhancement), and phases in a corresponding increase in the loss tables (or, in the case of option 3, into the base offense level). Arguments for revising or eliminating the “more than minimal planning” specific offense characteristic include: (i) the workload (and related litigation) burden of the provision is considerable; in each of the over 9,000 cases sentenced

under these guidelines, some consideration is given to whether this SOC is applicable; (ii) the definition of more-than-minimal planning is arguably unclear or ambiguous; (iii) past Commission studies have shown that the provision is applied unevenly, thus contributing to unwarranted disparity; and (iv) the adjustment is applied with such frequency, particularly at higher dollar amounts, that it arguably should be built into the loss table or even the base offense level. (The more-than-minimal planning adjustment is applied in 58.7% of all cases sentenced under §2B1.1; of all cases under §2F1.1, it is applied in 82.5% of the cases (and in over 89% of cases involving loss amounts greater than \$10,000)).

The amendment proposes creating a two-level specific offense characteristic in §§2B1.1 and 2F1.1 (and other guidelines that currently have a more-than-minimal planning enhancement) that would apply if “sophisticated means” were used to impede discovery of the existence of the offense or its extent, and proposes a floor of level 12 for such offenses. Replacing the more-than-minimal planning enhancement with one for sophisticated means will increase the fact-finding and application burden compared to just deleting the more-than-minimal planning enhancement. In addition, in the proposed loss table options at levels at or above the point where the two levels from more-than-minimal planning are automatically built into the loss table, defendants who would receive the new two-level enhancement for sophisticated means would effectively receive an additional two-level increase as compared to defendants sentenced before the amendment (in addition to any others provided in this amendment). It is unclear how many cases would be affected by this new enhancement. In conjunction with the addition of this enhancement, it is proposed that the current specific offense characteristic involving use of foreign bank accounts found at subsection (b)(5) (providing a floor of level 12 for such offenses), be deleted and incorporated into the definition of “sophisticated means” for all guidelines that currently have a more-than-minimal planning enhancement. The floor of level 12 in subsection (b)(5) is added for all offenses that qualify for the “sophisticated means” enhancement. In FY 1995, of the 6,019 cases sentenced under §2F1.1, 3 cases (.05%) received the enhancement for use of foreign bank accounts.

## **(2) Amendments to Loss Tables.**

Three options are presented for changes to the loss tables for the theft and fraud guidelines. A corresponding change is proposed to the tax loss table in §2T4.1 (for options 1 and 2; if option 3 is chosen, a conforming tax loss table will be prepared). Depending on the option chosen, the necessity of factual findings for the lowest loss amounts is eliminated by building these loss amounts into the base offense level.

Options 1 and 2 of this proposal provide identical base offense levels of 6 for the theft and fraud guidelines. Option 3 provides a base offense level of 8.

## **(3) Loss Tables - Two-level Increments.**

Second, in options one and three the loss tables are changed from the current one-level increments to two-level increments, so that broader ranges of dollar loss are assigned to a particular offense level increase. Option two generally retains one-level increments, but provides two-level increments for losses above \$2,000 and \$5,000, and for loss increments above \$5,000,000. Option two retains cutting points that are very similar to the current loss tables, but has no consistent pattern in the selection of the cutting points.

Several arguments suggest use of two-level increments in the loss tables, as proposed in options one and three: (i) reduction in probation officer and judicial workload (broader loss ranges will produce fewer “cutting points”; for example, a two-level loss table - with no other changes - would go from 18 to 10 cutting points); (ii) increased consistency with other offense guidelines (most alternative base offense levels and specific offense characteristics increase by at least two-level increments; for example, the drug table); and (iii) a table with two-level increments is less mechanistic and lessens the appearance of false precision compared to the current structure. On the other hand, one-level increments provide a smoother increase in levels relative to loss amounts, with a minimized “cliff” effect and somewhat greater proportionality.

#### **(4) Loss Tables - Increased Severity at Higher Loss Amounts.**

Fourth, all three options provide for increases in the severity levels assigned to the higher loss amounts, in addition to the increase built into the table (or base offense level) in response to the elimination of the more-than-minimal planning adjustment.

There are several reasons why consideration should be given to raising the severity levels for cases involving the largest loss amounts. First, the draft report of the Commission-sponsored “just punishment” study suggests that respondents identified certain kinds of cases that may warrant greater punishment for higher loss amounts than currently provided by the loss tables in the theft and fraud guidelines: embezzlement or theft cases involving bank officials or postal workers; fraudulent solicitation for a nonexistent charity; fraud involving false mortgage application with no intent to repay; and forgery or fraud involving stolen credit cards or writing bad checks.

Second, the draft results of the Federal Judicial Center survey of federal district court judges and chief probation officers reveal sentiment that §§2B1.1 and 2F1.1 under punish defendants whose offenses involve large monetary losses.

Third, the Department of Justice and the Criminal Law Committee of the Judicial Conference have recommended that consideration be given to raising the severity levels at higher loss amounts for theft and fraud cases to more appropriately punish large-scale offenders.

#### **(5) Telemarketing Enhancements.**

The fifth change proposed by this amendment is to add specific offense characteristics to §2F1.1 for offense conduct involving telemarketing. In the 1994 omnibus crime bill Congress raised the statutory maximum for telemarketing offenses by five years (18 U.S.C. § 2326(1)), and by ten years for such offenses that victimized ten or more persons over age 55 or targeted persons over the age of 55 (18 U.S.C. § 2326(2)). This amendment provides a two-level increase in §2F1.1 for offenses involving telemarketing, and an additional cumulative 2-level increase if the offense victimized 10 or more persons over the age of 55, or targeted persons over the age of 55.

#### **(6) Cross Reference - Arson.**

The sixth change proposed by the amendment is to add to the fraud guideline a cross reference to §2K1.4 (Arson, Property Damage by Use of Explosives), if the offense involved arson or property destruction by use of explosives, and if the resulting offense level is greater. Offenses that involve an underlying arson may be charged as frauds. The proposed cross reference better ensures that similar offenses are treated similarly.

**(7) Conforming Technical Changes.**

The amendment also makes the following technical changes that are shown in the section on more-than-minimal planning above: In §2B1.1, subsection (b)(3) is proposed for deletion because the floor of 6 for offenses involving the theft of mail is unnecessary given the proposal to increase the base offense level for all offenses under this guideline from 4 to 6; in §2B1.1, subsection (b)(4)(B) providing a four-level increase for offenses involving receiving stolen property is revised to provide a two-level increase because of the proposed deletion of more-than-minimal planning (*i.e.*, the current, four-level enhancement is applied in the alternative to a two-level enhancement for more-than-minimal planning; if the more-than-minimal planning enhancement is subsumed in the loss tables, it arguably is necessary to reduce the four-level enhancement for fencing stolen property to two levels to maintain equipoise). In §2F1.1, subsection (b)(2)(B), providing an alternative (to the more-than-minimal-planning) two-level increase for a scheme involved the defrauding of more than one victim, is proposed for deletion because the concerns are handled by building the levels for more-than-minimal planning into the loss table.

It should be noted that §2B1.3 (Property Damage or Destruction) is proposed to be eliminated by consolidation into §2B1.1 by proposed amendment #37, Part C (shown in the section on consolidation). In combination with this amendment (*i.e.*, 18(A)) the effect of the consolidation would be to raise the base offense level of §2B1.3 from level four to level six and to eliminate the enhancement for more-than-minimal planning and replace it with one for “sophisticated means,” although it is not expected that this new enhancement would actually apply to cases previously sentenced under §2B1.3. The definition of “sophisticated means” currently in §§2T1.1, 2T3.1, and 2T1.4 are revised slightly, as shown in the section on more-than-minimal planning above.

**1. Elimination of More-than-Minimal-Planning Enhancement for Sophisticated Means.**

**§1B1.1. Application Instructions** \* \* \*

Commentary

Application Notes:

1. \* \* \*

(f) *"More than minimal planning" means more planning than is typical for commission of the offense in a simple form. "More than minimal planning" also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies.*

*“Sophisticated means to impede discovery of the offense or its extent,” includes conduct that is more complex or demonstrates greater intricacy or planning than a routine effort to impede discovery of the offense or its extent. An enhancement would be applied, for example where the defendant used transactions through corporate shells or fictitious entities, or used foreign bank accounts or transactions to conceal the nature or extent of the fraudulent conduct.*

~~*“More than minimal planning” is deemed present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. Consequently, this adjustment will apply especially frequently in property offenses.*~~

\* \* \*

**§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property**

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

- (3) ~~If (A) undelivered United States mail was taken, or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, and the offense level as determined above is less than level 6, increase to level 6.~~

*If sophisticated means were used to impede discovery of the offense or its extent, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.*

- (4) (A) ~~If the offense involved more than minimal planning, increase by 2 levels; or~~

~~(B) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 4 levels.~~

\* \* \*

Commentary

\* \* \*

Application Notes:

1. ~~*“More than minimal planning*~~ *Sophisticated means...*, “firearm,” and “destructive device” are defined in the Commentary to §1B1.1 (Application Instructions).

\* \* \*

6. ~~*“Undelivered United States mail” means mail that has not actually been received by the*~~

~~addressee or his agent (e.g., it includes mail that is in the addressee's mail box).~~

~~\* \* \*~~

13. ~~If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."~~

~~\* \* \*~~

Background:

~~\* \* \*~~

~~The guidelines provide an enhancement for more than minimal planning, which includes most offense behavior involving affirmative acts on multiple occasions. Planning and repeated acts are indicative of an intention and potential to do considerable harm. Also, planning is often related to increased difficulties of detection and proof.~~

~~Consistent with statutory distinctions, an increased minimum offense level is provided for the theft of undelivered mail. Theft of undelivered mail interferes with a governmental function, and the scope of the theft may be difficult to ascertain.~~

~~\* \* \*~~

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

- (2) ~~If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.~~

If sophisticated means were used to impede discovery of the offense or its extent, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

\* \* \*

- ~~(5) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.~~

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

2. “More than minimal planning *Sophisticated means...*” (subsection (b)(2)(A)) is defined in the Commentary to §1B1.1 (Application Instructions).
3. “~~Scheme to defraud more than one victim,~~” as used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one person. In this context, “victim” refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.

\* \* \*

§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

- (2) If sophisticated means were used to impede discovery of the offense ~~existence~~ or ~~its extent of the offense~~, increase by 2 levels. **If the resulting offense level is less than level 12, increase to level 12.**

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

- 4. *“Sophisticated means...” (as used in subsection (b)(2)), is defined in the Commentary to §1B1.1 (Application Instructions) and includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax evasion case. As explained in the definition, An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.*

\* \* \*

**§2T1.4 Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud**

\* \* \*

- (b) Specific Offense Characteristics

\* \* \*

- (2) If sophisticated means were used to impede discovery of the offense ~~existence~~ or ~~its extent of the offense~~, increase by 2 levels. **If the resulting offense level is less than level 12, increase to level 12.**

Commentary

\* \* \*

Application Notes:

\* \* \*

- 3. *“Sophisticated means...” (as used in subsection §2T1.4(b)(2)), is defined in the Commentary to*

*§1B1.1 (Application Instructions) and includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax evasion case. As explained in the definition, An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.*

\* \* \*

**§2T3.1 Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property**

- (a) Base Offense Level:
- (1) The level from §2T4.1 (Tax Table) corresponding to the tax loss, if the tax loss exceeded \$1,000; or
  - (2) ~~5~~, if the tax loss exceeded \$100 but did not exceed \$1,000; or  
**6, if there is no tax loss.**
  - (3) ~~4~~, if the tax loss did not exceed \$100.

For purposes of this guideline, the “tax loss” is the amount of the duty.

- (b) Specific Offense Characteristic
- (1) If sophisticated means were used to impede discovery of the **offense nature or existence or its extent** of the offense, increase by **2** levels. **If the resulting offense level is less than level 12, increase to level 12.**

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

3. *“Sophisticated means ...” (as used in subsection (b)(1)), is defined in the Commentary to §1B1.1 (Application Instructions) and includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax evasion case. As explained in the definition, an enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.*

\* \* \*

**2. Amendments to Loss Tables (Starting Points, Break Points)**

**§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property**

- (a) Base Offense Level: **4 6**
- (b) Specific Offense Characteristics
  - (1) If the loss exceeded \$100 [see three options], increase the offense level as follows:

[Current table deleted and replaced with one of three options.]

\* \* \*

**§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

\* \* \*

- (b) Specific Offense Characteristics
  - (1) If the loss exceeded \$2,000 [see three options], increase the offense level as follows:

[Current table deleted and replaced with one of three options.]

\* \* \*

- 3. Loss Tables - Two-level Increments (See table options below.)
- 4. Loss Tables - Increased Severity at Higher Loss Amounts.

**OPTION ONE**

- §2B1.1. **Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property**
- §2F1.1. **Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

\* \* \*

(b) Specific Offense Characteristics

- (1) If the loss [§2B1.1] ~~exceeded \$100~~ [§2F1.1] ~~exceeded \$2,000~~ was **\$5,000 or more**, increase the offense level as follows:

\* \* \*

**PROPOSED LOSS TABLE FOR §§2B1.1, 2F1.1, and 2T4.1**

**OPTION ONE**

**PROPOSED LOSS TABLE FOR §§2B1.1 AND 2F1.1**

<u>Loss</u> (Apply greatest)	<u>Increase in Level</u>	<u>Multiplier</u>	<u>[Level Increment]</u>
(A) \$5,000 or more	add 2		
(B) \$10,000 or more	add 4	<b>2</b>	2
(C) \$22,500 or more	add 6	<b>2.25</b>	2
(D) \$50,000 or more	add 8	<b>2.22</b>	2
(E) \$120,000 or more	add 10	<b>2.4</b>	2
(F) \$275,000 or more	add 12	<b>2.3</b>	2
(G) \$650,000 or more	add 14	<b>2.3</b>	2
(H) \$1,500,000 or more	add 16	<b>2.3</b>	2
(I) \$3,500,000 or more	add 18	<b>2.3</b>	2
(J) \$8,000,000 or more	add 20	<b>2.28</b>	2
(K) \$18,000,000 or more	add 22	<b>2.25</b>	2
(L) \$40,000,000 or more	add 24	<b>2.22</b>	2
(M) \$90,000,000 or more	add 26	<b>2.25</b>	2

**PROPOSED TAX TABLE FOR §2T4.1.**

		<u>Level</u>	<u>Multiplier</u>	[Level increment]
(A)	\$5,000 or more	8		
(B)	\$10,000 or more	10	<b>2</b>	2
(C)	\$22,500 or more	12	<b>2.25</b>	2
(D)	\$50,000 or more	14	<b>2.22</b>	2
(E)	\$120,000 or more	16	<b>2.4</b>	2
(F)	\$275,000 or more	18	<b>2.3</b>	2
(G)	\$650,000 or more	20	<b>2.3</b>	2
(H)	\$1,500,000 or more	22	<b>2.3</b>	2
(I)	\$3,500,000 or more	24	<b>2.3</b>	2
(J)	\$8,000,000 or more	26	<b>2.28</b>	2
(K)	\$18,000,000 or more	28	<b>2.25</b>	2
(L)	\$40,000,000 or more	30	<b>2.22</b>	2
(M)	\$90,000,000 or more	32	<b>2.25</b>	2

**OPTION TWO**

**§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property**  
**§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

\* \* \*

(b) Specific Offense Characteristics

(1) If the loss exceeded [§2B1.1] ~~\$100~~ [§2F1.1] **\$2,000**, increase the offense level as follows:

\* \* \*

**PROPOSED LOSS TABLE FOR §§2B1.1 and 2F1.1**

<u>Loss</u> (Apply greatest)	<u>Increase in Level</u>	<u>Add</u>	<u>Multiplier</u>	[Level increment]
(A) more than \$2,000		add 2		
(B) more than \$5,000		add 4	<b>2.5</b>	2
(C) more than \$10,000		add 5	<b>2</b>	1
(D) more than \$20,000		add 6	<b>2</b>	1
(E) more than \$40,000		add 7	<b>2</b>	1
(F) more than \$70,000		add 8	<b>1.75</b>	1
(G) more than \$120,000		add 9	<b>1.71</b>	1
(H) more than \$200,000		add 10	<b>1.67</b>	1
(I) more than \$350,000		add 11	<b>1.75</b>	1
(J) more than \$500,000		add 12	<b>1.43</b>	1
(K) more than \$800,000		add 13	<b>1.60</b>	1
(L) more than \$1,500,000		add 14	<b>1.88</b>	1

(M)	more than \$2,500,000	add 15	<b>1.67</b>	1
(N)	more than \$5,000,000	add 16	<b>2</b>	1
(O)	more than \$7,500,000	add 18	<b>1.5</b>	2
(P)	more than \$15,000,000	add 20	<b>2</b>	2
(Q)	more than \$25,000,000	add 22	<b>1.67</b>	2
(R)	more than \$50,000,000	add 24	<b>2</b>	2

**PROPOSED TAX TABLE FOR §2T4.1**

<u>Tax Loss (Apply the Greatest)</u>	<u>Level</u>	<u>Multiplier</u>	<u>[Level Increment]</u>
(A)	2,000 or less	8	
(B)	more than \$2,000	9	
(C)	more than \$5,000	10	<b>2.25</b> 1
(D)	more than \$10,000	11	<b>2</b> 1
(E)	more than \$20,000	12	<b>2</b> 1
(F)	more than \$40,000	13	<b>2</b> 1
(G)	more than \$70,000	14	<b>1.75</b> 1
(H)	more than \$120,000	15	<b>1.71</b> 1
(I)	more than \$200,000	16	<b>1.67</b> 1
(J)	more than \$350,000	17	<b>1.75</b> 1
(K)	more than \$500,000	18	<b>1.43</b> 1
(L)	more than \$800,000	19	<b>1.60</b> 1
(M)	more than \$1,500,000	20	<b>1.88</b> 1
(N)	more than \$2,500,000	21	<b>1.67</b> 1
(O)	more than \$5,000,000	22	<b>1.43</b> 1
(P)	more than \$7,500,000	24	<b>1.5</b> 2
(Q)	more than \$15,000,000	26	<b>2</b> 2
(R)	more than \$25,000,000	28	<b>1.67</b> 2
(S)	more than \$50,000,000	30	<b>2</b> 2

**OPTION THREE**

- §2B1.1. **Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property**
- §2F1.1. **Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

§2T4.1 **Tax Table**

**PROPOSED AMENDMENT TO §§2B1.1 and 2F1.1**

- (a) Base Offense Level: [§2B1.1: 4 8][§2F1.1: 6 8]
- (b) Specific Offense Characteristics
- (1) If the loss exceeded [§2B1.1: \$100][§2F1.1: \$2,000 \$5,000, increase the offense level as follows:

Loss	(Apply the Greatest	I	<b>Multiplier</b>
			[Level Increment]

(A)	more than \$5,000	add 2		
(B)	more than \$20,000	add 4	<b>4</b>	2
(C)	more than \$60,000	add 6	<b>3</b>	2
(D)	more than \$100,000	add 8	<b>1.66</b>	2
(E)	more than \$250,000	add 10	<b>2.5</b>	2
(F)	more than \$500,000	add 12	<b>2</b>	2
(G)	more than \$750,000	add 14	<b>1.5</b>	2
(H)	more than \$1,000,000	add 16	<b>1.33</b>	2
(I)	more than \$3,000,000	add 18	<b>3</b>	2
(J)	more than \$7,000,000	add 20	<b>2.33</b>	2
(K)	more than \$12,000,000	add 22	<b>1.71</b>	2
(L)	more than \$20,000,000	add 24	<b>1.66</b>	2
(M)	more than \$40,000,000	add 26	<b>2</b>	2
(N)	more than \$80,000,000	add 28"]	<b>2</b>	2

**PROPOSED TAX TABLE FOR §2T4.1**

Tax Loss (Apply the Greatest)	Offense Level	[Multiplier	Level Increment]
(A) \$5,000 or less	8		
(B) more than \$5,000	10		
(C) more than \$20,000	12	<b>4</b>	2
(D) more than \$60,000	14	<b>3</b>	2
(E) more than \$100,000	16	<b>1.66</b>	2
(F) more than \$250,000	18	<b>2.5</b>	2
(G) more than \$500,000	20	<b>2</b>	2
(H) more than \$750,000	22	<b>1.5</b>	2
(I) more than \$1,000,000	24	<b>1.33</b>	2
(J) more than \$3,000,000	26	<b>3</b>	2
(K) more than \$7,000,000	28	<b>2.33</b>	2
(L) more than \$12,000,000	30	<b>1.71</b>	2
(M) more than \$20,000,000	32	<b>1.66</b>	2
(N) more than \$40,000,000	34	<b>2</b>	2
(O) more than \$80,000,000	36"]	<b>2</b>	2

**5. Telemarketing Enhancements**

**§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

~~(5) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.~~

\* \* \*

- (6) If the offense involved telemarketing, increase by 2 levels.
- (7) If the offense [involved telemarketing conduct and either] victimized 10 or more persons over the age of 55, or targeted persons over the age of 55, increase by 2 levels.

~~(6)~~(8) \* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

- 19. *The specific offense characteristics set forth in subsection (b)(6), addressing telemarketing fraud, applies cumulatively with that set forth in subsection (b)(7), addressing telemarketing fraud that victimized 10 or more persons over the age of 55, or targeted persons over the age of 55. Subsection (b)(6) is not intended as an alternative to subsection (b)(7).*
- 20. *If subsection (b)(7) is applicable, do not apply an adjustment under §3A1.1 (Vulnerable Victim) unless it is applicable for a reason unrelated to the age of the victim(s).*

**6. Cross Reference - Arson.**

**§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

\* \* \*

(c) **Cross Reference**

If the offense involved arson or property destruction by use of explosives, apply §2K1.4 (Arson, Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

\* \* \*

**(B) Issues for Comment:** The following issues for comment are provided to facilitate informed comment on the issues raised by the preceding amendment.

(1) Loss Tables: In addition to requesting input on the options in the proposed amendment, the Commission requests comment on whether §§2B1.1 and 2F1.1 should have different base offense levels and different starting points and cutting points for the loss tables. If so, the Commission requests comment on what the respective base offense levels should be (for example, level 6 for §2B1.1 and level 8 for §2F1.1), on what loss amount should trigger the first increase (\$2,000, \$5,000, or \$10,000 for §2B1.1; \$2,000, \$5,000, \$10,000, or \$20,000 for §2F1.1), and what the cutting points of the loss tables should be.

(2) Telemarketing offenses: In addition to the issues raised by the proposed

amendment, the Commission invites comment on whether the guidelines should be amended to add a Chapter Three adjustment that provides a 2-level increase if the offense, regardless of type, involves the victimization of 10 or more persons over the age of 55 or the targeting of persons over the age of 55. Alternatively, the Commission invites comment on whether §3A1.1 (Vulnerable Victim) should be amended to provide that it will always apply when an offense involves the victimization of 10 or more persons over the age of 55 or the targeting of persons over the age of 55.

(4) Rick of serious bodily injury: Section 2F1.1(b)(4)(A) provides that if the offense involved “the conscious or reckless risk of serious bodily injury” there should be an increase of 2 levels, but that if “the resulting offense level is less than level 10, increase to level 10.” In FY 1995 of the 6,019 cases sentenced under §2F1.1, 37 (.6%) received the 2-level increase for (b)(4)(A) or (B) (“possession of a dangerous weapon (including a firearm)”). Without pulling the case files we cannot determine how many of the 37 cases were under (b)(4)(A) or (B). The Commission invites comment about whether subsection (b)(4)(A) provides adequate punishment for offenses involving the conscious or reckless risk of bodily injury, and if not, whether the adjustment should be increased to 4 or 6 levels, or whether it should be broken into increments of 2-, 4- or 6-levels depending on whether bodily injury, serious bodily, or permanent or life-threatening injury was caused. The Commission also invites comment on whether the provision should be replaced with an encouraged departure, generally, or whether it should be supplemented with an encouraged departure if serious bodily injury is risked to more than one person.

(5) Cross Reference: The Commission invites comment on whether the following cross reference should be adopted: “If the offense involved a bribe, gratuity, commercial bribe or kickback, or similar conduct, apply §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); §2C1.5 (Payment to Obtain Public Office); §2C1.6 (Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper); §2C1.7 (Fraud Involving Deprivation of the Intangible Right to the Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions); or §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), whichever is the most applicable, would provide that the cross reference should apply only if the listed offense conduct results in a higher offense level.”

(6) Consolidation of §§2B1.1 and 2F1.1: Currently there is sometimes confusion about whether a given offense should be sentenced using §2B1.1 or §2F1.1 and which definition of loss should be used. The Commission invites comment on whether §§2B1.1 and 2F1.1 should be consolidated into one guideline and, if so, what provisions of each should be retained in the consolidated guideline, and how the two definitions of loss should be combined into one. Alternatively, the Commission invites comment on whether the definitions of loss in §§2B1.1 and 2F1.1 should be combined into one definition and, if so, what provisions of each should be retained in the consolidated definition and how the new definition should be worded.

**(C) Additional Issues for Comment - Determination of Loss:** These issues for comment solicit input on possible changes to the definition of loss in §§2B1.1 and 2F1.1 to clarify the Commission’s intent, resolve issues raised by case law, and aid in consistency of application.

(1) Standard of causation: Currently, the definition of loss in §2F1.1 does not specify a standard of causation governing whether unintended or unexpected losses are to be included in the loss calculation under the guidelines. See United States v. Needle, 72 F.3d 1104, 1108-11 (3d Cir.) (holding defendant fraudulently posted required \$750,000 bond to open insurance company accountable for \$23 million in property damage from a hurricane that the defendant's insurance company lacked the assets to cover, loss undoubtedly would have gone unreimbursed regardless of defendant's insurance fraud), amended, 79 F.3d 14 (3d Cir.), cert. denied, 117 S. Ct. 238 (1996).

The Commission invites comment on whether to clarify the standard of causation necessary to link a harm with an offense under §1B1.3(a)(3). More specifically, the Commission requests comment on whether it should include only harm proximately caused (or directly caused) by the defendant's conduct, or whether it should include all harm that would not have occurred "but for" the defendant's conduct. Finally, the Commission invites comment on whether, regardless of which causation standard is adopted, the Commission should invite the possibility of a departure when losses far exceed those intended or reasonably foreseen by the defendant.

(2) Market value: The current definition of loss in theft and fraud uses the concept of market value as an important factor in determining loss. The Commission invites comment on whether this concept should be clarified to specify whether retail, wholesale, or black market value is intended, depending on the nature of the offense. In addition, the Commission invites comment on whether market value includes the enhanced value on the black market when it exceeds fair market value, or alternatively, whether black market value should be a departure consideration.

(3) Consequential damages and administrative costs - inclusion of interest: The definition of loss in fraud provides that reasonably foreseeable consequential damages and administrative costs are included in determinations of loss only in cases involving procurement fraud or product substitution. The Commission invites comment on whether consequential damages should be used in determinations of loss in all theft and/or fraud cases, and if so, how such damages should be determined. Alternatively, should the special rule in fraud on the inclusion of consequential damages and administrative costs in loss determinations in procurement fraud and product substitution cases be deleted? The Commission further invites comment on whether, even if consequential damages, generally, are not included in loss, they might be used as an offset against the value of the benefit received by the victim(s).

Although the definition of loss in the theft and fraud guidelines excludes interest "that could have been earned had the funds not been stolen," some courts have interpreted the definition of loss to permit inclusion in loss of the interest that the defendant agreed to pay in connection with the offense. Cf., United States v. Hoyle, 33 F.3d 415, 419 (4th Cir. 1994) ("[I]nterest shall not be included to determine loss for sentencing purposes.") with United States v. Gilberg, 75 F.3d 15, 18-19 (1st Cir. 1996) (including in loss interest on fraudulently procured mortgage loan); and United States v. Henderson, 19 F.3d 917, 928-29 (5th Cir.) ("Interest should be included if, as here, the victim had a reasonable expectation of receiving interest from the transaction."), cert. denied, 115 S. Ct. 207 (1994).

The Commission invites comment on whether the definition of loss should be clarified

to (A) exclude all interest from loss; (B) to permit inclusion of bargained-for interest, or © to allow consideration of bargained-for interest as a departure factor only.

(4) Benefit received by victims: Currently, with the exception of payments made and collateral pledged in fraudulent loan cases, the definition of loss does not specify whether benefit received by the victim(s) reduces the amount of the loss. Courts have generally although not unanimously, held that loss in fraud cases must be reduced by any benefits received by the victim(s). See, e.g., United States v. Maurello, 76 F.3d 1304, 1311-12 (3d Cir. 1996) (calculating loss by subtracting value of satisfactory legal services from amount of fees paid to bogus lawyer); United States v. Reddeck, 22 F.3d 1504, 1513 (10th Cir. 1994) (reducing loss by value of education received from bogus university); United States v. Mucciante, 21 F. 3d 1228, 1237-38 (2d Cir.) (refusing to reduce loss by amount that defendant “repaid...as part of a meretricious effort to maintain [the victims’] confidences” in a non-Ponzi scheme), cert. denied, 115 S. Ct. 361 (1994).

A Ponzi scheme is a particular kind of criminal offense that may warrant explicit treatment in the definition of loss. A Ponzi scheme is defined as “a fraudulent investment scheme in which money placed by later investors pays artificially high dividends to the original investors, thereby attracting even larger investments.” Bryan A. Garner, *A Dictionary of Modern Legal Usage* 671 (2d ed. 1995). Several cases raise some important issues about Ponzi schemes.

The Seventh Circuit was the first to address the issue of calculating loss from a Ponzi scheme. In United States v. Holiusa, 13 F.3d 1043, 1044-45 (6th Cir. 1994), the defendant perpetuated a Ponzi scheme by appropriating \$11,625,739 from “investors” and returning approximately \$8,000,000 in “interest.” The appellate court rejected the district court holding that because the defendant intended “to defraud all of the victims of their money” he was accountable for the full \$11,625,739. *Id.* at 1045; see also U.S.S.G. §2F1.1, comment. (n. 7) (“[I]f an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss.”). The court held that “[t]he full amount invested was not the probable or intended loss because [the defendant] did not at any point intend to keep the entire sum.... Because he did not intend to and did not keep the full \$11.6 million, that amount does not reflect the actual or intended loss, and is not an appropriate basis for sentencing.” *Holiusa*, 13 F.3d at 1046-47. The court remanded the case, instructing the district court not to include in loss “amounts that [the defendant] both intended to and indeed did return to investors.” *Id.* at 1048; see also United States v. Wolfe, 71 F.3d 611, 618 (6th Cir. 1995) (following *Holiusa*).

While the Seventh Circuit saw the concept of intended loss as the focus of Ponzi scheme loss calculation, the Eleventh Circuit took a different approach in United States v. Orton, 73 F.3d 331 (11th Cir. 1996). The Orton defendant had received \$525,865.66 from and returned \$242,513.65 to the “investors.” Twelve investors received more than they had invested; the total lost by the other investors was \$391,540.01. *Id.* at 333. The Eleventh Circuit adopted what it dubbed the “loss to losing victims” method: it held the defendant accountable for “the net losses of all victims who lost all or part of the money they invested.” *Id.* at 334. The money that the defendant received from and returned to those investors who ended up with a net gain did not enter into the loss calculation. The Orton defendant was therefore held accountable for \$391,540.01.

The Commission invites comment on whether the value of the benefit received by the victim(s) of an offense should be used to reduce the amount of the loss and, if so, how benefits that are more theoretical than real should be valued. The Commission also invites comment on whether the money returned to victim-investors (including “profits”) in a Ponzi scheme should be included in the calculation of loss. In addition, the Commission invites comment on whether in cases involving fraudulent representations of a defendant’s professional license or training, the loss should be reduced by the value of the “benefit/service” given to the victim (or to someone else on the victim’s behalf) by the defendant, or whether it should be determined based on the full charge for the “service.”

(5) Diversion of government benefits: The Commission invites comment on how loss should be determined in fraud cases involving the diversion of government program benefits and kickbacks. These cases tend to present special difficulties in determining or estimating loss and determining gain. At the same time, there is a strong societal interest in the integrity of government programs. More specifically, the Commission invites comment on whether the “value of benefits diverted” in such cases should be reduced by the “benefits” or services provided by the participants. In addition, the Commission invites comment on whether special rules should be devised for such cases to facilitate the determination/estimation of loss or gain, such as a special rule that determines loss or gain based on a percentage of the total value of the benefits diverted and, if so, what percentage should be chosen (such as 5-40%). The Commission also invites comment on whether the nature and seriousness of such offenses require a specific offense characteristic to target such conduct and/or a floor offense level to guarantee a minimum offense level.

(6) Pledged collateral and payments: Currently, the value of pledged collateral is determined based on the net proceeds of the sale of the collateral, or if the sale has not been accomplished prior to sentencing, then the market value of the collateral reduced by the expected cost of the sale. See, e.g., United States v. Barrett, 51 F.3d 86, 90-91 (7th Cir. 1995) (including in loss the drop in value of property securing fraudulently obtained loans). The Commission invites comment on how and when to determine loss in respect to crediting pledged collateral and payments. More specifically, the Commission invites comment on whether to clarify the current rule that only payments made prior to discovery of the offense are to be credited in determining loss, whether to clarify or change the current rule that provides that the value of the pledged collateral is determined by the amount the lending institution has recovered or can expect to recover, and whether to clarify what constitutes “discovery of the offense.” In addition, the Commission invites comment on whether the value of the pledged collateral should be determined at the time it is pledged or at the time of discovery of the offense, or some other time. In addition, the Commission invites comment on whether unforeseen (or unforeseeable) decreases (or increases) in the value of the collateral should affect the credit to be used to determine loss.

(7) Gain: Currently gain can be used in lieu of loss in certain limited circumstances under §2F1.1. Compare United States v. Kopp, 951 F.2d 521, 530 (3d Cir. 1991) (holding that gain cannot be used if loss is measurable even if loss is zero), with United States v. Haddock, 12 F.3d 950, 960 (10th Cir. 1993) (allowing gain to be used as alternative at all times). The Commission invites comment on whether to clarify the issue of whether or not gain may be used in lieu of loss. If the rule should be clarified, should upward departures be encouraged if the amount of gain substantially exceeds loss? Alternatively, the Commission invites comment on whether gain should be used whenever it is greater than actual or intended loss and, if so, how gain should be determined. The Commission also invites comment on whether there are situations in which gain should be used for theft-type cases under §2B1.1.

(8) Intended loss: Intended loss is to be used in fraud cases when it is determined to be greater than actual loss. §2F1.1, comment. (n. 7). Some courts have held that intended loss should be limited by concepts of “economic reality” or impossibility. Compare United States v. Moore, 38 F.3d 1419, 1425 (6th Cir. 1994) (focusing on loss that defendant “realistically intended”) with United States v. Lorenzo, 995 F.2d 1448, 1460 (9th Cir.) (“[T]he amount of [intended] loss . . . does not have to be realistic.”), cert. denied, 510 U.S. 881 (1993).

The Commission invites comment on whether the current rule should be changed to provide that loss is to be based primarily on actual loss, with intended loss available only as a possible ground for departure. The Commission further invites comment on whether, if the substance of the current rule is to be retained, the magnitude of intended loss should be limited by the amount that the defendant realistically could have succeeded in obtaining. More specifically, the Commission invites comment on whether intended loss should be limited by concepts of “economic reality” or impossibility, such as in a government sting operation where there can be no loss, or in a false insurance claims case in which the defendant submits a claim for an amount in excess of the fair market value of the item.

(9) Risk of loss: Currently, in some cases defendants obtain loans by fraudulent

means but the loss is determined to be zero because of pledged collateral and payments made prior to discovery. The Commission invites comment on whether the definition of loss should be revised to include the concept of risk of loss, so as to ensure higher punishment levels for defendants who commit serious crimes that, because of the value of pledged collateral or payments made before discovery, result in low or even zero loss, and if so, how the risk of loss might be determined. See §2F1.1, comment. (n. 7).

(10) Loss amounts that over- or understate the significance of the offense: The Commission invites comment on whether to provide guidance for applying the current provision allowing departure where the loss amount over- or understates the significance of the offense. See §2F1.1, comment. (n. 10). More specifically, the Commission invites comment on whether to specify that where the loss amount included through §1B13 (Relevant Conduct) is far in excess of the benefit personally derived by the defendant, the court might depart down to an offense level corresponding to the loss amount that more appropriately measures the defendant's culpability. Alternatively, the Commission invites comment on whether to provide a specific offense characteristic or special rule to reduce the offense level in such cases.

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**19(A). Issue for comment:** Section 511 of the Antiterrorism and Effective Death Penalty Act of 1996 pertains to biological weapons. It incorporates attempt and conspiracy into 18 U.S.C. § 175, which prohibits the production, stockpiling, transferring, acquiring, retaining, or possession of biological weapons. It also expands the scope of biological weapons provisions in chapter 10 of Title 18, United States Code, by expanding the meaning of biological agents.

Section 521 creates a new offense at 18U.S.C. § 2332c. The new offense makes it unlawful for a person, without lawful authority, to use (or attempt or conspire to use) a chemical weapon against a United States national outside the United States, any person within the United States, or any federal property. The penalty is any term of years or life or, if death results, death or any term of years or life.

The Commission invites comment as to how the guidelines could be amended to include these statutes. One approach could be to amend §2M6.1 (Unlawful Acquisition, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons or Facilities) to include these statutes. If the Commission were to select this approach, what changes, if any, would be appropriate to accommodate these offenses?

**(B). Issue for comment:** Section 702 creates a new offense at 18U.S.C. § 2332b. The new offense makes it unlawful for a person, committing conduct occurring outside the United States and conduct occurring inside the United States and under specified circumstances, to (1) kill, kidnap, maim, or commit an assault resulting in serious bodily injury or with a dangerous weapon, or (2) create a substantial risk of serious bodily injury to another person by damaging (or conspiring to damage) any real or personal property within the United States. The specified circumstances are using or obstructing interstate or foreign commerce, having the federal government or one of its employees or agents as a victim or intended victim, involving federal property, and committing the offense in the territorial sea of the

United States or within the special maritime or territorial jurisdiction of the United States.

The terms of imprisonment under the new offense are (1) death, or life, or any term of years, if death resulted; (2) any term of years, for kidnapping; (3) not more than 35 years, for maiming; (4) not more than 30 years, for assault; (5) not more than 25 years, for damaging or destroying property; (6) for any term of years not exceeding that which would have applied if the offense had been committed, for a conspiracy; and (7) not more than 10 years, for threatening to commit any such offense.

The provision also expressly precludes the imposition of a term of probation for any of the above-described offenses and precludes the imposition of concurrent sentences for terms of imprisonment imposed under this section with any other terms of imprisonment.

The Commission invites comment on how the guidelines should be amended to include this statute. For example, one option could be to amend the statutory index to reference the statute to the guideline for each of the underlying offenses.

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**20. Synopsis of Proposed Amendment:** This is a three-part amendment. First, this amendment clarifies the application of §2X3.1 when this guideline is used as the result of a cross reference.

Second, this amendment clarifies the interaction of §1B1.3 (Relevant Conduct) with §§2X3.1 (Accessory After the Fact) and 2X4.1 (Misprision of Felony). In the case of a guideline with alternative base offense levels, as opposed to one base offense level and one or more specific offense characteristics, the question has arisen as to whether the knowledge requirement set forth in Application Note 1 applies to the selection of the appropriate base offense level. Consistent with §1B1.3, this amendment clarifies that the knowledge requirement does apply.

Finally, this amendment clarifies that, for purposes of §§2X3.1 and 2X4.1, if the offense guideline applicable to the underlying offense refers to the defendant, such reference is to the defendant who committed the underlying offense, not to the defendant who is convicted of being an accessory or to the defendant who committed the misprision.

**§2X3.1. Accessory After the Fact**

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Commentary

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Application Notes:

1. *"Underlying offense" means the offense as to which the defendant is convicted of being an accessory. However, if the application of §2X3.1 results from a cross reference or other instruction in another Chapter Two offense guideline (e.g., §§2J1.2(c)(1), 2J1.3(c)(1)), the underlying offense is the offense determined by that cross reference or instruction.*

*~~Apply the base offense level plus any applicable specific offense characteristics that were~~Determine the offense level (base offense level, specific offense characteristics, and cross references) based on the conduct that was known, or reasonably should have been known, by the defendant; see Application Note 10 of the Commentary to §1B1.3 (Relevant Conduct). In addition, if the Chapter Two offense guideline applicable to the underlying offense refers to the defendant, such reference is to the defendant who committed the underlying offense, not to the defendant who is convicted of being an accessory or to whom this section applies due to a cross reference or other instruction in another Chapter Two offense guideline.*

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**§2X4.1. Misprision of Felony**

\* \* \*

Commentary

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Application Notes:

1. *"Underlying offense" means the offense as to which the defendant is convicted of committing the misprision. ~~Apply the base offense level, plus any applicable specific offense characteristics that were~~Determine the offense level (base offense level, specific offense characteristics, and cross references) based on the conduct that was known, or reasonably should have been known, by the defendant; see Application Note 10 of the Commentary to §1B1.3 (Relevant Conduct). In addition, if the Chapter Two offense guideline applicable to the underlying offense refers to the defendant, such reference is to the defendant who committed the underlying offense, not to the defendant who is convicted of committing the misprision or to whom this section applies due to a cross reference or other instruction in another Chapter Two offense guideline.*

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**21. Synopsis of Proposed Amendment:** This two-part amendment A) revises the Introductory Commentary to Chapter Three, Part B to put the application of §§3B11

(Aggravating Role) and 3B1.2 (Mitigating Role) in perspective and show the relationship among these adjustments, and B) revises §3B1.1. Options 1 and 2 of Part B maintain the current structure of §3B1.1 but revise the guideline to provide clearer definitions and cure a significant anomaly in the current guideline structure. Option 3 of Part B presents an alternative structure similar to the proposed amendment to §3B1.2.

Following the amendment to §3B1.2 are several issues for comment designed to elicit suggestions for alternative approaches.

**A) Proposed Amendment:**

**PART B - ROLE IN THE OFFENSE**

Introductory Commentary

*This Part provides adjustments to the offense level based upon whether, in committing the offense, the role the defendant (A) played in committing the offense an aggravating or a mitigating role, (B) abused a position of trust or used a special skill, or (C) used a minor. The determination of a defendant's role in the offense Each of these determinations is to be made on the basis of all the conduct within the scope of for which the defendant is accountable under §1B1.3 (Relevant Conduct); i.e., all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction.*

*Sections 3B1.1 (Aggravating Role) and 3B1.2 (Mitigating Role) are designed to provide appropriate adjustments in the defendant's offense level based on the defendant's role and relative culpability in the offense conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). For §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role) to apply, the offense must involve the defendant and at least one other participant. If an offense has only one participant, neither §3B1.1 nor §3B1.2 will apply. In some cases, some participants may warrant an upward adjustment under §3B1.1, other participants may warrant a downward adjustment under §3B1.2, and still other participants may warrant no role adjustment.*

*When an offense is committed by more than one participant, §3B1.1 or §3B1.2 (or neither) may apply. Section 3B1.3 may apply to offenses committed by any number of participants.*

*Although role adjustments are made within a framework of comparing the defendant's conduct to the conduct of other participants in the offense, the fact that the conduct of one participant warrants an upward adjustment for an aggravating role, or warrants no adjustment, does not necessarily mean that another participant must be assigned a downward adjustment for a mitigating role. For example, Defendant A plans a bank robbery and hires Defendant B, who commits the robbery. Both defendants plead guilty to bank robbery, and each has a Chapter Two offense level of 24. Defendant B may be less culpable than Defendant A, who will receive an upward adjustment under §3B1.1 for organizing the robbery and employing Defendant B. Nevertheless, Defendant B does not have a minimal or minor role in the robbery and thus would not receive a downward adjustment under §3B1.2 (Mitigating Role).*

**B) Proposed Amendment:**

[Option 1

§3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:~~follows~~ **(Apply the Greatest):**

- (a) If the defendant was an organizer or leader of ~~a criminal activity that involved five or more participants or was otherwise extensive~~ **an offense that involved at least four other participants or was otherwise extensive**, increase by **4** levels.
- (b) If the defendant was a manager or supervisor ~~(but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive~~ **(1) of at least [three][four] other participants in the offense, or (2) in an offense that was otherwise extensive**, increase by **3** levels.
- (c) If the defendant was an organizer, leader, manager, or supervisor ~~in any criminal activity other than described in (a) or (b)~~ **of at least one other participant in the offense**, increase by **2** levels.

#### Commentary

#### Application Notes:

1. *For purposes of this guideline —*

*A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been ~~convicted~~ **charged [or specifically identified, so long as the court determines that the offense involved another such person]**. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.*

2. *~~To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.~~*

*An "organizer" or "leader" is the participant who is primarily responsible for the criminal venture; the person in overall charge of the other participant(s). Generally, the organizer or leader will be the person who plans and organizes the offense, recruits the other key participant(s), makes the key decisions, directs and controls the actions of other participants, and receives the largest share of the proceeds. In some offenses (generally larger scale offenses), there may be more than one organizer or leader. The term "organizer" or "leader" is not intended to apply to a person who merely suggests the commission of the offense.*

*A "manager" or "supervisor" is a person, other than an "organizer" or "leader", who exercises managerial or supervisory authority over one or more other participants, either directly or indirectly. A manager or supervisor is at a lower level in the hierarchy than the organizer or leader of the offense, and generally will receive a share of the proceeds that is less than that of the organizer or leader but greater than that of the participant(s) that he or she manages or supervises.*

32. *In assessing whether an organization is "otherwise extensive," all persons involved during*

the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

3. *In the case of a defendant who would have merited a minor or minimal role adjustment but for the defendant's supervision of other minor or minimal participants, do not apply an adjustment from §3B1.1 (Aggravating Role). Instead, this factor is to be considered in determining the appropriate reduction, if any, under §3B1.2 (Mitigating Role). For example, if the defendant would have merited a reduction for a minimal role but for his or her supervision of other minimal participants, a reduction for a minor, rather than a minimal, role ordinarily would be appropriate. Similarly, if the defendant would have merited a reduction for a minor role but for his or her supervision of other minimal or minor participants, no reduction for role in the offense ordinarily would be appropriate.*

*The interaction of §§3B1.1 and 3B1.2 is to be addressed in the manner described above. Thus, if an adjustment from §3B1.1 is applied, an adjustment from §3B1.2 may not be applied.*

- ~~4. *In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.*~~

4. *Illustrations of Circumstances That May Warrant an Upward Departure.*

*There may be circumstances in which a defendant has a more culpable role in the offense but does not qualify for an upward adjustment under this section. In such circumstances, an upward departure may be considered. The following are examples of circumstances that may warrant an upward departure analogous to an aggravating role adjustment:*

- (A) *A defendant who exercised management responsibility over the property, assets, or activities of a criminal organization but who did not organize, lead, manage, or supervise another participant.*
- (B) *In a controlled substance offense, a defendant who functions at a relatively high level in a drug distribution network but who, nevertheless, may not qualify for an aggravating role adjustment because he or she does not exercise supervisory control over other participants.*

\* \* \*

[Option 2

**§3B1.1. Aggravating Role**

Based on the defendant's role in the offense, increase the offense level as follows:

- (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive **an offense that**

involved at least four other participants or was otherwise extensive, increase by 4 levels.

~~(b) — If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.~~

(eb) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b) of one other participant in the offense, increase by 2 levels.

In cases falling between (a) and (b), increase by 3 levels.

#### Commentary

#### Application Notes:

1. *For purposes of this guideline —*

*A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted charged [or specifically identified, so long as the court determines that the offense involved another such person]. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.*

*An "organizer" or "leader" is the participant who is primarily responsible for the criminal venture; the person in overall charge of the other participant(s). Generally, the organizer or leader will be the person who plans and organizes the offense, recruits the other key participant(s), makes the key decisions, directs and controls the actions of other participants, and receives the largest share of the proceeds. In some offenses (generally larger scale offenses), there may be more than one organizer or leader. The term "organizer" or "leader" is not intended to apply to a person who merely suggests the commission of the offense.*

*A "manager" or "supervisor" is a person, other than an "organizer" or "leader", who exercises managerial or supervisory authority over one or more other participants, either directly or indirectly. A manager or supervisor is at a lower level in the hierarchy than the organizer or leader of the offense, and generally will receive a share of the proceeds that is less than that of the organizer or leader but greater than that of the participant(s) that he or she manages or supervises.*

2. *To qualify for a 4-level adjustment under subsection (a), the defendant must be an organizer or leader of an offense involving at least four participants in addition to the defendant. The defendant need not, however, personally exercise supervisory control over all such participants. To qualify for ~~an~~ a 2-level adjustment under ~~this section~~ subsection (b), the defendant must have been the organizer, leader, manager, or supervisor of one ~~or more~~ other participants. ~~An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.~~ In cases falling between subsections (a) and (b), i.e., where the defendant organizes, leads, manages, or supervises more than one participant but whose aggravating role does not rise to the level of that described in subsection (a), a three level upward adjustment is warranted.*
3. *In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.*
4. *In the case of a defendant who would have merited a minor or minimal role adjustment but for the defendant's supervision of other minor or minimal participants, do not apply an adjustment from §3B1.1 (Aggravating Role). Instead, this factor is to be considered in determining the appropriate reduction, if any, under §3B1.2 (Mitigating Role). For example, if the defendant would have merited a reduction for a minimal role but for his or her supervision of other minimal participants, a reduction for a minor, rather than a minimal, role ordinarily would be appropriate. Similarly, if the defendant would have merited a reduction for a minor role but for his or her supervision of other minimal or minor participants, no reduction for role in the offense ordinarily would be appropriate.*

*The interaction of §§3B1.1 and 3B1.2 is to be addressed in the manner described above. Thus, if an adjustment from §3B1.1 is applied, an adjustment from §3B1.2 may not be applied.*

- ~~4. *In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.*~~

5. *Illustrations of Circumstances That May Warrant an Upward Departure.*

*There may be circumstances in which a defendant has a more culpable role in the offense but does not qualify for an upward adjustment under this section. In such circumstances, an upward departure may be considered. The following are examples of circumstances that may warrant an upward departure analogous to an aggravating role adjustment:*

- (A) *A defendant who exercised management responsibility over the property, assets, or activities of a criminal organization but who did not organize, [lead], manage, or supervise another participant.*
- (B) *In a controlled substance offense, a defendant who functions at a relatively high level in a drug distribution network but who, nevertheless, may not qualify for an aggravating role adjustment because he or she does not exercise supervisory control over other participants.*

\* \* \*

[Option 3

[§3B1.1 Deleted - Not Shown]

**§3B1.1. Aggravating Role**

Based on the defendant's role in the offense as a substantially more culpable participant, increase the offense level as follows (Apply the greater):

- (a) If the defendant had [a major aggravating] role in [the][a large-scale] offense, increase by **4** levels.
- (b) If the defendant had [a lesser aggravating] role in the offense, increase by **2** levels.

Commentary

Application Notes:

1. *For purposes of this guideline—*

*A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been charged [or specifically identified, so long as the court determines that the offense involved another such person]. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.*

*["Large-scale offense" means an offense that involves at least five participants, including the defendant, or an offense that involves at least two participants, including the defendant, and is otherwise extensive.]*

2. *For a major aggravating role adjustment to apply under subsection (a), the defendant must be (A) a substantially more culpable participant, and (B) among the most culpable participants in the offense. The following is a non-exhaustive list of characteristics typically possessed by a defendant with a major aggravating role:*

- (i) *broad knowledge and understanding of the scope and structure of the offense, and of the identity and role of the other participants in the offense;*
- (ii) *sophisticated tasks performed;*
- (iii) *[primary][major] decision-making authority in the offense;*

- (iv) *[primary][major] responsibility and control over the property, finances, and other participants involved in the offense;*
  - (v) *the anticipated or actual total compensation or benefit was large in comparison to the total return typically associated with offenses of the same type and scope; and*
  - (vi) *recruitment of other participants in the offense.*
3. *For a lesser role adjustment to apply under subsection (b), the defendant must (A) be a substantially more culpable participant, and (B) typically possess some of the characteristics associated with a major aggravating role, but not qualify for a major aggravating role adjustment.*
4. *The determinations of (A) whether a defendant is a substantially more culpable participant warranting an aggravating role adjustment under this section, and (B) if so, whether a major aggravating or lesser aggravating role adjustment is more appropriate, involve case-specific, fact-based assessments of the defendant's conduct in comparison to that of other participants in the offense. [In making these determinations, and particularly in determining whether a defendant in fact has an aggravating role, the court may also wish to compare the conduct of the defendant to the conduct of an average participant in an offense of the same type and scope.] The sentencing judge is in a unique position to make these determinations, based on the judge's assessment of all of the relevant circumstances.*
5. *In the case of a defendant who would have merited a minor or minimal role adjustment but for the defendant's supervision of other minor or minimal participants, do not apply an adjustment from §3B1.1 (Aggravating Role). Instead, this factor is to be considered in determining the appropriate reduction, if any, under §3B1.2 (Mitigating Role). For example, if the defendant would have merited a reduction for a minimal role but for his or her supervision of other minimal participants, a reduction for a minor, rather than a minimal, role ordinarily would be appropriate. Similarly, if the defendant would have merited a reduction for a minor role but for his or her supervision of other minimal or minor participants, no reduction for role in the offense ordinarily would be appropriate.*

*The interaction of §§3B1.1 and 3B1.2 is to be addressed in the manner described above. Thus, if an adjustment from §3B1.1 is applied, an adjustment from §3B1.2 may not be applied.*

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**22(A). Synopsis of Proposed Amendment:** This amendment clarifies the operation of the mitigating role adjustment in §3B1.2, as follows:

1. The language in the guideline is standardized by using the term “offense” instead of “criminal activity.”

2. The “intermediate,” 3-level reduction is bracketed for possible deletion because it does not provide a meaningfully distinct category and is unnecessary in view of the overlapping ranges feature of the Sentencing Table.
3. A common, umbrella definition for mitigating role; *i.e.*, “substantially less culpable participant”, is provided. This definition should assist the court in distinguishing mitigating role defendants from those who receive an aggravating or no role adjustment.
4. Commentary in current Application Note 2 that has been viewed as overly restrictive in regard to the minimal role adjustment is removed. In its place, a non-exhaustive list of typical characteristics associated with minimal role is provided. The characteristics are derived from the case law and staff review of cases involving adjustments for mitigating role.
5. A somewhat more helpful but still flexible definition of minor role is provided.
6. Commentary is added to reflect Commission intent that district court assessments of mitigating role should be reviewed deferentially.
7. A circuit conflict regarding how mitigating role comparisons should be done - whether within the context of relevant conduct or by comparing the defendant to a hypothetical average participant -- is addressed. The suggested “compromise” resolution (see bracketed language in Application Note 4) is to require the relevant conduct comparison but also suggest/allow the broader, “average participant” comparison if the court finds it helpful.
8. Commentary is added to address the burden of persuasion in a common-sense fashion consistent with the overall guidelines structure.
9. Commentary is added to address another circuit conflict regarding whether a court can analogize to mitigating role and downwardly depart when a defendant is “directed” to some extent by a government agent or other person who is not a criminally responsible participant.
10. The existing background commentary is removed because it is largely redundant and unnecessary.

**§3B1.2. Mitigating Role**

Based on the defendant's role in the offense **as a substantially less culpable participant**, decrease the offense level as follows:

- (a) If the defendant ~~was a minimal participant in any criminal activity~~ **had a minimal role in the offense**, decrease by **4** levels.

- (b) If the defendant ~~was a minor participant in any criminal activity~~ **had a minor role in the offense**, decrease by 2 levels.

~~[In cases falling between (a) and (b), decrease by 3 levels.]~~

### Commentary

#### Application Notes:

1. ~~Subsection (a) applies to a defendant who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.~~

*For purposes of this guideline—*

*"Participant" is defined in the Commentary to §3B1.1 (Aggravating Role).*

*"Substantially less culpable participant" means a defendant who (A) is recruited by, or voluntarily assists, another more culpable participant in facilitating the commission of a criminal offense, and (B) performs one or more limited, discrete functions that typically are less critical to the success of the offense.*

2. ~~It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marijuana shipment, or in a case where an individual was recruited as a courier for a singly smuggling transaction involving a small amount of drugs.~~

*For a minimal role adjustment to apply under subsection (a), the defendant must be (A) a substantially less culpable participant, and (B) among the least culpable participants in the offense. The following is a non-exhaustive list of characteristics typically possessed by a defendant with a minimal role:*

- (i) *lack of knowledge or understanding of the scope and structure of the offense, and of the identity or role of the other participants in the offense;*
  - (ii) *only unsophisticated tasks performed;*
  - (iii) *no material decision-making authority in the offense;*
  - (iv) *no, or very minimal, supervisory responsibility over the property, finances, or other participants involved in the offense; and*
  - (v) *the anticipated or actual total compensation or benefit was small in comparison to the total return typically associated with offenses of the same type and scope.*
3. ~~For purposes of §3B1.2(b), a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal.~~

*For a minor role adjustment to apply under subsection (b), the defendant must (A) be a substantially less culpable participant, and (B) typically possess some of the characteristics*

*associated with a minimal role, but not qualify for a minimal role adjustment.*

4. *The determinations of (A) whether a defendant is a substantially less culpable participant warranting a mitigating role adjustment under this section, and (B) if so, whether a minimal or minor role adjustment is more appropriate, involve case-specific, fact-based assessments of the defendant's conduct in comparison to that of other participants in the offense. [In making these determinations, and particularly in determining whether a defendant in fact has a mitigating role, the court may also wish to measure the defendant's conduct and relative culpability against the elements of the offense of conviction and to compare the conduct of the defendant to the conduct of an average participant in an offense of the same type and scope.] The sentencing judge is in a unique position to make these determinations, based on the judge's assessment of all of the relevant circumstances.*

*The defendant bears the burden of persuasion in establishing whether the defendant qualifies for a minimal or minor role adjustment under this section. As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.*

45. *If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not a substantially less culpable ~~than~~ participant compared to a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.*
6. *If the defendant would be a substantially less culpable participant but for the fact that the defendant was recruited by a person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer), a downward departure may be warranted. Such a downward departure should not result, without more, in a lower sentence than would result if the defendant had received a mitigating role adjustment under this section.*

\* \* \*

**(B). Additional Issues for Comment:** 1) The Commission invites comment on whether, as an alternative to separate guidelines for aggravating role (§3B1.1) and mitigating role (§3B1.2), it should adopt a single or unitary role guideline with aggravating, mitigating, and no role adjustments. What would be the advantages and/or disadvantages of such an approach in comparison to the current structure?

2) Focusing on aggravating role, Option 3, the Commission invites comment on characteristics, in addition to those suggested, that reliably distinguish among aggravating role adjustments, as well as those characteristics that reliably distinguish defendants with an aggravating role from those warranting no role adjustment or a mitigating role adjustment.

3) Focusing on mitigating role, the Commission invites comment on characteristics, in addition to those suggested in the proposed amendment, that distinguish defendants with a

mitigating role from defendants who do not merit such an adjustment. Additionally, the Commission invites suggestions regarding characteristics, factors, and/or definitional language that would better provide a meaningful distinction between minimal role and minor role. Finally, the Commission invites comment on whether it should expressly state whether “couriers” or “mules” receive a minimal, minor, or no role adjustment.

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**23. Synopsis of Proposed Amendment:** This amendment addresses a split in the circuits over the meaning of the last sentence of Application Note 1 in the Commentary to §3C1.1. The issue is whether that sentence requires the use of a heightened standard of proof when the court applies an enhancement for perjury. Compare United States v. Montague, 40 F.3d 1251 (D.C. Cir. 1994) (applying the clear and convincing standard) with United States v. Zajac, 62 F.3d 145 (6th Cir. 1995) (applying the preponderance of the evidence standard). The amendment changes the last sentence of Application Note 1 so that it no longer suggests the use of a heightened standard of proof. Instead, it clarifies that the court should be mindful that not all inaccurate testimony or statements reflect a willful attempt to obstruct justice.

Second, subdivision (i) of Application Note 3 in §3C1.1 is deleted as unnecessary. This subdivision is not helpful in contrasting the types of conduct that are serious enough to warrant an enhancement from those that are not serious enough to warrant the enhancement. The statutes referred to in subdivision (i) include a hodgepodge of provisions. Some have very marginal, if any, relevance (e.g., 18 U.S.C. § 1507 (picketing or parading)); and some (e.g., 18 U.S.C. §§ 1514 (civil action to restrain harassment of a victim or witness), and 1515 (definitions for certain provisions; general provision)) have no relevance at all.

Third, this amendment adds an additional sentence at the end of Application Note 4 in §3C1.1 to clarify the meaning of the phrase "absent a separate count of conviction." A panel of the Seventh Circuit, although reaching the correct result, has examined this phrase and found it to be unclear. See United States v. Giacometti, 28 F.3d 698 (7th Cir. 1994).

Fourth, this amendment moves the last two sentences of Application Note 6 into a separate Application Note 7. This clarifies that the guidance provided in these two sentences applies to a broader set of cases than the cases described in the first two sentences of Application Note 6.

§3C1.1. Obstructing or Impeding the Administration of Justice

\* \* \*

Commentary

Application Notes:

1. *This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, ~~such testimony or statements should be evaluated in a light most favorable to the defendant~~ **the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.***

\* \* \*

3. *The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:*

\* \* \*

- (h) *providing materially false information to a probation officer in respect to a presentence or other investigation for the court;*
- (i) ~~*conduct prohibited by 18 U.S.C. §§ 1501-1516.*~~

\* \* \*

4. ~~*The following is a non-exhaustive list of examples of the*~~ ***Some*** ~~*types of conduct that, absent a separate count of conviction for such conduct, ordinarily do not warrant application of this enhancement, but ordinarily can appropriately be sanctioned by the determination of the particular*~~ ***but may warrant a greater*** ~~*sentence within the otherwise applicable guideline range. However, if the defendant is convicted of a separate count for such conduct, this enhancement will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 7, below.*~~

***The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:***

- (a) *providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;*

- (b) *making false statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies;*
- (c) *providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;*
- (d) *avoiding or fleeing from arrest (see, however, §3C1.2 (Reckless Endangerment During Flight)).*

\* \* \*

- 6. *Where the defendant is convicted for an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), §2J1.5 (Failure to Appear by Material Witness), §2J1.6 (Failure to Appear by Defendant), §2J1.9 (Payment to Witness), §2X3.1 (Accessory After the Fact), or §2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except where a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., where the defendant threatened a witness during the course of the prosecution for the obstruction offense). ~~Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.~~*
- 7. *Where the defendant is convicted both of the obstruction offense and the underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.*
- 78. *Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.*

**24. Synopsis of Proposed Amendment:** This amendment revises §3E1.1 (Acceptance of Responsibility) in a number of key respects to provide greater flexibility to the sentencing judge in determining whether a defendant qualifies for a reduction in sentence, particularly the additional 1-level reduction in subsection (b), based on the defendant's acceptance of responsibility. First, this amendment eliminates many of the considerations currently listed as appropriate to consider in determining whether the defendant qualifies for the 2-level reduction under subsection (a), reserving many of those considerations for a determination of whether the defendant qualifies for the additional one-level reduction under subsection (b).

Second, this amendment conditions receipt of the 2-level reduction on the timeliness of the defendant's admission of conduct composing the offense of conviction, the defendant's admission or failure to falsely deny relevant conduct, and the defendant's not having

committed, after filing of charges on the instant offense, conduct that, under the totality of the circumstances, negates an inference of acceptance of responsibility. Therefore obstructive conduct does not automatically preclude receipt of the 2-level reduction if the totality of the circumstances indicate that the defendant has accepted responsibility for the offense.

Third, this amendment provides for an additional 1-level reduction if the defendant qualifies for the 2-level reduction and the defendant has demonstrated extraordinary acceptance of responsibility based on the sentencing judge's consideration of a variety of considerations including those listed in Application Note 2, as well as the sentencing judge's consideration of the totality of the circumstances.

Finally, the amendment provides a number of options with respect to whether the commission of obstructive conduct or a new offense should disqualify the defendant from receiving the additional 1-level reduction.

[Entire §3E1.1 Deleted - Not Shown]

**§3E1.1. Acceptance of Responsibility**

- (a) If the defendant demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant clearly demonstrates extraordinary acceptance of responsibility, decrease the offense level by 1 additional level.

Commentary

Application Notes:

1. *A defendant qualifies under subsection (a), if the defendant:*
  - (a) *truthfully admits, in a timely manner, the conduct comprising the offense(s) of conviction, and truthfully admits or does not falsely deny any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility; and*
  - (b) *has not, after the filing of charges on the instant offense, committed conduct that, under the totality of the circumstances, negates an inference of acceptance of responsibility. Conduct that may negate an inference of acceptance of responsibility under this paragraph is (1) conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice), i.e.,*

*obstructive conduct, or (2) the commission of an offense by the defendant. Such conduct does not necessarily disqualify the defendant from receiving a reduction in offense level under this section. In determining whether such conduct disqualifies the defendant from receiving a reduction in offense level under this section, the court should consider the nature, seriousness, and timing of the conduct, as well as the extent to which commission of the conduct is inconsistent with acceptance of responsibility.*

2. *In the case in which the defendant qualifies for the 2-level reduction under subsection (a) and the offense level determined prior to the operation of subsection (a) is level 16 or greater, the court may grant an additional 1-level reduction under subsection (b) if the court determines, under the totality of the circumstances, that the defendant has clearly demonstrated extraordinary acceptance of responsibility. The sentencing judge is in a unique position to make this determination. For this reason, this determination is entitled to great deference on review. In determining whether the defendant has clearly demonstrated extraordinary acceptance of responsibility for purposes of subsection (b), appropriate considerations include the following:*
- (a) fully cooperating with the probation officer in the preparation of the presentence report. (Note: This includes appearing for interview as required, providing accurate background information, including information regarding the defendant's juvenile and adult criminal record, and providing complete financial information as requested, in a timely fashion. With respect to discussion of the offense of conviction and relevant conduct, the provisions set forth in Application Note 1(a) above control);*
  - (b) timely notifying authorities of his intention to enter a plea of guilty, in a sufficiently prompt manner to permit the government to avoid preparing for trial and to permit the court to allocate its resources efficiently. (Note: The notification to authorities of the intention to plead guilty should occur particularly early in the case. For example, a defendant who pleads guilty one day before his scheduled trial date may qualify under subsection (a), but such plea will not ordinarily be timely enough to constitute an indicia of extraordinary acceptance of responsibility under this paragraph);*
  - [(c) voluntary termination or withdrawal from criminal conduct or associations;]*
  - [(d) voluntary payment of restitution prior to adjudication of guilt;]*
  - [(e) voluntary surrender to authorities promptly after commission of the offense;]*
  - [(f) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;]*
  - [(g) voluntary resignation from the office or position held during the commission of the offense;]*
  - [(h) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and]*
  - [(i) voluntary stipulation to administrative deportation, in the case of a deportable alien].*

*The defendant may qualify for the additional 1-level decrease under subsection (b) without*

*satisfying all of the factors listed in this Application Note. However, satisfaction by the defendant of one or more of the factors listed in this Application Note will not be sufficient under subsection (b) if the court determines that, under the totality of the circumstances, the defendant has not clearly demonstrated extraordinary acceptance of responsibility.*

*A defendant who, after the filing of charges on the instant offense, commits obstructive conduct or a new offense [may not receive the additional 1-level decrease under subsection (b)] [ordinarily will not qualify for the additional 1-level decrease under subsection (b)] [will qualify for the additional 1-level decrease under subsection (b) only in an extraordinary case].*

3. *A reduction in offense level under this section is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.*

*Background: Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and clearly demonstrates extraordinary acceptance of responsibility based on the factors listed in Application Note 2 or equivalent factors. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). The reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) is sufficient at offense level 15 or lower because the 2-level decrease provides a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table.*

*The reduction of offense level provided by this section recognizes legitimate societal interests. A defendant who timely demonstrates acceptance of responsibility for his offense is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility. A defendant who further demonstrates extraordinary acceptance of responsibility is likewise deserving of additional recognition of his extraordinary acceptance.*

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**25. Synopsis of Proposed Amendment:** This amendment clarifies that the commission of a new offense while pending trial or sentencing on the instant offense is a negative indicant of acceptance of responsibility. This provision does not require that the new offense be related or similar to the instant offense. Currently, there is a circuit split on this issue Compare United States v. Morrison, 983 F.2d 730 (6th Cir. 1993)(consideration of post-indictment theft and positive drug test inappropriate in determining whether defendant accepted responsibility for firearms violations) with, e.g., United States v. Watkins, 911 F.2d 983 (5th Cir. 1990)(upholding denial of acceptance for defendant convicted of possessing stolen treasury checks who used cocaine pending sentencing).

**§3E1.1. Acceptance of Responsibility**

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

4. *Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply. Similarly, the commission of an offense by the defendant while pending trial or sentencing on the instant offense, whether or not that offense is similar to the instant offense, ordinarily indicates that the defendant has not accepted responsibility for the instant offense.*

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**26. Synopsis of Proposed Amendment:** This amendment revises §3E1.1 (Acceptance of Responsibility) to remove the restriction that currently prohibits the application of the additional 1-level decrease in subsection (b) for offense levels 15 and lower. This amendment would allow consideration of the additional 1-level decrease for defendants at all offense levels. Consequently, eligibility for alternatives to incarceration would be increased for defendants at offense levels 15 and lower who receive a 3-level reduction for acceptance of responsibility.

**§3E1.1. Acceptance of Responsibility**

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.
- (b) If the defendant qualifies for a decrease under subsection (a), ~~the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the~~ **defendant** has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:
- (1) timely providing complete information to the government concerning his own involvement in the offense; or
  - (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,
- decrease the offense level by **1** additional level.

Commentary

Application Notes:

\* \* \*

6. *Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant ~~at offense level 16 or greater prior to the operation of subsection (a)~~ who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking one or both of the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b)(1) or (2) will occur particularly early in the case. For example, to qualify under subsection (b)(2), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.*

Background: *The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, one or more of the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.*

*Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant ~~at offense level 16 or greater prior to operation of subsection (a)~~ who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.*

**§4B1.3. Criminal Livelihood**

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If the defendant committed an offense as part of a pattern of criminal conduct engaged in as a livelihood, his offense level shall be not less than ~~13, unless §3E1.1 (Acceptance of Responsibility) applies, in which event his offense level shall be not less than 11~~ **level 13 (decreased by any applicable adjustment from §3E1.1 (Acceptance of Responsibility)).**

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**27. Synopsis of Proposed Amendment:** This amendment resolves a circuit conflict with respect to definitions of terms used in §4B1.1 (Career Offender) and addresses several related issues.

**A) Miscellaneous Controlled Substance Offenses—**This amendment addresses the question of whether the offenses of possessing a listed chemical with intent to manufacture

a controlled substance or possessing a prohibited flask or equipment with intent to manufacture a controlled substance are “controlled substance offenses” under the career offender guideline. A panel of the Fifth Circuit concluded that possession of a listed chemical with intent to manufacture a controlled substance is a controlled substance offense under §4B1.2. United States v. Calverley, 11 F.3d 505 (5th Cir. 1993). (The panel questioned the precedent on which the decision was based and recommended reconsideration en banc; on reconsideration en banc, the Fifth Circuit declined to address the merits of the issue.) In contrast, the Tenth Circuit has concluded that possession of a listed chemical with intent to manufacture a controlled substance is not a controlled substance offense. United States v. Wagner, 994 F.2d 1467, 1475 (10th Cir. 1993). This amendment makes such offenses a “controlled substance offense” under the career offender guideline. There seems such an inherent connection between possession of a listed chemical or prohibited flask or equipment with intent to manufacture a controlled substance and actually manufacturing a controlled substance that the former offenses are fairly considered as controlled substance trafficking offenses.

**B) Additional Related Issues**—This amendment also addresses two other issues related to the application of §4B1.1. The first related issue is whether the Commission should amend §4B1.2 to clarify that certain offenses are "crimes of violence" or "controlled substance offenses" if the offense of conviction established that the underlying offense was a "crime of violence" or "controlled substance offense." See United States v. Baker, 16 F.3d 854 (8th Cir. 1994); United States v. Veal-Gonzalez, 999 F.2d 1326 (9th Cir. 1993), effectively overruled on other grounds by Custis v. United States, 114 S.Ct. 1732 (1994).

The second issue is whether to make the following nonsubstantive changes to §4B1.2 to improve the internal consistency of the guidelines: (A) adding the phrase "punishable by imprisonment for a term exceeding one year" in subsection (2) to make it consistent with subsection (1); and (B) conforming the second paragraph of Application Note 2 of §4B1.2 to the language of §§2K1.3 and 2K2.1.

**§4B1.2. Definitions of Terms Used in Section 4B1.1**

- (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that --
  - (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
  - (ii) is burglary of a dwelling, arson, or involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.
- (b) The term "controlled substance offense" means an offense under a federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

- (3c) The term “two prior felony convictions” means (A1) the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of either a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (B2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Commentary

Application Notes:

1. *For the purposes of this guideline --*

~~The terms “Crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.~~

2. ~~“Crime of violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included whereas “crimes of violence” if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.~~

~~The term “Crime of violence” does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant has had one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.~~

*Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(d)(1)) is a “controlled substance offense.”*

*Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a “controlled substance offense.”*

*Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense facilitated) was a “controlled substance offense.”*

*Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a “controlled substance offense.”*

*Possessing a firearm during and in relation to a crime of violence or drug offense (18 U.S.C. § 924(c)) is a "crime of violence" or "controlled substance offense" if the offense of conviction established that the underlying offense (the offense during and in relation to which the firearm was carried or possessed) was a "crime of violence" or "controlled substance offense." Note that if the defendant also was convicted of the underlying offense, the two convictions will be treated as related cases under §4A1.2 (Definitions and Instruction for Computing Criminal History)).*

3. *"Prior felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).*
2. *Section 4B1.1 (Career Offender) expressly provides that the instant and prior offenses must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled substance for the purposes of §4B1.1 (Career Offender), the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.*

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**28. Issue for Comment:** The Commission requests public comment on whether, and in what manner, it should address the following circuit court conflicts:

- 1) Whether an upward departure may be based on dismissed or uncharged conduct that is related to the offense of conviction but is not relevant conduct. Compare United States v. Figaro, 935 F.2d 4 (1st Cir. 1991) (permitting consideration of uncharged conduct related to the offense of conviction); United States v. Kim, 896 F.2d 678 (2d Cir. 1990) with United States v. Thomas, 961 F.2d 1110 (3d Cir. 1992) (court cannot consider uncharged conduct).
- 2) Whether information provided in connection with an agreement under §1B1.8 (Use of Certain Information) may be placed in the presentence report or used to affect conditions of confinement. (The amendment would implicate §1B1.8.) Compare United States v. Marsh, 963 F.2d 72, 74 (5th Cir.1992) (implying court may receive information); United States v. Malvito, 946 F.2d 1066, 1068 (4th Cir.1991) (same) with United States v. Abanatha, 999 F.2d 1246, 1249 (8th Cir. 1993), cert. denied 114 S.Ct. 1549 (1994) (information should not be included in the presentence report because the Fifth Amendment precludes information from being considered at sentencing or allowed to affect conditions of confinement).
- 3) Whether drug quantities possessed for personal use should be aggregated with quantities distributed or possessed with intent to distribute. (Amendment would implicate §1B1.3 and §2D1.1.) Compare United States v. Antonietti, 86 F.3d 206, 209 (11th Cir.

1996); United States v. Innamorati, 996 F.2d 456, 492 (1st Cir. 1993), cert. denied, 510 U.S. 955 (1996) with United States v. Rodriguez-Sanchez, 23 F.3d 1488 (9th Cir. 1994) (personal use amounts are not same course of conduct as quantities possessed for distribution).

4) Whether a federal prison camp is a “similar facility” under §2P1.1(b)(3). Compare United States v. Hillstrom, 988 F.2d 448 (3d Cir. 1993), cert. denied, 115 S. Ct. 1382 (1995) with United States v. Sarno, 24 F.3d 618 (4th Cir. 1994) (minimum security prison is a secure facility); United States v. Tapia, 981 F.2d 1194 (11th Cir.), cert. denied, 113 S. Ct. 2979 (1993). (Although the Third Circuit initially disagreed with the Fourth, Fifth, Ninth, Tenth, and Eleventh circuits, the district court on remand held that a federal prison camp is not a “similar facility” within the meaning of the escape guideline. United States v. Hillstrom, 837 F.Supp. 1324 (M.D.Pa. 1993); aff’d, 37 F.3d 1490 (unpublished)).

5) Whether the 2-level enhancement at §2F1.1(b)(3)(A) requires that the defendant misrepresent his authority to act on behalf of a charitable or governmental organization. Compare United States v. Frazier, 53 F.3d 1105, 1111-14 (10th Cir. 1995) (enhancement does not apply to chairman of educational organization who misapplied funds because he made no misrepresentation of his authority to act on behalf of the organization) with United States v. Marcum, 16 F.3d 599, 603 (4th Cir.), cert. denied, 115 S. Ct. 137 (1994) (applying enhancement to president of charitable organization who embezzled fund from the organization).

6) Whether “victim of the offense” under §3A1.1 refers only to victim of the offense of conviction or to victim of any relevant conduct. Compare United States v. Echevarria, 33 F.3d 175 (2d Cir. 1994) (vulnerable victim need not be victim of the offense of conviction); United States v. Roberson, 872 F.2d 597 (5th Cir.), cert. denied, 493 U.S. 961 (1989) with United States v. Dixon, 66 F.3d 133 (6th Cir. 1995); United States v. Wright, 12 F.3d 70 (6th Cir. 1993), cert. denied 116 S. Ct. 320 (1995).

7) Whether a defendant’s failure to admit to use of a controlled substance amounts to willful and material obstruction of justice under §3C1.1 (Obstruction of Justice). Compare United States v. Garcia, 20 F.3d 670 (6th Cir. 1994), cert. denied, 115 S. Ct. 1120 (1995) with United States v. Belletiere, 971 F.2d 961 (3d Cir. 1992); United States v. Thompson, 944 F.2d 1331 (7th Cir. 1991), cert. denied, 502 U.S. 1097 (1992).

8) Whether time in a community treatment center is a “sentence of imprisonment” under §4A1.2(e)(1). Compare United States v. Rasco, 963 F.2d 132 (6th Cir.), cert. denied 113 S. Ct. 238 (1992) (detention in community treatment facility following revocation of parole is “incarceration”); United States v. Vanderlaan, 921 F.2d 257 (10th Cir. 1990), cert. denied, 499 U.S. 954 (1991) (placement in federal special treatment facility during period of commitment to federal prison is confinement and is considered “sentence of imprisonment”) with United States v. Latimer, 991 F.2d 1509 (9th Cir. 1993) (placement in community treatment facility following revocation of parole is not considered “incarceration”); United States v. Urbizu, 4 F.3d 636 (8th Cir. 1993) (dicta) (placement in halfway house not categorized as confinement).

9) Whether convictions that are erased for reasons unrelated to innocence or errors of law (regardless of whether they are termed by statute as “set aside” or “expunged”) should

be counted for purposes of criminal history. (Amendment would implicate §4A1.2, comment. n. 10). Compare United States v. McDonald, 991 F.2d 866 (D.C. Cir. 1993) (examining effect of set aside D.C. Youth Rehabilitation Act conviction and noting it is automatic and unrelated to innocence) with United States v. Beaulieu, 959 F.2d 375 (2d Cir. 1992) (do not count conviction where Vermont set aside statute intended to erase conviction from record; such a set aside is equivalent to expungement); United States v. Hidalgo, 932 F.2d 805 (9th Cir. 1991) (do not count conviction subject to California Youth Act set aside provision releasing youth from all penalties and disabilities; treat as an expungement provision).

10) Whether a court may impose a fine for costs of imprisonment under §5E1.2(c) Compare United States v. Sellers, 42 F.3d 116 (2d Cir. 1994), cert. denied, 116 S. Ct. 93 (1995) (§5E1.2 does not require district court to impose a punitive fine in order to impose a fine for costs of imprisonment); United States v. Turner, 998 F.2d 534 (7th Cir.), cert. denied, 114 S. Ct. 639 (1993) with United States v. Corral, 964 F.2d 83 (1st Cir. 1992) (court cannot impose fine for cost of imprisonment when defendant is indigent); United States v. Labat, 915 F.2d 603 (10th Cir. 1990) (cost of imprisonment is additional fine that cannot be imposed unless court first imposes a punitive fine).

11) Whether a departure above a statutorily required minimum sentence should be measured from a defendant's guideline range or the applicable mandatory minimum (Amendment would implicate §§5G1.1, 5K2.0, 4A1.3.) Compare United States v. Carpenter, 963 F.2d 736 (5th Cir. 1992) (appropriate for court to depart upwards from the range within which the mandatory minimum falls); United States v. Doucette, 979 F.2d 1042, 1047 (5th Cir. 1992) with United States v. Rodriguez-Martinez, 25 F.3d 797 (9th Cir. 1994) (if the court determines that a departure above a mandatory minimum is warranted, it should calculate the departure from the defendant's guideline range).

12) Whether the district court can depart to the career offender level based on the defendant's criminal history, although the defendant does not otherwise qualify for the career offender enhancement. Compare United States v. Ruffin, 997 F.2d 343, 347 (7th Cir. 1993) ("Only real convictions support a sentence under §4B1.1."); United States v. Faulkner, 952 F.2d 1066, 1072-73 (9th Cir. 1991) (career offender guidelines operate as an "on/off switch and cannot be used for departure purposes if defendant does not qualify as a career offender) with United States v. Cash, 983 F.2d 558, 562 (4th Cir. 1992) (departure reasonable when defendant would be career offender but for constitutional invalidity of one prior conviction; §4A1.3's level-by-level consideration is implicit in the departure); United States v. Hines, 943 F.2d 348, 354-55 (4th Cir. 1991) (departure reasonable when defendant's two prior murder convictions were consolidated for sentencing).

13) Whether multiple criminal incidents occurring over a period of time may constitute a single act of aberrant behavior warranting departure. Compare United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996) (includes multiple acts leading up to the defendant's commission of the offense); United States v. Takai, 941 F.2d 738 (9th Cir. 1991) (multiple incidents over six-week period can be "single act of aberrant behavior") with United States v. Marcello, 13 F.3d 752 (3d Cir. 1994) (requires spontaneous, thoughtless, single act involving lack of planning); United States v. Williams, 974 F.2d 25 (5th Cir. 1992), cert. denied, 507 U.S. 934 (1993) (same).

14) Whether collateral consequences of a defendant's conviction can be the basis of a downward departure. Compare United States v. Smith, 27 F.3d 649 (D.C. Cir. 1994) (objectively more serious prison conditions faced by deportable aliens may warrant downward departure) with United States v. Sharapan, 13 F.3d 781 (3d Cir. 1994) (demise of defendant's business, employees' loss of jobs, and economic harm do not support downward departure); United States v. Restreppo, 999 F.2d 640 (2d Cir.), cert. denied, 114 S. Ct. 405 (1993) (disallowing departure based on collateral consequences of being a deportable alien).

15) Whether the definition of "violent offense" under §5K2.13 (Diminished Capacity) is the same as "crime of violence" under §4B1.2. Compare United States v. Poff, 926 F.2d 588 (7th Cir.), cert. denied, 502 U.S. 827 (1991); United States v. Maddalena, 893 F.2d 815 (6th Cir. 1990), cert. denied, 502 U.S. 882 (1991) with United States v. Weddle, 30 F.3d 532 (4th Cir. 1994); United States v. Chatman, 986 F.2d 1446 (D.C. Cir. 1993).

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**29(A). Synopsis of Proposed Amendment:** This amendment revises §§5B1.3, 5B1.4, and 5D1.3 to reflect required conditions of probation and supervised release that have been added by the Antiterrorism and Effective Death Penalty Act of 1996 and other statutory provisions. Section 5B1.4 is amended to list both statutorily required and discretionary conditions in a way that will facilitate their application in individual cases.

It is unclear whether section 203 of the Antiterrorism and Effect Death Penalty Act of 1996 was intended to effect a change in the conditions specified in the brackets in subsection (b) of this amendment. Section 3563(a)(2) of Title 18, United States Code, provides that a defendant convicted of a felony must also abide by at least one of the conditions of probation set forth in 18 U.S.C. § 3563(b)(2), (b)(3), or (b)(13). Before the Act, those conditions were a fine ((b)(2)), an order of restitution ((b)(3)), or community service ((b)(13)). The Act deleted the fine provision and renumbered the restitution and community service provision. The conditions now referenced to 18 U.S.C. § 3563(b)(2), (b)(3), and (b)(13) are restitution ((b)(2)), notice to victims of the offense ((b)(3)), and an order that the defendant reside, or refrain from residing, in a specific area ((b)(13)).

**§5B1.3. Conditions of Probation**

~~(a) — If a term of probation is imposed, the court shall impose a condition that the defendant shall not commit another federal, state, or local crime during the term of probation. 18 U.S.C. § 3563(a)(1). The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. § 3563(a)(3).~~

(a) If a term of probation is imposed, the court is required by statute to impose the following conditions:

(1) that the defendant not commit another federal, state, or local crime during the term of probation. 18 U.S.C. § 3563(a)(1). This condition is reflected in §5B1.4(a) (condition #1);

- (2) that the defendant not unlawfully possess a controlled substance. 18 U.S.C. § 3563(a)(3). This condition is reflected in a broader form in §5B1.4(a) (condition #8);
  - (3) in the case of a defendant convicted for the first time of a domestic violence crime, as defined in 18 U.S.C. § 3561(b), that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with the State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. 18 U.S.C. § 3563(a)(4). This condition is reflected in a broader form in §5B1.4(b) (condition #25);
  - (4) that the defendant refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable sentencing information indicates a low risk of future substance abuse by the defendant. 18 U.S.C. § 3563(a)(5). This condition is reflected in a broader form in §5B1.4(a) (condition #8) and §5B1.4(b) (conditions #22 and #23);
  - (5) that the defendant make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. 18 U.S.C. § 3563(a)(6)(A). This condition is reflected in a broader form in §5B1.4(b) (condition #18);
  - (6) that the defendant pay the special assessment imposed under 18 U.S.C. § 3013. 18 U.S.C. § 3563(a)(6)(B). This condition is reflected in §5B1.4(a) (condition #15);
  - (7) that the defendant notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments. 18 U.S.C. § 3563(a)(7). This condition is reflected in §5B1.4(a) (condition #16);
  - (8) if the court has imposed a fine, that the defendant pay the fine or adhere to a court-established installment schedule. 18 U.S.C. § 3563(a). This condition is reflected in §5B1.4(b) (condition #19).
- (eb) If a term of probation is imposed for a felony, the court shall impose at least one of the following as a condition of probation: ~~a fine~~; [an order of restitution, or community service], unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the other conditions set forth under 18 U.S.C. § 3563(b) (pertaining to discretionary conditions of probation). 18 U.S.C. § 3563(a)(2).

- (bc) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the purposes of sentencing, and (2) involve only such deprivations of liberty or property as are reasonably necessary to effect the purposes of sentencing. 18 U.S.C. § 3563(b). ~~Recommended conditions are set forth in §5B1.4.~~
- (d) Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation. 18 U.S.C. § 3563(b)(1+0). Intermittent confinement shall be credited toward the guideline term of imprisonment at §5C1.1 as provided in the schedule at §5C1.1(e). **This condition is reflected in §5B1.4(c) (condition #31).**
- (e) **Recommended conditions of probation are set forth in §5B1.4 (Recommended Conditions of Probation and Supervised Release).**

Commentary

~~————— A broader form of the condition required under 18 U.S.C. § 3563(a)(3) (pertaining to possession of controlled substances) is set forth as recommended condition (7) at §5B1.4 (Recommended Conditions of Probation and Supervised Release).~~

§5B1.4.

Recommended Conditions of Probation and Supervised Release (Policy Statement)

- (a) The following "standard" conditions ~~(1-13)~~ are generally recommended for both probation and supervised release. A condition (or a part of a condition) designated by an asterisk may be statutorily required in all or some cases:
- (1) the defendant shall not commit another federal, state, or local crime;\*
  - ~~(2)~~ the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;
  - ~~(23)~~ the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
  - (34) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
  - ~~(45)~~ the defendant shall support ~~his~~the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);
  - ~~(56)~~ the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
  - ~~(67)~~ the defendant shall notify the probation officer ~~within seventy-two hours of~~at least ten days prior to any change ~~in~~of residence or employment;
  - ~~(78)~~ the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any ~~narcotic or other~~ controlled substance, or any paraphernalia related to ~~such~~ any controlled substances, except as prescribed by a physician;\*
  - ~~(89)~~ the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;
  - ~~(910)~~ the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

- (~~10~~11) the defendant shall permit a probation officer to visit ~~him~~the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- (~~11~~12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- (~~12~~13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- (~~13~~14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.;
- (15) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.\*
- (16) the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.\*

(b) The following "special" conditions of probation and supervised release (~~14-24~~) are either recommended or required by law under in the circumstances described, or may be appropriate in a particular case and, in addition, may otherwise be appropriate in particular cases. A condition (or a part of a condition) designated by an asterisk may be statutorily required in all or some cases:

(~~14~~17) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense, ~~it is recommended that the court impose~~ -- a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(~~15~~18) Restitution

If the court imposes an order ~~of~~ for condition requiring restitution, ~~it is recommended that the court impose~~ -- a condition requiring the defendant to make payment of restitution or adhere to a court ordered installment schedule for payment of restitution. See §5E1.1 (Restitution).\*

If any restitution obligation remains unpaid at the commencement of a term of supervised release, it shall be a condition of supervised

release that the defendant pay any such restitution in accordance with the schedule of payments ordered by the court.

(+619) Fines

If the court imposes a fine, ~~it is recommended that the court impose~~ -- a condition requiring the defendant to pay the fine or adhere to a court ordered installment schedule for payment of the fine.\*

If any fine obligation remains unpaid at the commencement of a term of supervised release, it shall be a condition of supervised release that the defendant pay any such fine in accordance with the schedule of payments ordered by the court.

(+720) Debt Obligations

If an installment schedule of payment of restitution or fines is imposed, ~~it is recommended that the court impose~~ -- a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(+821) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine, ~~it is recommended that the court impose~~ -- a condition requiring the defendant to provide the probation officer access to any requested financial information.

(2322) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol, ~~it is recommended that the court impose~~ -- a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

(23) Drug Testing

Unless the court determines that there is a low risk of future substance abuse by the defendant -- a condition requiring the defendant to submit to one drug test within fifteen days of release on (probation)(supervised release) and at least two periodic drug tests thereafter, as determined by the court.\*

Note: This condition is not necessary if the substance abuse program participation condition (condition #22) is imposed.

(24) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment, ~~it is recommended that the court impose~~ -- a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(25) Domestic Violence Program Participation

In the case of a defendant convicted of a domestic violence crime, as defined in 18 U.S.C. § 3561(b), a condition requiring the defendant to attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with the State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant.\*

(c) Additional Conditions

The following "special conditions" may be appropriate on a case-by-case basis:

~~(19)~~26) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of probation or supervised release. See §5F1.1 (Community Confinement).

~~(20)~~27) Home Detention

Home detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

~~(21)~~28) Community Service

Community service may be imposed as a condition of probation or supervised release. See §5F1.3 (Community Service).

~~(22)~~29) Occupational Restrictions

Occupational restrictions may be imposed as a condition of probation or supervised release. See §5F1.5 (Occupational Restrictions).

~~(25)~~30) Curfew

~~If~~A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the

rehabilitation of the defendant, ~~a condition of curfew is recommended.~~ Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(31) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of probation during the first year of probation.

Note: This condition may not be ordered as a condition of supervised release.

Commentary

Application Note:

1. *Home detention, as defined by §5F1.2, may only be used as a substitute for imprisonment. See §5C1.1 (Imposition of a Term of Imprisonment). Under home detention, the defendant, with specified exceptions, is restricted to ~~his~~ **the defendant's** place of residence during all non-working hours. Curfew, which limits the defendant to ~~his~~ **the defendant's** place of residence during evening and nighttime hours, is less restrictive than home detention, and may be imposed as a condition of probation whether or not imprisonment could have been ordered.*

\* \* \*

**§5D1.3. Conditions of Supervised Release**

- ~~(a) — If a term of supervised release is imposed, the court shall impose a condition that the defendant not commit another federal, state, or local crime. 18 U.S.C. § 3583(d). The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 U.S.C. § 3563(a)(3).~~
- (a) **If a term of supervised release is imposed, the court is required by statute to impose the following conditions:**
  - (1) **that the defendant not commit another federal, state, or local crime during the term of supervised release. 18 U.S.C. § 3583(d). This condition is reflected in §5B1.4(a) (condition #1);**
  - (2) **that the defendant not unlawfully possess a controlled substance. 18 U.S.C. § 3583(d). This condition is reflected in a broader form in §5B1.4 (a) (condition #8);**
  - (3) **in the case of a defendant convicted for the first time of a domestic violence crime, as defined in 18 U.S.C. § 3561(b), that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with the State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. 18 U.S.C. § 3583(d).**

This condition is reflected in §5B1.4(b) (condition #25);

- (4) that the defendant refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but this condition may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable sentencing information indicates a low risk of future substance abuse by the defendant. 18 U.S.C. § 3583(d). This condition is reflected in a broader form in §§5B1.4(a) (condition #8), and 5B1.4(b) (conditions #22 and #23).
- (b) The court may impose other conditions of supervised release, to the extent that such conditions are reasonably related to (1) the nature and circumstances of the offense and the history and characteristics of the defendant, and (2) the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 U.S.C. §§~~3553(a)(2)~~ and 3583(d).
- (c) Recommended conditions of supervised release are set forth in §5B1.4 (**Recommended Conditions of Probation and Supervised Release**).

Commentary

*Background:* This section applies to conditions of supervised release. The conditions generally recommended for supervised release are those recommended for probation. See §5B1.4. ~~A broader form of the condition required under 18 U.S.C. § 3563(a)(3) (pertaining to possession of controlled substances) is set forth as recommended condition (7) at §5B1.4 (Recommended Conditions of Probation and Supervised Release).~~

Conforming Amendment:

**§8D1.3.            Conditions of Probation - Organizations**

- (a) Pursuant to 18 U.S.C. § 3563(a)(1), any sentence of probation shall include the condition that the organization ~~shall~~ not commit another federal, state, or local crime during the term of probation.

\* \* \*

- (c) Pursuant to 18 U.S.C. § 3563(a)(6)(A), any sentence of probation shall include the condition that the defendant make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2327, 3663, 3663A, and 3664.
  - (d) Pursuant to 18 U.S.C. § 3563(a)(6)(B), any sentence of probation shall include the condition that the defendant pay the special assessment imposed under 18 U.S.C. § 3013.
  - (e) Pursuant to 18 U.S.C. § 3563(a)(7), any sentence of probation shall include the condition that the defendant notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.
  - (f) Pursuant to 18 U.S.C. § 3563(a), if the court has imposed a fine, any sentence of probation shall include the condition that the defendant pay the fine or adhere to a court-established installment schedule.
- (cg)

\* \* \*

**(B). Issue for Comment:** The Commission invites comment as to whether §§5B13 (Conditions of Probation), 5B1.4 (Recommended Conditions of Probation and Supervised Release), and 5D1.3 (Conditions of Supervised Release) should be reorganized so as to better distinguish between the statutorily required, standard, and special conditions of probation and supervised release. For example, one option could be to delete §5B1.4 and amend §§5B1.3 and 5D1.3 so that subsection (a) of each guideline lists all the statutorily required conditions of probation or supervised release, subsection (b) lists all the standard conditions, and subsection (c) lists all the optional conditions.

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**30. Synopsis of Proposed Amendment:** This amendment revises §5D1.2 (Term of Supervised Release) to make clear that a defendant who qualifies under the "safety valve" (§5C1.2, 18 U.S.C. § 3553(f)) is not subject to any statutory minimum term of supervised release. This issue has arisen in a number of hotline calls. This amendment also clarifies that the requirement in subsection (a), with respect to the length of a term of supervised release, is subject to the requirement in subsection (b) that the term be not less than any statutorily required term of supervised release.

**§5D1.2. Term of Supervised Release**

- (a) **Subject to subsection (b),** if a term of supervised release is ordered, the length of the term shall be:
  - (1) at least three years but not more than five years for a defendant convicted of a Class A or B felony;
  - (2) at least two years but not more than three years for a defendant convicted of a Class C or D felony;

- (3) one year for a defendant convicted of a Class E felony or a Class A misdemeanor.
- (b) ~~Provided, that~~ The term of supervised release imposed shall in no event be less than any statutorily required term of supervised release.

Commentary

Application Note:

- 1. *In the case of a defendant who qualifies under §5C1.2 (Limitation on Applicability of Statutory Minimum Sentence in Certain Cases), the term of supervised release is to be determined under subsection (a) without regard to any otherwise applicable statutory minimum term of supervised release; i.e., the requirement in subsection (b) is inapplicable in such a case because a statutory minimum term of supervised release no longer applies to that defendant.*

\* \* \*

**31(A). Synopsis of Proposed Amendment:** This amendment conforms the provisions of §5E1.1 to the restitution provisions of sections 204 and 205 of the Antiterrorism and Effective Death Penalty Act of 1996. Because the new restitution provisions have ex post facto provisions that cannot be addressed in the usual fashion (by determining whether the final Chapter Five guideline range is greater), a separate provision is set forth as a special instruction to address this issue and allow the maintenance of the Commission's "one book" rule.

**§5E1.1. Restitution**

- (a) The court shall --
  - (1) enter a restitution order **in the case of an identifiable victim of the offense for the full amount of the victim's loss**, if such order is authorized under 18 U.S.C. §§ 2248, § 2259, § 2264, § 2327, § 3663-~~3664~~, or § 3663A; or
  - (2) **impose a term of probation or supervised release with a condition requiring restitution in the case of an identifiable victim of the offense for the full amount of the victim's loss**, if a restitution order would be authorized under 18 U.S.C. §§ 3663-~~3664~~, except for the fact that the offense of conviction is not an offense set forth in under Title 18, United States Code, 21 U.S.C. § 841, § 848(a), § 849, § 856, § 861, or § 863, or 49 U.S.C. § 46312, § 46502, or § 46504, ~~impose a term of probation or supervised release with a condition requiring restitution.~~
- (b) *Provided*, that the provisions of subsection (a) do not apply --

- (1) when full restitution has been made; or
  - (2) in the case of a restitution order under § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of a restitution requirement outweighs the need to provide restitution to any victims through the criminal process finds, from facts on the record, that (1) the number of identifiable victims is so large as to make restitution impracticable, or (2) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.
- (c) If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.
- ~~(d) With the consent of the victim of the offense, the court may order a defendant to perform services for the benefit of the victim in lieu of monetary restitution or in conjunction therewith. 18 U.S.C. § 3663(b)(4).~~
- (d) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. 18 U.S.C. § 3664(f)(3)(A). An in-kind payment may be in the form of (1) return of property; (2) replacement of property; or (3) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. 18 U.S.C. § 3664(f)(4).
- (e) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.
- (f) Special Instruction
- (1) This guideline applies only to a defendant convicted of an offense committed on or after November 1, 1997. Notwithstanding the provisions of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), use the former §5E1.1 (set forth in Appendix C, amendment 537) in lieu of this guideline in any other case.

Commentary

Application Note:

~~1. In the case of a conviction under certain statutes, additional requirements regarding restitution apply. See 18 U.S.C. §§ 2248 and 2259 (applying to convictions under 18 U.S.C. §§ 2241-2258 for sexual-abuse offenses and sexual exploitation of minors); 18 U.S.C. § 2327 (applying to convictions under 18 U.S.C. §§ 1028-1029, 1341-1344 for telemarketing-fraud offenses); 18 U.S.C. § 2264 (applying to convictions under 18 U.S.C. §§ 2261-2262 for domestic-violence offenses). To the extent that any of the above-noted statutory provisions conflict with the provisions of this guideline, the applicable statutory provision shall control.~~

**Background:** Section 3553(a)(7) of Title 18, *United States Code*, requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Section 3556 of Title 18 authorizes the court to impose restitution in accordance with 18 U.S.C. §§ 3663 and 3664, which authorize restitution for violations of Title 18 or 49 U.S.C. § 46312, § 46502, or § 46504. **Orders of restitution are authorized under 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, and 3663A.** For other offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation or supervised release. ~~See 18 U.S.C. § 3563(b)(3), as amended by Section 7110 of Pub. L. No. 100-690 (1988).~~ **To the extent that any of the above-noted statutory provisions conflict with the provisions of this guideline, the applicable statutory provision shall control.**

~~A court's authority to decline to order restitution is limited. Subsection (a)(1) of this guideline requires the court to order restitution for offenses under Title 18, United States Code, or 49 U.S.C. § 46312, § 46502, or § 46504, unless full restitution has already been made or "the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution . . . outweighs the need to provide restitution to any victims." 18 U.S.C. § 3663(d). The legislative history of 18 U.S.C. § 3579, the precursor of 18 U.S.C. § 3663, states that even "[i]n those unusual cases where the precise amount owed is difficult to determine, the section authorizes the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim." S. Rep. No. 532, 97th Cong., 2d Sess. 31, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2537. If the court does not order restitution, or orders only partial restitution, it must state its reasons for doing so. 18 U.S.C. § 3553(c). Subsection (a)(2) provides for restitution as a condition of probation or supervised release for offenses not set forth in Title 18, United States Code, or 49 U.S.C. § 46312, § 46502, or § 46504.~~

~~In determining whether to impose an order of restitution, and the amount of restitution, the court shall consider the amount of loss the victim suffered as a result of the offense, the financial resources of the defendant, the financial needs of the defendant and his dependents, and other factors the court deems appropriate. 18 U.S.C. § 3664(a).~~

~~Pursuant to Rule 32(b)(4)(D), Federal Rules of Criminal Procedure, the probation officer's presentence investigation report must contain a victim impact statement. That report must contain information about the financial impact on the victim and the defendant's financial condition. The sentencing judge may base findings on the presentence report or other testimony or evidence supported by a preponderance of the evidence. 18 U.S.C. § 3664(d).~~

~~Unless the court orders otherwise, restitution must be made immediately. 18 U.S.C. § 3663(f)(3). The court may permit the defendant to make restitution within a specified period or in specified installments, provided that the last installment is paid not later than the expiration of probation, five years after the end of the defendant's term of imprisonment, or in any other case five years after the date of sentencing. 18 U.S.C. § 3663(f)(1) and (2). The restitution order should specify the manner in which, and the persons to whom, payment is to be~~

~~made.~~

Conforming Amendment:

[Entire §8B1.1 Deleted - Not shown]

**§8B1.1. Restitution - Organizations**

- (a) The court shall --
  - (1) enter a restitution order in the case of an identifiable victim of the offense for the full amount of the victim's loss, if such order is authorized under 18 U.S.C. § 2248, § 2259, § 2264, § 2327, § 3663, or § 3663A; or
  - (2) impose a term of probation with a condition requiring restitution in the case of an identifiable victim of the offense for the full amount of the victim's loss, if a restitution order would be authorized under 18 U.S.C. § 3663, except for the fact that the offense of conviction is not an offense under Title 18, United States Code, 21 U.S.C. § 841, § 848(a), § 849, § 856, § 861, or § 863, or 49 U.S.C. § 46312, § 46502, or § 46504.
- (b) *Provided*, that the provisions of subsection (a) do not apply --
  - (1) when full restitution has been made; or
  - (2) in the case of a restitution order under § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed pursuant to subsection (a)(2) above, to the extent the court finds, from facts on the record, that (1) the number of identifiable victims is so large as to make restitution impracticable, or (2) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.
- (c) If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution.
- (d) A restitution order may direct the defendant to make a single, lump sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments. 18 U.S.C. § 3664(f)(3)(A). An in-kind payment may be in the form of (1) return of property; (2) replacement of property, or (3) if the victim agrees, services rendered to the victim or to a person or organization other than the victim. 18 U.S.C. § 3664(f)(4).
- (e) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic

circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.

(f) Special Instruction

- (1) This guideline applies only to a defendant convicted of an offense committed on or after November 1, 1997. Notwithstanding the provisions of §1B1.11 (Use of Guidelines Manual in Effect on Date of Sentencing), use the former §8B1.1 (set forth in Appendix C, amendment 537) in lieu of this guideline in any other case.

Commentary

*Background: Section 3553(a)(7) of Title 18 requires the court, "in determining the particular sentence to be imposed," to consider "the need to provide restitution to any victims of the offense." Orders of restitution are authorized under 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, and 3663A. For offenses for which an order of restitution is not authorized, restitution may be imposed as a condition of probation.*

\* \* \*

**(B). Issue for Comment:** Community Restitution -- Section 205 of the Antiterrorism and Effective Death Penalty Act of 1996 authorizes district courts to order "community restitution" when sentencing a defendant convicted of an offense described in 21 U.S.C. § 841, § 848(a), § 849, § 856, § 861, or § 863 in which there is no identifiable individual victim. The Act further directs the Commission to promulgate guidelines, based on the amount of public harm caused by the offense and not to exceed the amount of the fine ordered for the offense, to assist courts in determining the appropriate amount of community restitution to be ordered in individual cases.

The Commission requests comment regarding implementation of this directive in order to effectuate fully congressional intent. The Commission specifically requests comment on (1) how the Commission should determine the appropriate amount of community restitution to be ordered, (2) whether it would be appropriate to determine the amount of community restitution by reference to the fine table found at §5E1.2 of the Guidelines Manual, (3) whether it would be appropriate to apportion a specific percentage of any fine ordered under the current guidelines to community restitution, and (4) if it is appropriate to apportion a specific percentage of any fine ordered under the current guidelines to community restitution, whether the Commission should adjust the fine table.

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**32. Synopsis of Proposed Amendment:** This amendment implements section 210 of the Antiterrorism and Effective Death Penalty Act of 1996. Section 210 amends 18 U.S.C. § 3013(a)(2) to provide for a special assessment, in the case of a felony, of not less than \$100 for an individual and not less than \$400 for an organization.

[Entire §5E1.3 Deleted - Not shown]

§5E1.3. Special Assessments

- (a) In the case of a defendant convicted of a felony offense committed on or after April 24, 1996, the special assessment shall be \$100.
- (b) In the case of a defendant convicted of --
  - (1) a misdemeanor offense or an infraction; or
  - (2) a felony offense committed prior to April 24, 1996,the special assessment shall be the amount fixed by statute (18 U.S.C. § 3013).

Commentary

Application Notes:

1. *This guideline applies only if the defendant is an individual. See §8E1.1 for special assessments applicable to organizations.*

*In the case of a felony conviction for an offense committed by an individual on or after April 24, 1996, this guideline specifies a special assessment in the amount of \$100. Any greater special assessment is a departure from this guideline.*

*In any other case, the special assessment is in the amount set forth by statute.*

2. *The following special assessments are provided by statute (18 U.S.C. § 3013):*

*For Offenses Committed By Individuals On Or After April 24, 1996:*

- (A) *Not less than \$100, if convicted of a felony;*
- (B) *\$25, if convicted of a Class A misdemeanor;*
- (C) *\$10, if convicted of a Class B misdemeanor or an infraction;*
- (D) *\$5, if convicted of an infraction or a Class C misdemeanor.*

*For Offenses Committed By Individuals On Or After November 18, 1988 But Prior To April 24, 1996:*

- (E) *\$50, if convicted of a felony;*
- (F) *\$25, if convicted of a Class A misdemeanor;*
- (G) *\$10, if convicted of a Class B misdemeanor or an infraction;*
- (H) *\$5, if convicted of an infraction or a Class C misdemeanor.*

*For Offenses Committed By Individuals Prior To November 18, 1988:*

- (I) *\$50, if convicted of a felony;*
- (J) *\$25, if convicted of a misdemeanor.*

3. *A special assessment is required by statute for each count of conviction.*

*Background: Section 3013 of Title 18, added by The Victims of Crimes Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.*

*In the case of felony conviction for an offense committed on or after April 24, 1996, the special assessment authorized by statute on each count is not less than \$100 if the defendant is an individual. No maximum limit is specified. In all other cases, the amount of the special assessment is fixed by statute.*

*The Commission has set the guideline for a special assessment for a felony offense committed by an individual on or after April 24, 1996 at \$100. The Commission believes a special assessment in this amount, combined with the restitution provisions in §5E1.1 (Restitution) and the fine provisions in §5E1.2 (Fines) (which increase with the seriousness of the offense committed), will provide an appropriate, coordinated financial penalty.*

[Entire §8E1.1 Deleted - Not shown]

**§8E1.1.            Special Assessments - Organizations**

- (a)     In the case of a defendant convicted of a felony offense committed on or after April 24, 1996, the special assessment shall be \$400.
  
- (b)     In the case of a defendant convicted of --
  - (1)     a misdemeanor offense or an infraction; or
  - (2)     a felony offense committed prior to April 24, 1996,

the special assessment shall be the amount fixed by statute (18 U.S.C. § 3013).

Commentary

Application Notes

1. *This guideline applies if the defendant is an organization. It does not apply if the defendant is an individual. See §5E1.3 for special assessments applicable to individuals.*

*In the case of a felony conviction for an offense committed by an organization on or after April 24, 1996, this guideline specifies a special assessment in the amount of \$400. Any greater special assessment is a departure from this guideline.*

*In any other case, the special assessment is in the amount set forth by statute.*

2. *The following special assessments are provided by statute (18 U.S.C. § 3013):*

*For Offenses Committed By Organizations On Or After April 24, 1996:*

- (A) *Not less than \$400, if convicted of a felony;*
- (B) *\$125, if convicted of a Class A misdemeanor;*
- (C) *\$50, if convicted of a Class B misdemeanor; or*
- (D) *\$25, if convicted of a Class C misdemeanor or an infraction.*

*For Offenses Committed By Organizations On Or After November 18, 1988 But Prior To April 24, 1996:*

- (E) *\$200, if convicted of a felony;*
- (F) *\$125, if convicted of a Class A misdemeanor;*
- (G) *\$50, if convicted of a Class B misdemeanor; or*
- (H) *\$25, if convicted of a Class C misdemeanor or an infraction.*

*For Offenses Committed By Organizations Prior To November 18, 1988:*

- (I) *\$200, if convicted of a felony;*
- (J) *\$100, if convicted of a misdemeanor.*

3. *A special assessment is required by statute for each count of conviction.*

*Background:* *Section 3013 of Title 18, added by The Victims of Crimes Act of 1984, Pub. L. No. 98-473, Title II, Chap. XIV, requires courts to impose special assessments on convicted defendants for the purpose of funding the Crime Victims Fund established by the same legislation.*

*In the case of felony conviction for an offense committed on or after April 24, 1996, the special assessment authorized by statute on each count is not less than \$400 if the defendant is an organization. No maximum limit is specified. In all other cases, the amount of the special assessment is fixed by statute.*

*The Commission has set the guideline for a special assessment for a felony offense committed by an organization on or after April 24, 1996 at \$400. The Commission believes a*

*special assessment in this amount, combined with the restitution provisions in Part B of this Chapter and the fine provisions in Part C of this Chapter (which increase with the seriousness of the offense committed), will provide an appropriate, coordinated financial penalty.*

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**33. Synopsis of Proposed Amendment:** This amendment creates an additional policy statement in Chapter Five, Part H as §5H1.13 (Susceptibility to Abuse in Prison and Designation of Prison (Policy Statement)). The amendment provides that neither susceptibility to abuse in prison nor the type of imprisonment facility designated for service of imprisonment is ordinarily relevant in determining a departure.

**§ 5H1.13. Susceptibility to Abuse in Prison and Designation of Prison Facility (Policy Statement)**

Neither susceptibility to abuse in prison nor the type of facility designated for service of a term of imprisonment is ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

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**34. Synopsis of Proposed Amendment:** This amendment proposes to make changes to policy statement §5K2.0 (Grounds for Departure). The proposed amendment moves language discussing departure policies from the Introduction of the Guidelines Manual to §5K2.0; deletes a sentence that, under the proposed emergency amendment to the immigration guidelines, will no longer be apt; adds a citation to Koon v. United States, 116 S.Ct. 2035 (1996) to reflect the greater deference to be accorded district court departure decisions by the appellate courts; adds a sentence stating that departures must be consistent with the purposes of sentencing and Sentencing Reform Act goals; and makes minor changes to improve the precision of the language.

**§5K2.0. Grounds for Departure (Policy Statement)**

~~Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."~~**The Sentencing Reform Act permits a court to depart from a guideline range when it finds "an aggravating or mitigating circumstance, of a kind or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."** 18 U.S.C. § 3553(b). The Commission intends for sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies, but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. With the few exceptions noted below, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

Factors that the court may not take into account as grounds for departure are:

- (1) race, sex, national origin, creed, religion, and socio-economic status (See §5H1.10);
- (2) lack of guidance as a youth and similar circumstances (See §5H1.12);
- (3) drug or alcohol abuse (See §5H1.4);
- (4) personal financial difficulties and economic pressures upon a trade or business (See §5K2.12).

Circumstances that may warrant departure from the ~~guidelines~~ **guideline range** pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The ~~controlling~~ decision as to whether and to what extent departure is warranted ~~can only be~~ **most appropriately is** made by the ~~courts~~ **sentencing court on a case-specific basis**. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. The presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in **determining** the ~~guidelines~~ **guideline range** (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the ~~guideline level~~ **weight** attached to that factor **under the guidelines** is inadequate.

\* \* \*

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. ~~For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.~~

**Finally, An an** offender characteristic or other circumstance that, **in the Commission's view**, is "not ordinarily relevant" in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing.

#### Commentary

\* \* \*

*In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside*

the guideline range is not authorized. ~~See 18 U.S.C. § 3553(b).~~ Moreover, any cited basis for departure must be consistent with the statutory purposes of sentencing and the fundamental objectives of the Sentencing Reform Act. See 18 U.S.C. § 3553(a),(b); 28 U.S.C. § 991(b)(1). For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range.

The Supreme Court has determined that, in reviewing a district court's decision to depart from the guidelines, appellate courts are to apply an abuse of discretion standard. Koon v. United States, 116 S.Ct. 2035 (1996).

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**35. Synopsis of Proposed Amendment:** This amendment proposes to create an additional amendment in Chapter 5, Part K as §5K2.19 (Successive Federal Prosecutions (Policy Statement)). The amendment provides that a federal prosecution following another jurisdiction's prosecution for the same or similar conduct is not ordinarily relevant in determining a departure, except as authorized by §5G1.3 (Imposition of a Sentence on a Defendant subject to an Undischarged Term of Imprisonment).

**§5K2.19. Successive Federal Prosecution (Policy Statement)**

Prosecution and conviction in federal court following prosecution in another jurisdiction for the same or similar offense conduct is not ordinarily relevant in determining whether a sentence below the guideline range is warranted, except as authorized by §5G1.3 (Imposition of a Sentence on a Defendant subject to an Undischarged Term of Imprisonment). In circumstances not covered by §5G1.3, concerns about the impact of successive prosecutions must be carefully weighed against concerns relating to the legitimate exercise of prosecutorial authority by separate sovereigns.

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**36. Synopsis of Proposed Amendment:** This amendment makes a number of technical changes to Chapter Six (Sentencing Procedures and Plea Agreements) to reflect changes recently made in the structure of Rule 32, Fed. R. Crim. P.

**§6A1.1. Presentence Report (Policy Statement)**

A probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record. Rule 32(c)(1)(b)(1), Fed. R. Crim. P. The defendant may not waive preparation of the presentence report.

*Commentary*

*A thorough presentence investigation is essential in determining the facts relevant to sentencing. In order to ensure that the sentencing judge will have information sufficient to determine the appropriate sentence, Congress deleted provisions of Rule 32(c), Fed. R. Crim. P., which previously permitted the defendant to waive the presentence report. Rule 32(c)(1)(b)(1) permits the judge to dispense with a presentence report, but only after explaining, on the record, why sufficient information is already available.*

**§6A1.2. Disclosure of Presentence Report; Issues in Dispute (Policy Statement)**

Courts should adopt procedures to provide for the timely disclosure of the presentence report; the narrowing and resolution, where feasible, of issues in dispute in advance of the sentencing hearing; and the identification for the court of issues remaining in dispute. ~~See Model Local Rule for Guideline Sentencing prepared by the Probation Committee of the Judicial Conference (August 1987)~~ **Rule 32(b)(6), Fed. R. Crim. P..**

*Commentary*

*Application Note:*

1. Under Rule 32, Fed.R.Crim. P., if the court intends to consider a sentence outside the applicable guideline range on a ground not identified as a ground for departure either in the presentence report or a pre-hearing submission, it shall provide reasonable notice that it is contemplating such ruling, specifically identifying the ground for the departure. *Burns v. United States*, ~~11 S.Ct 2182~~ **501 U.S. 129, 135-39** (1991).

*Background:* In order to focus the issues prior to sentencing, the parties are required to respond **in writing** to the presentence report and to identify any issues in dispute. ~~The potential complexity of factors important to the sentencing determination normally requires that the position of the parties be presented in writing. However, because courts differ greatly with respect to their reliance on written plea agreements and with respect to the feasibility of written statements under guidelines, district courts are encouraged to consider the approach that is most appropriate under local conditions. The Commission intends to reexamine this issue in light of experience under the guidelines.~~ **Rule 32(b)(6)(B), Fed. R. Crim. P.**

**§6A1.3. Resolution of Disputed Factors (Policy Statement)**

- (a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the

court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

- (b) The court shall resolve disputed sentencing factors **at a sentencing hearing** in accordance with Rule 32 (a)(1)(c)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), ~~notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.~~

#### Commentary

*In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a ~~reasonable~~ dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. See United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979) cert. denied, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.*

*In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." United States v. Marshall, 519 F. Supp. 751 (E.D. Wis. 1981), aff'd, 719 F.2d 887 (7th Cir. 1983); United States v. Fatico, 579 F.2d 707 (2d Cir. 1978) cert. denied, 444 U.S. 1073 (1980). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." United States v. Fatico, 579 F.2d at 713. Unreliable allegations shall not be considered. United States v. Weston, 448 F.2d 626 (9th Cir. 1971) cert. denied, 404 U.S. 1061 (1972).*

*The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.*

~~*If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.*~~

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**37. Synopsis of Proposed Amendment** This amendment consolidates a number of Chapter Two offense guidelines. There are several advantages to consolidation of offense guidelines: (1) shortening the Guidelines Manual and simplifying its application and appearance; (2) reducing the potential for inconsistency in phraseology and definitions between closely related offense guidelines (and litigation as to the meaning of such differences); (3) reducing the potential for inadvertent, unwarranted inconsistency in offense levels among closely related offense guidelines; (4) reducing the potential for uncertainty (and resulting litigation) as to which offense guideline applies when one statute references two or more closely related offense guidelines; (5) making application of the rules relating to the grouping of multiple counts of conviction simpler by reducing the frequency of cases in which the offense levels have to be determined under more than one guideline using aggregate quantity and then compared (see §3D1.3(b)); (6) reducing the number of cross references in the Guidelines Manual and the added calculations entailed; (7) aiding the development of case law because cases involving similar or identical concepts will be referenced under one guideline section rather than different guideline sections; and (8) reducing the number of conforming amendments required when the guidelines are amended.

However, the proposed consolidation of offense guidelines may raise one or more of the following concerns: (1) some of the proposals result, or may result, in a change in offense levels for some offenses (due mainly to the application of specific offense characteristics and cross references as a result of consolidation); (2) some of the proposals may move closer to a “real offense” system with respect to offense behavior covered by those proposals; and (3) some of the proposals implicate other policy issues (e.g., through the elimination of specific offense characteristics).

**(A) Consolidation of §§2A1.5 and 2E1.4**

**Synopsis of Proposed Amendment:** Section 2E1.4 (Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire) is consolidated with §2A1.5 (Conspiracy or Solicitation to Commit Murder) with no change in offense levels. The base offense level of 32 under §2E1.4 is represented in the consolidation by a base offense level of 28 plus four levels for pecuniary gain under subsection (b)(2). The 4-level enhancement for pecuniary gain always should apply to murder-for-hire offenses under §2E1.4. This amendment also eliminates the cross reference in §2A1.5(c)(2) and replaces it with a bodily injury enhancement in subsection (b)(1).

The 1993 Annual Report (FY 93) shows 31 cases sentenced under §2A1.5 (in 13 of those it was the primary guideline) and 26 cases sentenced under §2E1.4 (in 24 of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 28 cases sentenced under §2A1.5 (in 18 of those it was the primary guideline) and 31 cases sentenced under §2E1.4 (in 23 of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 25 cases sentenced under §2A1.5 (in 16 of those it was the primary guideline) and 20 cases sentenced under §2E1.4 (in 15 of those it was the primary guideline).

Consolidated Guideline:

**§2A1.5. Conspiracy or Solicitation to Commit Murder; Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire**

- (a) Base Offense Level: **28**
- (b) Specific Offense Characteristic
  - (1) (A) If the victim sustained permanent or life-threatening bodily injury, increase by **4** levels; or (B) if the victim sustained serious bodily injury, increase by **2** levels.
  - (2) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by **4** levels.
- (c) Cross References
  - (1) If the offense resulted in the death of a victim, apply §2A1.1 (First Degree Murder).
  - (2) ~~If the offense resulted in an attempted murder or assault with intent to commit murder, apply §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder).~~

Commentary

Statutory Provisions: 18 U.S.C. §§ 351(d), 371, 373, 1117, 1751(d), 1958 (formerly 18 U.S.C. § 1952A).

Application Notes:

1. Definitions of “serious bodily injury” and “permanent or life-threatening bodily injury” are found in the Commentary to §1B1.1 (Application Instructions).
2. If the offense involved a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted.

Guideline Deleted:

~~§2E1.4. Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire~~

- ~~(a) Base Offense Level (Apply the greater):~~
  - ~~(1) **32**; or~~
  - ~~(2) the offense level applicable to the underlying unlawful conduct.~~

Commentary

~~Statutory Provision: 18 U.S.C. § 1958 (formerly 18 U.S.C. § 1952A).~~

~~Application Note:~~

- ~~1. If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.~~

~~Background: This guideline and the statute to which it applies do not require that a murder actually have been committed.~~

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**(B) Consolidation of §§2A2.3 and 2A2.4**

**Synopsis of Proposed Amendment:** Section 2A2.4 (Obstructing or Impeding Officers) is consolidated with §2A2.3 (Minor Assault). The resulting offense levels are the same as those under the current guidelines except for the following differences. First, the cross reference to aggravated assault (shown as an option under the consolidated guideline) would now apply to offenses under §2A2.3; currently, the cross reference to aggravated assault applies only to §2A2.4. Second, the enhancement for official victim in the consolidated guideline would now apply to minor assault cases under §2A2.3. Similarly, the upward departure provision for significant disruption of governmental function (Application Note 3 of the consolidated guideline) would apply to minor assault cases.

In addition, there is a split among the circuits as to whether subsection (c) refers to the conviction offense or is based on consideration of the underlying conduct (compare United States v. Jennings, 991 F.2d 725 (11th Cir. 1993) with United States v. Padilla, 961 F.2d 322 (2d Cir.), cert. denied, 506 U.S. 846 (1992)). There seems no reason for the cross reference to apply to one guideline but not the other. Two options are provided. If the bracketed language (subsection (c)) is included, the cross reference to §2A2.2 will apply on the basis of the underlying conduct (i.e., whether the assault was an aggravated or simple assault will be a sentencing rather than a charge offense factor). If the bracketed language is not included, §2A2.2 will apply only if established by the offense of conviction (see §1B12 (Applicable Guidelines)).

The 1993 Annual Report (FY 93) shows 26 cases sentenced under §2A2.3 (in 25 of those it was the primary guideline) and 97 cases sentenced under §2A2.4 (in 83 of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 27 cases sentenced under §2A2.3 (in 22 of those it was the primary guideline) and 85 cases under §2A2.4 (in 73 of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 24 cases sentenced under §2A2.3 (in 19 of those it was the primary guideline) and 120 cases sentenced under §2A2.4 (in 98 of those it was the primary guideline).

Consolidated Guideline:

§2A2.3. **Minor Assault; Obstructing or Impeding Officers**

- (a) Base Offense Level:
  - (1) **6**, if the conduct involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened; or
  - (2) **3**, otherwise.
- (b) Specific Offense Characteristics
  - (1) If the offense involved obstructing or impeding a governmental officer in the performance of his duty, increase by **3** levels.
  - (±2) If the offense ~~resulted in~~involved substantial bodily injury to an individual under the age of sixteen years, increase by **4** levels.
- [(c) Cross Reference
  - (1) If the offense involved aggravated assault, apply §2A2.2 (Aggravated Assault). ]

Commentary

Statutory Provisions: 18 U.S.C. §§ **111, 112, 115(a), 115(b)(1), 351(e), 1501, 1502, 1751(e), 3056(d)**. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

- ~~1. "Minor assault" means a misdemeanor assault, or a felonious assault not covered by §2A2.2.~~
- ~~2. Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions).~~
- ~~3. "Substantial bodily injury" means "bodily injury which involves - (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." 18 U.S.C. § 113(b)(1).~~

**1. For purposes of this guideline)**

*"Minor assault" means a misdemeanor assault, or a felonious assault not covered by §2A2.2 (Aggravated Assault).*

*"Firearm" and "dangerous weapon" have the meaning given such terms in the Commentary to §1B1.1 (Application Instructions).*

*"Substantial bodily injury" means "bodily injury which involves (A) a temporary but substantial disfigurement; or (B) a temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." See 18 U.S.C. § 113(b)(1).*

- 2. Subsection (b)(1) reflects the fact that the victim was a governmental officer performing official duties. If subsection (b)(1) applies, do not apply §3A1.2 (Official Victim) unless the offense level is determined by use of the cross reference in subsection (c).**

3. *The offense level under this guideline does not assume any significant disruption of governmental functions. In situations involving such disruption, an upward departure may be warranted. See §5K2.7 (Disruption of Governmental Function).*

~~*Background:* Minor assault and battery are covered in this section.~~

~~Guideline Deleted:~~

~~§2A2.4. **Obstructing or Impeding Officers**~~

~~(a) Base Offense Level: 6~~

~~(b) Specific Offense Characteristic~~

~~(1) If the conduct involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened, increase by 3 levels.~~

~~(c) Cross Reference~~

~~(1) If the conduct constituted aggravated assault, apply §2A2.2 (Aggravated Assault).~~

~~*Commentary*~~

~~*Statutory Provisions:* 18 U.S.C. §§ 111, 1501, 1502, 3056(d).~~

~~*Application Notes:*~~

~~1. The base offense level reflects the fact that the victim was a governmental officer performing official duties. Therefore, do not apply §3A1.2 (Official Victim) unless subsection (c) requires the offense level to be determined under §2A2.2 (Aggravated Assault).~~

~~2. Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions).~~

~~3. The base offense level does not assume any significant disruption of governmental functions. In situations involving such disruption, an upward departure may be warranted. See §5K2.7 (Disruption of Governmental Function).~~

~~*Background:* Violations of 18 U.S.C. §§ 1501, 1502, and 3056(d) are misdemeanors; violation of 18 U.S.C. § 111 is a felony. The guideline has been drafted to provide offense levels that are identical to those otherwise provided for assaults involving an official victim; when no assault is involved, the offense level is 6.~~

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**(C) Consolidation of §§2B1.1, 2B1.3, 2B6.1, and 2H3.3**

**Synopsis of Proposed Amendment:** This is a three-part amendment. First, §2B13 (Property Damage or Destruction) is consolidated with §2B1.1 (Larceny, Embezzlement, and

Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property) with no change in offense levels.

Second, §2B6.1 (Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers) is consolidated with §2B1.1. Section 2B6.1 is, in effect, a stolen property guideline limited to stolen automobiles and automobile parts with altered or obliterated identification numbers. The offense levels resulting from application of the current guidelines in most cases are identical. The only differences are that §2B6.1 has a built-in adjustment for more than minimal planning and a loss of at least \$2,000. In the small percentage of cases in which the loss is \$1,000 or less, or more than minimal planning is not found, the offense level from §2B6.1 is higher than from §2B1.1. To ensure no reduction in offense level (with respect to the more than minimal planning adjustment) under the consolidated guideline, an application note is added providing that more than minimal planning is deemed present when the offense involved altering or removing an automobile or automobile part identification number or trafficking in an automobile or automobile part with an altered or obliterated identification number. Therefore, under the consolidated guideline, if the value of the vehicle(s) or part(s) is more than \$1,000, the offense level will be the same as under the current guidelines. The only difference in offense level between the current and proposed guideline is that if the value of the vehicle(s) or part(s) is \$100 or less, the offense level under the consolidated guideline will be 6 rather than 8; and if the value of the vehicle(s) or part(s) is \$101-\$1,000, the offense level under the consolidated guideline will be 7 rather than 8. In FY 95, 4.3% of cases (i.e., 3 of 70 cases) sentenced under §2B6.1 did not receive an enhancement under §2B6.1(b)(1) because the value of the vehicle was less than \$2,000.

Third, the consolidation of §§2B1.1 and 2B1.3 allows the consolidation of §2H3.3 (Obstructing Correspondence) with §2B1.1. No substantive change in offense levels would result.

The 1993 Annual Report (FY 93) shows 3,902 cases sentenced under §§2B1.1 and 2B1.2 (which is now consolidated with §2B1.1; in 3,769 of those they were the primary guidelines), 79 cases sentenced under §2B1.3 (in 74 of those it was the primary guideline), 93 cases sentenced under §2B6.1 (in 85 of those it was the primary guideline), and 17 cases sentenced under §2H3.3 (in all of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 3,712 cases sentenced under §§2B1.1/2B1.2 (in 3,598 of those they were the primary guidelines), 62 cases sentenced under §2B1.3 (in 56 of those it was the primary guideline), 55 cases sentenced under §2B6.1 (in 51 of those it was the primary guideline), and nine cases sentenced under §2H3.3 (in all of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 3,265 cases sentenced under §§2B1.1/2B1.2 (in 3,152 of those they were the primary guidelines), 81 cases sentenced under §2B1.3 (in 77 of those it was the primary guideline), 75 cases sentenced under §2B6.1 (in 70 of those it was the primary guideline), and seven cases sentenced under §2H3.3 (in all of those it was the primary guideline).

Consolidated Guideline:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property; Property Damage or Destruction; Obstructing Correspondence

- (a) Base Offense Level: 4
- (b) Specific Offense Characteristics

\* \* \*

- (3) If (A) undelivered United States mail was taken, destroyed, or obstructed, or (B) the taking, destruction, or obstruction of undelivered United States mail of such item was an object of the offense; or (BC) the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, and the offense level as determined above is less than level 6, increase to level 6.

\* \* \*

- (5) If the offense involved an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts, and the offense level as determined above is less than level 14, increase to level 14.

\* \* \*

- (c) Cross References

\* \* \*

- (2) If the offense involved arson, or property destruction by use of explosives, apply §2K1.4 (Arson; Property Destruction by Use of Explosives) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 225, 511, 553(a)(1), (2), 641, 656, 657, 659, 662, 664, 1361, 1702, 1703, 1708, 2113(b), 2312-2317, 2321; 29 U.S.C. § 501(c). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

\* \* \*

15. *In some cases, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused. For example, the destruction of a \$500 telephone line may cause an interruption in service to thousands of people for several hours. In such instances, an upward departure may be warranted.*

16. *More than minimal planning shall be deemed present in any offense involving altering or*

*removing an automobile (or automobile part) identification number or trafficking in an automobile (or automobile part) with an altered or obliterated identification number.*

*Background: This guideline covers offenses involving theft, stolen property, and property damage or destruction. It also covers offenses involving altering or removing motor vehicle identification numbers, trafficking in automobiles or automobile parts with altered or obliterated identification numbers, and obstructing correspondence.*

\* \* \*

*~~Consistent with statutory distinctions, an~~An increased minimum offense level is provided for the theft, **destruction, or obstruction** of undelivered mail. ~~Theft of undelivered mail interferes with a governmental function, and the scope of the theft may be difficult to ascertain~~**because theft, destruction, or obstruction of undelivered mail inherently interferes with a governmental function.***

\* \* \*

*A minimum offense level of 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts **or to receive stolen vehicles or vehicle parts**. Typically, the scope of such activity is substantial (*i.e.*, the value of the stolen property, combined with an enhancement for "more than minimal planning" would itself result in an offense level of at least 14), but the value of the property is particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of "organized scheme" is used as an alternative to "loss" in setting the offense level.*

\* \* \*

Guidelines Deleted:

~~§2B1.3. **Property Damage or Destruction**~~

~~(a) Base Offense Level: **4**~~

~~-~~

~~(b) Specific Offense Characteristics~~

~~(1) If the loss exceeded \$100, increase by the corresponding number of levels from the table in §2B1.1.~~

~~(2) If undelivered United States mail was destroyed, and the offense level as determined above is less than level **6**, increase to level **6**.~~

~~(3) If the offense involved more than minimal planning, increase by **2** levels.~~

~~(c) Cross Reference~~

~~(1) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives).~~

~~Commentary~~

~~Statutory Provisions: 18 U.S.C. §§ 1361, 1363, 1702, 1703 (if vandalism or malicious mischief,~~

~~including destruction of mail is involved). For additional statutory provision(s), see Appendix A (Statutory Index).~~

Application Notes:

- ~~1. "More than minimal planning" is defined in the Commentary to §1B1.1 (Application Instructions).~~
- ~~2. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).~~
- ~~3. "Undelivered United States mail" means mail that has not been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mailbox).~~
- ~~4. In some cases, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused. For example, the destruction of a \$500 telephone line may cause an interruption in service to thousands of people for several hours. In such instances, an upward departure would be warranted.~~

**§2B6.1. Altering or Removing Motor Vehicle Identification Numbers, or Trafficking in Motor Vehicles or Parts with Altered or Obliterated Identification Numbers**

~~(a) Base Offense Level: 8~~

~~(b) Specific Offense Characteristics~~

- ~~(1) If the retail value of the motor vehicles or parts involved exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit):~~
- ~~(2) If the defendant was in the business of receiving and selling stolen property, increase by 2 levels.~~
- ~~(3) If the offense involved an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts, and the offense level as determined above is less than level 14, increase to level 14.~~

Commentary

Statutory Provisions: ~~18 U.S.C. §§ 511, 553(a)(2), 2321.~~

Application Notes:

- ~~1. Subsection (b)(3), referring to an "organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts," provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or "chop shop." "Vehicles" refers to all forms of vehicles, including aircraft and watercraft. See Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).~~
- ~~2. The "corresponding number of levels from the table in §2F1.1 (Fraud and Deceit)," as used in subsection (b)(1), refers to the number of levels corresponding to the retail value of the~~

~~motor vehicles or parts involved.~~

~~*Background:* The statutes covered in this guideline prohibit altering or removing motor vehicle identification numbers, importing or exporting, or trafficking in motor vehicles or parts knowing that the identification numbers have been removed, altered, tampered with, or obliterated. Violations of 18 U.S.C. §§ 511 and 553(a)(2) carry a maximum of five years imprisonment. Violations of 18 U.S.C. § 2321 carry a maximum of ten years imprisonment.~~

~~§2H3.3. **Obstructing Correspondence**~~

~~(a) Base Offense Level:~~

~~(1) 6; or~~

~~(2) if the conduct was theft of mail, apply §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft);~~

~~(3) if the conduct was destruction of mail, apply §2B1.3 (Property Damage or Destruction).~~

~~*Commentary*~~

~~*Statutory Provision:* 18 U.S.C. § 1702. For additional statutory provision(s), see Appendix A (Statutory Index).~~

~~*Background:* The statutory provision covered by this guideline is sometimes used to prosecute offenses more accurately described as theft or destruction of mail. In such cases, §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or §2B1.3 (Property Damage or Destruction) is to be applied.~~

~~Conforming Amendment to §2K1.4:~~

~~§2K1.4. **Arson; Property Damage by Use of Explosives**~~

~~(a) Base Offense Level (Apply the Greatest):~~

~~\* \* \*~~

~~(4) 2 plus the offense level from §2B1.3 (Property Damage or Destruction) §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property; Property Damage or Destruction; Obstructing Correspondence).~~

~~\* \* \*~~

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**(D) Consolidation of §§2C1.2 and 2C1.6**

**Synopsis of Proposed Amendment:** This amendment consolidates §§2C1.2 (Offering Giving, Soliciting, or Receiving a Gratuity) and 2C1.6 (Loan or Gratuity to Bank Examiner,

or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper). Both guidelines cover offenses involving gratuities and have identical base offense levels. There are, however, several inconsistencies between §§2C1.2 and 2C1.6. Section 2C1.2 (like §2C1.1) contains enhancements for multiple instances and involvement of high-level officials, but §2C1.6 does not contain these enhancements. Section 2C1.2 has a special instruction pertaining to fines for organizations; §2C1.6 does not contain this instruction. This amendment removes these inconsistencies. In addition, this amendment adds an application note to clarify that the unlawful payment involved need not be a monetary payment.

The 1993 Annual Report (FY 93) shows 15 cases sentenced under §2C1.2 (in 13 of those it was the primary guideline) and one case sentenced under §2C1.6 (in that case it was the primary guideline).

The 1994 Annual Report (FY 94) shows 39 cases sentenced under §2C1.2 (in 37 of those it was the primary guideline) and no cases sentenced under §2C1.6.

The 1995 Annual Report (FY 95) shows 37 cases sentenced under §2C1.1 (in 35 of those it was the primary guideline) and no cases sentenced under §2C1.6.

Consolidated Guideline:

**§2C1.2. Offering, Giving, Soliciting, or Receiving a Gratuity**

- (a) Base Offense Level: 7
- (b) Specific Offense Characteristic
  - (1) If the offense involved more than one gratuity, increase by 2 levels.
  - (2) (If more than one applies, use the greater):
    - (A) If the value of the ~~gratuity~~unlawful payment exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).
    - (B) If the ~~gratuity~~unlawful payment was given, or to be given, to an elected official or any official holding a high-level decision-making or sensitive position, increase by 8 levels.
- (c) Special Instruction for Fines - Organizations
  - (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the value of the unlawful payment.

Commentary

Statutory Provisions: 18 U.S.C. §§ 201(c)(1), 212, 214, 217, 666. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

\* \* \*

5. *An unlawful payment may be anything of value; it need not be a monetary payment.*

\* \* \*

Background: This section applies to the offering, giving, soliciting, or receiving of a gratuity to a public official in respect to an official act. ~~A corrupt purpose is not an element of this offense. The maximum term of imprisonment authorized by statute for these offenses is two years. An adjustment is provided where the value of the gratuity exceeded \$2,000, or where the public official was an elected official or held a high-level decision-making or sensitive position.~~ *It also applies to the offer to, or acceptance by, a bank examiner of any unlawful payment; the offer or receipt of anything of value for procuring a loan or discount of commercial paper from a Federal Reserve Bank; and the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt.*

Guideline Deleted:

~~§2C1.6. Loan or Gratuity to Bank Examiner, or Gratuity for Adjustment of Farm Indebtedness, or Procuring Bank Loan, or Discount of Commercial Paper~~

~~\_\_\_\_\_ (a) Base Offense Level: 7~~

~~\_\_\_\_\_ (b) Specific Offense Characteristic~~

~~\_\_\_\_\_ (1) If the value of the gratuity exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).~~

~~\_\_\_\_\_ Commentary~~

~~Statutory Provisions: 18 U.S.C. §§ 212-214, 217.~~

~~Application Note:~~

~~1. Do not apply the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill).~~

~~Background: Violations of 18 U.S.C. §§ 212 and 213 involve the offer to, or acceptance by, a bank examiner of a loan or gratuity. Violations of 18 U.S.C. § 214 involve the offer or receipt of anything of value for procuring a loan or discount of commercial paper from a Federal Reserve bank. Violations of 18 U.S.C. § 217 involve the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt. These offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year.~~

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## **(E) Consolidation of §§2C1.3, 2C1.4, and 2C1.5**

**Synopsis of Proposed Amendment:** This amendment consolidates §§2C1.3 (Conflict of Interest), 2C1.4 (Payment or Receipt of Unauthorized Compensation), and 2C1.5 (Payments to Obtain Public Office).

Although the elements of the offenses of conflict of interest (currently covered by §2C1.3) and unauthorized compensation (currently covered by §2C1.4) payment differ in some ways, the gravamen of the offenses is similar - unauthorized receipt of a payment in respect to an official act. The base offense levels for both guidelines are identical. The few cases in which these guidelines were applied usually involved a conflict of interest offense that was associated with a bribe or gratuity; i.e., the conflict of interest statute was used as a plea bargaining statute.

Note that there may be a change in offense levels for some cases if the cross reference to the guidelines for offenses involving a bribe or gratuity is provided. If the bracketed language (subsection

(c)) is included, a cross reference to §2C1.1 or §2C1.2 will apply on the basis of the underlying conduct; i.e., as a sentencing factor rather than a charge of conviction factor.

Offenses involving payment to obtain public office (currently covered by §2C1.5) generally, but not always, involve the promised use of influence to obtain public appointive office. Also, such offenses need not involve a public official (see, for example, the second paragraph of 18 U.S.C. § 211). The current offense level for all such offenses is level 8. The two statutes to which §2C1.5 applies (18 U.S.C. §§ 210 and 211) are both Class A misdemeanors.

Under the proposed consolidation, the base offense level would be level 6, but the higher base offense level of §2C1.5 would be taken into account by a 2-level enhancement in subsection (b)(2) covering conduct under 18 U.S.C. § 210 and the first paragraph of 18 U.S.C. § 211. There is one circumstance in which a lower offense level may result and one circumstance in which a higher offense level may result. The offense level for conduct under the second paragraph of 18 U.S.C. § 211 (the prong of § 211 that does not pertain to the promise or use of influence) is reduced to level 6. On the other hand, conduct that involves a bribe of a government official will result in an increased offense level (level 10 or greater) under the proposed cross reference.

The 1993 Annual Report (FY 93) shows four cases sentenced under §2C1.3 (in all of those it was the primary guideline), seven cases sentenced under §2C1.4 (in all of those it was the primary guideline), and no cases sentenced under §2C1.5.

The 1994 Annual Report (FY 94) shows 16 cases sentenced under §2C1.3 (in 13 of those it was the primary guideline), 16 cases sentenced under §2C1.4 (in 15 of those it was the primary guideline), and one case sentenced under §2C1.5 (in that case it was the primary guideline).

The 1995 Annual Report (FY 95) shows 10 cases sentenced under §2C1.3 (in all of those it was the primary guideline), six cases sentenced under §2C1.4 (in all of those it was the primary guideline), and no cases sentenced under §2C1.5.

Consolidated Guideline:

**§2C1.3. Conflict of Interest; Payment or Receipt of Unauthorized Compensation; Payments to Obtain Public Office**

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristic
  - (1) If the offense involved actual or planned harm to the government, increase by **4** levels.
  - (2) **If the offense involved (A) the payment, offer, or promise of any money or thing of value in consideration of the use of, or promise to use, any influence to procure an appointive federal position for any person; or (B) the solicitation or receipt of any money or thing or value in consideration of the promise of support, or use of influence, in obtaining an appointive federal position for any person, increase**

by 2 levels.

[ (c) Cross Reference

- (1) If the offense involved a bribe or gratuity, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than determined above.]

Commentary

Statutory Provisions: 18 U.S.C. §§ 203, 205, 207, 208, 209, 210, 211, 1909. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. Do not apply the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: This section applies to financial and non-financial conflicts of interest by present and former federal officers and employees. The maximum term of imprisonment authorized by statute is two years.

Guidelines Deleted:

~~§2C1.4. — Payment or Receipt of Unauthorized Compensation~~

~~———— (a) — Base Offense Level: 6~~

~~———— Commentary~~

~~Statutory Provisions: 18 U.S.C. §§ 209, 1909.~~

~~Application Note:~~

- ~~1. — Do not apply the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill).~~

~~Background: Violations of 18 U.S.C. § 209 involve the unlawful supplementation of salary of various federal employees. 18 U.S.C. § 1909 prohibits bank examiners from performing any service for compensation for banks or bank officials. Both offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year.~~

~~§2C1.5. — Payments to Obtain Public Office~~

~~———— (a) ——— Base Offense Level: 8~~

~~————— Commentary~~

~~Statutory Provisions: 18 U.S.C. §§ 210, 211.~~

~~Application Note:~~

~~1. ——— Do not apply the adjustment in §3B1.3 (Abuse of Position of Trust or Use of Special Skill).~~

~~Background: Under 18 U.S.C. § 210, it is unlawful to pay, offer, or promise anything of value to a person, firm, or corporation in consideration of procuring appointive office. Under 18 U.S.C. § 211, it is unlawful to solicit or accept anything of value in consideration of a promise of the use of influence in obtaining appointive federal office. Both offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year.~~

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**(F) Consolidation of §§2D1.9 and 2D1.10**

**Synopsis of Proposed Amendment:** Section 2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance; Attempt or Conspiracy) is consolidated with §2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy). The offenses covered by both guidelines essentially involve endangering human life while manufacturing a controlled substance. The treatment under the current guidelines, however, is very different. Under §2D1.9 (effective 11/1/87), the offense level is 23, with no additional characteristics. Under §2D1.10 (effective 11/1/89), the offense level is the greater of 20, or 3 plus the offense level from the underlying drug offense. In the consolidated guideline, the structure from §2D1.10 (the more recently adopted guideline) is used. Two bracketed options (level 20 or level 23) are provided for the alternative base offense level in subsection (a)(2). If level 20 is provided as the alternative base offense level under subsection (a)(2), a change in offense levels for some cases under §2D1.9 may result. The base offense level currently is 23 for offenses under §2D1.9. The base offense level applicable for such offenses under the consolidation with §2D1.10 would be either 3 plus the offense level from the Drug Quantity Table in §2D1.1; or 20.

The 1993 Annual Report (FY 93) shows no cases sentenced under §2D1.9 or §2D1.10.

The 1994 Annual report (FY 94) shows no cases sentenced under §2D1.9 and four cases sentenced under §2D1.10 (in all of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows no cases sentenced under §2D1.9 and four cases sentenced under §2D1.10 (in all of those it was the primary guideline).

Consolidated Guideline:

§2D1.109. **Endangering Human Life While Illegally Manufacturing a Controlled Substance;**

**Attempt or Conspiracy; Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy**

- (a) Base Offense Level (Apply the greater):
- (1) 3 plus the offense level from the Drug Quantity Table in §2D1.1; or
  - (2) [20][23].

*Commentary*

*Statutory Provision:* 21 U.S.C. §§ 841(e), 858.

Guideline Deleted:

~~§2D1.9. **Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances; Attempt or Conspiracy**~~

- ~~(a) Base Offense Level: 23~~

~~*Commentary*~~

~~*Statutory Provision:* 21 U.S.C. § 841(e)(1).~~

~~*Background:* This section covers the offense of assembling, placing, or causing to be placed, or maintaining a "booby-trap" on federal property where a controlled substance is being manufactured or distributed.~~

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**(G) Consolidation of §§2D2.1 and 2D2.2**

**Synopsis of Proposed Amendment:** Sections 2D2.2 (Acquiring a Controlled Substance by Forgery, Fraud, Deception, or Subterfuge; Attempt or Conspiracy) and 2D2.1 (Unlawful Possession; Attempt or Conspiracy) are consolidated. The only substantive change is that any adjustment for acquiring a controlled substance by forgery, fraud, deception, or subterfuge will be determined as a sentencing factor rather than on the basis of the offense of conviction.

The 1993 Annual Report shows 961 cases sentenced under §2D2.1 (in 904 of those it was the primary guideline) and 38 cases sentenced under §2D2.2 (in 34 of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 845 cases sentenced under §2D2.1 (in 809 of those it was the primary guideline) and 46 cases sentenced under §2D2.2 (in 41 of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 630 cases sentenced under §2D2.1 (in 587 of those

it was the primary guideline), 24 cases sentenced under §2D2.2 (in 17 of those it was the primary guideline).

Consolidated Guideline:

**§2D2.1. Unlawful Possession of a Controlled Substance; Acquiring a Controlled Substance by Misrepresentation, Forgery, Fraud, Deception, or Subterfuge; Attempt or Conspiracy**

(a) Base Offense Level:

- (1) **8**, if the substance is heroin or any Schedule I or II opiate, an analogue of these, or cocaine base; or
- (2) **6**, if the substance is cocaine, LSD, or PCP; or
- (3) **4**, if the substance is any other controlled substance.

(b) **Specific Offense Characteristic**

- (1) **If the offense involved acquiring a controlled substance from a legally authorized source by misrepresentation, forgery, fraud, deception, or subterfuge, increase by 2 levels. If the resulting offense level is less than level 8, increase to level 8.**

(c) **Cross References**

- (1) If the defendant is convicted of possession of more than 5 grams of a mixture or substance containing cocaine base, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) as if the defendant had been convicted of possession of that mixture or substance with intent to distribute.
- (2) If the offense involved possession of a controlled substance in a prison, correctional facility, or detention facility, apply §2P1.2 (Providing or Possessing Contraband in Prison) **if the resulting offense level is greater than that determined above.**

Commentary

Statutory Provision: 21 U.S.C. §§ 843(a)(3), 844(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. *Subsection (b)(1) would apply, for example, where the defendant obtained a controlled substance from a pharmacist by using a forged prescription or a prescription obtained from a physician by fraud or deception.*

Background:

\* \* \*

Section 2D2.1(b)(1) provides a cross reference to §2D1.1 for possession of more than five grams of a mixture or substance containing cocaine base, an offense subject to an enhanced penalty under Section 6371 of the Anti-Drug Abuse Act of 1988. Other cases for which enhanced penalties are provided under Section 6371 of the Anti-Drug Abuse Act of 1988 (e.g., for a person with one prior conviction, possession of more than three grams of a mixture or substance containing cocaine base; for a person with two or more prior convictions, possession of more than one gram of a mixture or substance containing cocaine base) are to be sentenced in accordance with §5G1.1(b).

Guideline Deleted:

~~§2D2.2. Acquiring a Controlled Substance by Forgery, Fraud, Deception, or Subterfuge; Attempt or Conspiracy~~

~~(a) Base Offense Level: 8~~

~~Commentary~~

~~Statutory Provision: 21 U.S.C. § 843(a)(3).~~

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**(H) Consolidation of §§2D3.1 and 2D3.2**

**Synopsis of Proposed Amendment:** Sections 2D3.1 (Regulatory Offenses Involving Registration Numbers; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy) and 2D3.2 (Regulatory Offenses Involving Controlled Substances; Attempt or Conspiracy) are consolidated. Section 2D3.1 currently has a base offense level of 6; §2D3.2 has a base offense level of 4. The consolidated guideline would have a base offense level of 6, the base offense level most typical for regulatory offenses.

The 1993 Annual Report shows seven cases sentenced under §2D3.1 (in all of those it was the primary guideline) and three cases sentenced under §2D3.2 (then §§2D3.2 - 2D3.5; in all of those they were the primary guidelines).

The 1994 Annual Report (FY 94) shows nine cases sentenced under §2D3.1 (in eight of those it was the primary guideline) and two cases sentenced under §§2D3.2 - 2D3.5 (in both of those they were the primary guidelines).

The 1995 Annual Report (FY 95) shows two cases sentenced under §2D3.1 (in both of those it was the primary guideline) and four cases sentenced under §§2D3.2-2D3.5 (in three of those they were the primary guidelines).

Consolidated Guideline:

**§2D3.1. Regulatory Offenses Involving Registration Numbers ~~Controlled Substances or Listed Chemicals~~; Unlawful Advertising Relating to Schedule I Substances; Attempt or Conspiracy**

(a) Base Offense Level: 6

*Commentary*

*Statutory Provisions:* 21 U.S.C. §§ ~~842(a)(1), 843(a)(1), (2)~~ *842(a)(1), (2), (9), (10), (b), 843(a)(1), (2), 954, 961.*

Guideline Deleted:

~~**§2D3.2. Regulatory Offenses Involving Controlled Substances or Listed Chemicals; Attempt or Conspiracy**~~

~~(a) Base Offense Level: 4~~

~~*Commentary*~~

~~*Statutory Provisions:* 21 U.S.C. §§ ~~842(a)(2), (9), (10), (b), 954, 961.~~~~

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**(I) Consolidation of §§2E1.2 and 2E1.3**

**Synopsis of Proposed Amendment:** Sections 2E1.2 (Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise) and 2E1.3 (Violent Crimes in Aid of Racketeering Activity) are consolidated. Both have the base offense level for the underlying offense as the primary base offense level. Section 2E1.2 has an alternative base offense level of 6, and §2E1.3 has an alternative base offense level of 12. Elimination of these alternative base offense levels will considerably simplify the operation of these guidelines, removing the need in each case for the comparison set forth in Application Note 1. In FY 95, 5 of the 24 cases sentenced under §2E1.2 (or 20.8%) had a base offense level of 6, and one of the 9 cases sentenced under §2E1.3 (or 5.3%) had a base offense level of 12.

The 1993 Annual Report (FY 93) shows 90 cases sentenced under §2E1.2 (in 72 of those it was the primary guideline) and 55 cases sentenced under §2E1.3 (in 26 of those it was the primary guideline).

The 1994 Annual Report (FY94) shows 97 cases sentenced under §2E1.2 (in 77 of those it was the primary guideline), and 48 cases sentenced under §2E1.3 (in 17 of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 33 cases sentenced under §2E1.2 (in 24 of those it was the primary guideline), and six cases sentenced under §2E1.3 (in three of those it was the primary guideline).

Consolidated Guideline:

**§2E1.2. Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise; Violent Crimes in Aid of Racketeering Activity**

(a) Base Offense Level (Apply the greater):

(1) ~~6~~; or

(2) ~~The offense level applicable to the underlying crime of violence or other unlawful activity in respect to which the travel or transportation was undertaken~~ offense (crime of violence or racketeering activity).

Commentary

Statutory Provisions: 18 U.S.C. §§ 1952; 1959 (formerly 18 U.S.C. 1952B).

Application Notes:

1. ~~Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.~~
2. ~~If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.~~
3. ~~If the offense level for the underlying conduct is less than the alternative minimum base offense level specified (i.e., 6), the alternative minimum base offense level is to be used.~~

Guideline Deleted:

~~§2E1.3. Violent Crimes in Aid of Racketeering Activity~~

~~(a) Base Offense Level (Apply the greater):~~

~~(1) 12; or~~

~~(2) the offense level applicable to the underlying crime or racketeering activity.~~

~~Commentary~~

~~Statutory Provision: 18 U.S.C. § 1959 (formerly 18 U.S.C. § 1952B).~~

~~Application Notes:~~

1. ~~If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.~~

~~2. If the offense level for the underlying conduct is less than the alternative minimum base offense level specified (i.e., 12), the alternative minimum base offense level is to be used.~~

~~*Background:* The conduct covered under this section ranges from threats to murder. The maximum term of imprisonment authorized by statute ranges from three years to life imprisonment.~~

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## **(J) Consolidation of §§2E2.1 and 2B3.2**

**Synopsis of Proposed Amendment:** Sections 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) and 2E2.1 (Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means) are consolidated. These guidelines use the same basic structure and cover conduct that is in many respects similar. The current guidelines have four differences. First, the base offense level of §2B3.2 is 18 with a 2-level adjustment for an express or implied threat of death, bodily injury, or kidnapping. The base offense level of §2E2.1 is 20. Second, the offense levels for weapon use (originally identical) are now different. (In 1991, the Commission increased the adjustments for firearms possession or use in §§2B3.1 and 2B3.2 but not §2E2.1). Third, §2B3.2 provides an enhancement for the amount demanded or loss to the victim. Section 2E2.1 does not contain this enhancement (because there would be substantial difficulty in separating the unlawfully demanded interest from the principal and legitimate interest that could have been charged). Fourth, §2B3.2 contains a cross reference to the attempted murder guideline; §2E2.1 does not.

The consolidated guideline uses the base offense level and adjustments from §2B3.2. A specific offense characteristic is added to include a 2-level adjustment for extortionate extension of credit and collecting an extension of credit by extortionate means (resulting in the same offense level as the current guideline for such conduct). In addition, Application Note 1 is amended to provide (as in current §2E2.1) that, in cases involving extortionate extension of credit or collecting an extension of credit by extortionate means, subsection (b)(2) does not apply to the demand for repayment of principal or interest in the case of a loan.

Under the consolidation, offenses under §2E2.1 will be subject to a weapon enhancement that may be two levels greater, in some cases, than is currently provided by the weapon enhancement in §2E2.1. In addition, under the consolidated guideline, the attempted murder cross reference in §2B3.2 and the enhancement in §2B3.2(b)(3)(B) (providing a 3-level increase if the offense involved preparation or other demonstrated ability to carry out a threat of specified unlawful behavior), would now apply to offenses under §2E2.1.

The 1993 Annual Report (FY 93) shows 52 cases sentenced under §2B3.2 (in 36 of those it was the primary guideline) and 48 cases sentenced under §2E2.1 (in 31 of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 129 cases sentenced under §2B3.2 (in 74 of those it was the primary guideline), and 48 cases sentenced under §2E2.1 (in 29 of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 93 cases sentenced under §2B3.2 (in 52 of those it was the primary guideline), and 62 cases sentenced under §2E2.1 (in 39 of those it was the primary guideline).

Consolidated Guideline:

**§2B3.2. Extortion by Force or Threat of Injury or Serious Damage; Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means**

- (a) Base Offense Level: **18**
- (b) Specific Offense Characteristics
  - (1) If the offense involved an express or implied threat of death, bodily injury, or kidnapping, increase by **2** levels.
  - (2) If the greater of the amount demanded or the loss to the victim exceeded \$10,000, increase by the corresponding number of levels from the table in §2B3.1(b)(6). **Do not apply this subsection in the case of extortionate extension of credit or collecting an extension of credit by extortionate means.**
  - (3) (A)(i) If a firearm was discharged, increase by **7** levels; (ii) if a firearm was otherwise used, increase by **6** levels; (iii) if a firearm was brandished, displayed, or possessed, increase by **5** levels; (iv) if a dangerous weapon was otherwise used, increase by **4** levels; or (v) if a dangerous weapon was brandished, displayed, or possessed, increase by **3** levels; or  
  
 (B) If the offense involved preparation to carry out a threat of (i) death, (ii) serious bodily injury, (iii) kidnapping, or (iv) product tampering; or if the participant(s) otherwise demonstrated the ability to carry out such threat, increase by **3** levels.
  - (4) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	<u>Degree of Bodily Injury</u>	<u>Increase in Level</u>
(A)	Bodily Injury	add <b>2</b>
(B)	Serious Bodily Injury	add <b>4</b>
(C)	Permanent or Life-Threatening Bodily Injury	add <b>6</b>
(D)	If the degree of injury is between that specified in subdivisions (A) and (B), add <b>3</b> levels; or	
(E)	If the degree of injury is between that specified in subdivisions (B) and (C), add <b>5</b> levels.	

*Provided*, however, that the cumulative adjustments from (3) and (4)

shall not exceed **11** levels.

- (5) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by **2** levels.
- (6) **If the offense involved extortionate extension of credit or collecting an extension of credit by extortionate means, increase by 2 levels.**

(c) Cross References

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).
- (2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder) if the resulting offense level is greater than that determined above.
- (3) **If the offense did not involve a threat, express or implied, that reasonably could be interpreted as one to injure a person or physically damage property, or any comparably serious threat, apply §2B3.3 (Blackmail and Similar Forms of Extortion).**

Commentary

Statutory Provisions: 18 U.S.C. §§ 875(b), 876, 877, **892-894**, 1951. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *For purposes of this guideline)*

*"Firearm," "dangerous weapon," "otherwise used," "brandished," "bodily injury," "serious bodily injury," "permanent or life-threatening bodily injury," "abducted," and "physically restrained" are defined in the Commentary to §1B1.1 (Application Instructions) have the meaning given such terms in the commentary to §1B1.1.*

*"Loss to the victim," as used in subsection (b)(2), means any demand paid plus any additional consequential loss from the offense (e.g., the cost of defensive measures taken in direct response to the offense). Subsection (b)(2) does not apply in the case of extortionate extension of credit or collecting an extension of credit by extortionate means. However, in such a case, if the loss to the victim involved consequential loss from the offense, such as damage to an automobile, an upward departure may be warranted.*

2. *This guideline applies if there was any threat, express or implied, that reasonably could be interpreted as one to injure a person or physically damage property, or any comparably serious threat, such as to drive an enterprise out of business. Even if the threat does not in itself imply violence, the possibility of violence or serious adverse consequences may be inferred from the circumstances of the threat or the reputation of the person making it. An ambiguous threat, such as "pay up or else," or a threat to cause labor problems, ordinarily should be treated under this section.*

3. *Guidelines for bribery involving public officials are found in Part C, Offenses Involving Public Officials. "Extortion under color of official right," which usually is solicitation of a bribe by a public official, is covered under §2C1.1 unless there is use of force or a threat that qualifies for treatment under this section. ~~Certain other extortion offenses are covered under the provisions of Part E, Offenses Involving Criminal Enterprises and Racketeering.~~*

4. *The combined adjustments for weapon involvement and injury are limited to a maximum enhancement of 11 levels.*

~~5. *"Loss to the victim," as used in subsection (b)(2), means any demand paid plus any additional consequential loss from the offense (e.g., the cost of defensive measures taken in direct response to the offense).*~~

65. *In certain cases, an extortionate demand may be accompanied by conduct that does not qualify as a display of a dangerous weapon under subsection (b)(3)(A)(v) but is nonetheless similar in seriousness, demonstrating the defendant's preparation or ability to carry out the threatened harm (e.g., an extortionate demand containing a threat to tamper with a consumer product accompanied by a workable plan showing how the product's tamper-resistant seals could be defeated, or a threat to kidnap a person accompanied by information showing study of that person's daily routine). Subsection (b)(3)(B) addresses such cases.*

76. If the offense involved the threat of death or serious bodily injury to numerous victims (e.g., in the case of a plan to derail a passenger train or poison consumer products), an upward departure may be warranted.
87. If the offense involved organized criminal activity, or a threat to a family member of the victim, an upward departure may be warranted.

\* \* \*

~~**Background:** The Hobbs Act, 18 U.S.C. § 1951, prohibits extortion, attempted extortion, and conspiracy to extort. It provides for a maximum term of imprisonment of twenty years. 18 U.S.C. §§ 875-877 prohibits communication of extortionate demands through various means. The maximum penalty under these statutes varies from two to twenty years. Violations of 18 U.S.C. § 875 involve threats or demands transmitted by interstate commerce. Violations of 18 U.S.C. § 876 involve the use of the United States mails to communicate threats, while violations of 18 U.S.C. § 877 involve mailing threatening communications from foreign countries.~~

Guideline Deleted:

~~§2E2.1. **Making or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means**~~

- ~~(a) Base Offense Level: **20**~~
- ~~(b) Specific Offense Characteristics~~
- ~~(1) (A) If a firearm was discharged increase by **5** levels; or~~
- ~~(B) if a dangerous weapon (including a firearm) was otherwise used, increase by **4** levels; or~~
- ~~(C) if a dangerous weapon (including a firearm) was brandished, displayed or possessed, increase by **3** levels.~~
- ~~(2) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:~~

<del>Degree of Bodily Injury</del>	<del>Increase in Level</del>
<del>(A) Bodily Injury</del>	<del>add <b>2</b></del>
<del>(B) Serious Bodily Injury</del>	<del>add <b>4</b></del>
<del>(C) Permanent or Life-Threatening Bodily Injury</del>	<del>add <b>6</b></del>
<del>(D) If the degree of injury is between that specified in subdivisions (A) and (B), add <b>3</b> levels; or</del>	

~~(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels.~~

~~Provided, however, that the combined increase from (1) and (2) shall not exceed 9 levels.~~

~~(3) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or~~

~~(B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.~~

~~(c) Cross Reference~~

~~(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).~~

~~Commentary~~

~~Statutory Provisions: 18 U.S.C. §§ 892-894.~~

~~Application Notes:~~

~~1. Definitions of "firearm," "dangerous weapon," "otherwise used," "brandished," "bodily injury," "serious bodily injury," "permanent or life-threatening bodily injury," "abducted," and "physically restrained" are found in the Commentary to §1B1.1 (Application Instructions).~~

~~2. See also Commentary to §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) regarding the interpretation of the specific offense characteristics.~~

~~Background: This section refers to offenses involving the making or financing of extortionate extensions of credit, or the collection of loans by extortionate means. These "loan-sharking" offenses typically involve threats of violence and provide economic support for organized crime. The base offense level for these offenses is higher than the offense level for extortion because loan sharking is in most cases a continuing activity. In addition, the guideline does not include the amount of money involved because the amount of money in such cases is often difficult to determine. Other enhancements parallel those in §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).~~

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## **(K) Consolidation of §§2E5.3 and 2F1.1**

**Synopsis of Proposed Amendment:** Sections 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) and 2F1.1 (Fraud and Deceit; Forgery; Offenses Involving

Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) are consolidated. Section 2E5.3 is an infrequently used guideline for what is essentially a false statement offense or a failure to maintain records offense that in some cases may be used to conceal another offense, generally embezzlement or bribery. Consolidation with §2F1.1 retains the same base offense level, and will produce the same final offense level in cases of embezzlement.

Currently, Application Note 13 of §2F1.1 describes situations in which application of offense guidelines other than §2F1.1 may be more apt. This amendment adds a cross reference to §2F1.1 to apply another offense guideline if the offense conduct is addressed more specifically by that guideline and modifies Application Note 13 accordingly. Application Note 13 is also modified to address the small number of cases in which this offense may be committed to conceal a bribery offense.

The 1993 Annual Report (FY 93) shows two cases sentenced under §2E5.3 (in both of those it was the primary guideline) and 5,963 cases sentenced under §2F1.1 (in 5,696 of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 10 cases sentenced under §2E5.3 (in seven of those it was the primary guideline), and 6,235 cases sentenced under §2F1.1 (in 5,952 of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 90 cases sentenced under §2E5.3 (in eight of those it was the primary guideline) and 6,339 cases sentenced under §2F1.1 (in 6,019 of those it was the primary guideline).

Consolidated Guideline:

**§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

\* \* \*

**(c) Cross Reference**

- (1) If the offense conduct is addressed more specifically by another offense guideline, apply that offense guideline.**

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644; 18 U.S.C. §§ 225, 285-289, 471-473, 500, 510, 659, 1001-1008, 1010-1014, 1016-1022, ~~1025, 1026, 1028~~, **1025-1028**, 1029, 1031, 1341-1344, 2314, 2315; **29 U.S.C. §§ 439, 461, 1131.** For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

\* \* \*

- 13. Subsection (c)(1) provides a cross reference to another offense guideline if that guideline**

*more specifically addresses the offense conduct than this section does. For example, sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 would be more apt, false statements to secure immigration documents, for which §2L2.1 or §2L2.2 would be more apt, and false statements to a customs officer, for which §2S1.3 or §2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than §2F1.1. Otherwise, in such cases, §2F1.1 is to be applied, but a departure from the guidelines may be considered. In certain other cases, an offense involving fraudulent statements or documents, or failure to maintain required records, may be committed in furtherance of the commission or concealment of another offense, such as embezzlement or bribery. In such cases, §2B1.1 or §2E5.1 would be more apt.*

\* \* \*

*Background: This guideline is designed to apply to a wide variety of fraud cases. The statutory maximum term of imprisonment for most such offenses is five years. The guideline does not link offense characteristics to specific code sections. Because federal fraud statutes are so broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity.*

*This guideline also covers the falsification of documents or records relating to a benefit plan covered by the Employment Retirement Income Security Act and failure to maintain or falsification of documents required by the Labor Management Reporting and Disclosure Act.*

\* \* \*

Guideline Deleted:

~~§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**~~

~~\_\_\_\_\_ (a) \_\_\_\_\_ Base Offense Level (Apply the greater):~~

~~\_\_\_\_\_ (1) \_\_\_\_\_ **6**; or~~

~~\_\_\_\_\_ (2) \_\_\_\_\_ If the offense was committed to facilitate or conceal a theft or embezzlement, or an offense involving a bribe or a gratuity, apply §2B1.1 or §2E5.1, as applicable.~~

~~\_\_\_\_\_ Commentary~~

~~Statutory Provisions: 18 U.S.C. § 1027; 29 U.S.C. §§ 439, 461, 1131. For additional statutory provision(s), see Appendix A (Statutory Index).~~

~~*Background: This section covers the falsification of documents or records relating to a benefit plan covered by ERISA. It also covers failure to maintain proper documents required by the LMRDA or falsification of such documents. Such violations sometimes occur in connection with the criminal conversion of plan funds or schemes involving bribery or graft. Where a violation under this section occurs in connection with another offense, the offense level is determined by reference to the offense facilitated by the false statements or documents.*~~

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## **(L) Consolidation of §§2J1.2 and 2J1.3**

**Synopsis of Proposed Amendment:** Sections 2J1.3 (Perjury or Subornation of Perjury, Bribery of Witness) and 2J1.2 (Obstruction of Justice) are consolidated. No substantive change in offense levels results from this consolidation. The only difference between the current guidelines is that §2J1.3 contains a special instruction pertaining to the grouping of certain separate instances of perjury. This special instruction would continue to apply only to cases currently covered. This amendment also clarifies the interaction of §§2J1.2(c)(1) and 2J1.3(c)(1) with §2X3.1 and adds an Application Note to §2J1.2 to clarify that the criminal offense the investigation or prosecution of which was obstructed need not have been specifically charged or resulted in a conviction in order for the cross reference to §2X3.1 to apply.

In addition, this amendment adds an application note to reemphasize that the defendant's conduct need not constitute the offense of accessory after the fact in order for the cross reference to §2X3.1 to apply. Even though the background and commentary to §2J1.2 was amended in 1991 to clarify that the cross reference to §2X3.1 could apply even if the defendant was a principal to the underlying offense, hotline calls indicate there is still some confusion in respect to this issue for both §§2J1.2 and 2J1.3 cases.

The 1993 Annual Report (FY 93) shows 111 cases sentenced under §2J1.2 (in 89 of those it was the primary guideline) and 125 cases sentenced under §2J1.3 (in 109 of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 137 cases sentenced under §2J1.2 (in 99 of those it was the primary guideline) and 119 cases sentenced under §2J1.3 (in 96 of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 104 cases sentenced under §2J1.2 (in 82 of those it was the primary guideline) and 78 cases sentenced under §2J1.3 (in 63 of those it was the primary guideline).

### Consolidated Guideline:

**§2J1.2. Perjury or Subornation of Perjury; Witness Bribery; Obstruction of Justice**

- (a) Base Offense Level: **12**
- (b) Specific Offense Characteristics
  - (1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to **suborn perjury or otherwise** obstruct the administration of justice, increase by **8** levels.
  - (2) If the offense resulted in substantial interference with the administration of justice, increase by **3** levels.
- (c) Cross Reference
  - (1) If the offense involved obstructing the investigation or prosecution of a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.
- (d) **Special Instruction**
  - (1) **In the case of counts of perjury or subornation of perjury arising from testimony given, or to be given, in separate proceedings, do not group the counts together under §3D1.2 (Groups of Closely Related Counts).**

Commentary

Statutory Provisions: 18 U.S.C. §§ **201(b)(3), (4), 1503, 1505-1513, 1516, 1621-1623.** For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. "Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.
2. For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation, **or** trial, **or** sentencing of the, **perjury, subornation of perjury, witness bribery, or** obstruction of justice count.
3. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense that is the object of the obstruction), see the Commentary to Chapter Three, Part C (Obstruction), and to §3D1.2(c) (Groups of Closely Related Counts).
4. If a weapon was used, or bodily injury or significant property damage resulted, a departure may be warranted. See Chapter Five, Part K (Departures).
5. The inclusion of "property damage" under subsection (b)(1) is designed to address cases in which property damage is caused or threatened as a means of intimidation or retaliation (e.g., to **suborn perjury or** intimidate a witness from, or retaliate against a witness for,

testifying). Subsection (b)(1) is not intended to apply, for example, where the offense consisted of destroying a ledger containing an incriminating entry.

6. *For purposes of subsection (c)(1), the criminal offense the investigation or prosecution of which was obstructed need not have been charged or resulted in a conviction.*

*Application of subsection (c)(1) does not require that the defendant's conduct constitute the offense of accessory after the fact. Rather, it provides for the use, in the circumstances specified, of the guideline that applies to accessory after the fact offenses. Thus, the fact that a defendant cannot be an accessory after the fact, under federal law, to an offense in which the defendant is a principal does not bar application of this cross reference.*

7. *"Separate proceedings," as used in subsection (d)(1), includes different proceedings in the same case or matter (e.g., a grand jury proceeding and a trial, or a trial and retrial), and proceedings in separate cases or matters (e.g., separate trials of codefendants), but does not include multiple grand jury proceedings in the same case.*

**Background:** *This section addresses offenses involving ~~the~~ perjury, subornation of perjury, witness bribery, and obstruction of justice generally prosecuted under the above-referenced statutory provisions. Numerous offenses of varying seriousness may constitute obstruction of justice: using threats or force to intimidate or influence a juror or federal officer; obstructing a civil or administrative proceeding; stealing or altering court records; unlawfully intercepting grand jury deliberations; obstructing a criminal investigation; obstructing a state or local investigation of illegal gambling; using intimidation or force to influence testimony, alter evidence, evade legal process, or obstruct the communication of a judge or law enforcement officer; or causing a witness bodily injury or property damage in retaliation for providing testimony,*

information or evidence in a federal proceeding. The conduct that gives rise to the violation may, therefore, range from a mere threat to an act of extreme violence.

The specific offense characteristics reflect the more serious forms of obstruction. Because the conduct covered by this guideline is frequently part of an effort to avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense, a cross reference to §2X3.1 (Accessory After the Fact) is provided. Use of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person.

Guideline Deleted:

~~§2J1.3. **Perjury or Subornation of Perjury; Bribery of Witness**~~

~~(a) Base Offense Level: **12**~~

~~(b) Specific Offense Characteristics~~

~~(1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to suborn perjury, increase by **8** levels.~~

~~(2) If the perjury, subornation of perjury, or witness bribery resulted in substantial interference with the administration of justice, increase by **3** levels.~~

~~(c) Cross Reference~~

~~(1) If the offense involved perjury, subornation of perjury, or witness bribery in respect to a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to that criminal offense, if the resulting offense level is greater than that determined above.~~

~~(d) Special Instruction~~

~~(1) In the case of counts of perjury or subornation of perjury arising from testimony given, or to be given, in separate proceedings, do not group the counts together under §3D1.2 (Groups of Closely Related Counts).~~

~~Commentary~~

~~Statutory Provisions: 18 U.S.C. §§ 201 (b)(3), (4), 1621-1623. For additional statutory provision(s), see Appendix A (Statutory Index).~~

~~Application Notes:~~

~~1. "Substantial interference with the administration of justice" includes a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.~~

2. ~~For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation or trial of the perjury count.~~
3. ~~In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which he committed perjury, subornation of perjury, or witness bribery), see the Commentary to Chapter Three, Part C (Obstruction), and to §3D1.2(c) (Groups of Closely Related Counts).~~
4. ~~If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).~~
5. ~~"Separate proceedings," as used in subsection (d)(1), includes different proceedings in the same case or matter (e.g., a grand jury proceeding and a trial, or a trial and retrial), and proceedings in separate cases or matters (e.g., separate trials of codefendants), but does not include multiple grand jury proceedings in the same case.~~

~~**Background:** This section applies to perjury, subornation of perjury, and witness bribery, generally prosecuted under the referenced statutes. The guidelines provide a higher penalty for perjury than the pre-guidelines practice estimate of ten months imprisonment. The Commission believes that perjury should be treated similarly to obstruction of justice. Therefore, the same considerations for enhancing a sentence are applied in the specific offense characteristics, and an alternative reference to the guideline for accessory after the fact is made.~~

**Issue for Comment:** The special instruction currently contained in §2J1.3(d)(1) applies to perjury or subornation of perjury and not to obstruction, separate instances of which are more difficult to determine. This special instruction was not included in the original guideline but was later added to cover the very infrequent perjury case to which it applied (approximately six in 40,000 cases). The Commission requests comment on whether this historical policy judgment, which was limited to perjuries, should be expanded to cover obstructions.

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## (M) Consolidation of §§2K1.1 and 2K1.6

**Synopsis of Proposed Amendment:** Sections 2K1.1 and 2K1.6 are consolidated. These are regulatory and recordkeeping offenses having the same base offense level. The only substantive change resulting from the consolidation is that the cross reference in §2K1.6 which directs to apply §2K1.3 if the offense reflected an effort to conceal a substantive offense, would also apply to offenses under §2K1.1. This could result in a change in offense levels for cases under §2K1.1 (offenses under which currently have a statutory maximum of one year.) There seems no reason that the cross reference in §2K1.6 (covering conduct reflecting an effort to conceal a substantive offense) should not also cover conduct under §2K1.1.

The 1993 Annual Report (FY 93) shows no cases sentenced under §2K1.1 or §2K1.6.

The 1994 Annual Report (FY 94) shows nine cases sentenced under §2K1.1 (in all of those it was the primary guideline) and no cases sentenced under §2K1.6.

The 1995 Annual Report (FY 95) shows 11 cases sentenced under §2K1.1 (in all those it was

the primary guideline) and no cases sentenced under §2K1.6.

Consolidated Guideline:

**§2K1.1. Failure to Report Theft of Explosive Materials; Improper Storage of Explosive Materials; Licensee Recordkeeping Violations**

(a) Base Offense Level: **6**

(b) Cross Reference:

(1) If the offense involved an effort to conceal a substantive explosive materials offense, apply §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosives Materials; Prohibited Transactions Involving Explosive Materials).

Commentary

Statutory Provisions: 18 U.S.C. § 842(f), (g), (k), 844(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Background: ~~The above-referenced provisions are misdemeanors. The maximum term of imprisonment authorized by statute is one year.~~

Guideline Deleted:

~~**§2K1.6. Licensee Recordkeeping Violations Involving Explosive Materials**~~

~~(a) Base Offense Level: **6**~~

~~(b) Cross Reference~~

~~(1) If a recordkeeping offense reflected an effort to conceal a substantive explosive materials offense, apply §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosives Materials; Prohibited Transactions Involving Explosive Materials):~~

~~Commentary~~

~~Statutory Provisions: 18 U.S.C. § 842(f), (g).~~

~~Background: The above-referenced provisions are recordkeeping offenses applicable only to "licensees," who are defined at 18 U.S.C. § 841(m).~~

**(N) Consolidation of §§2L2.2 and 2L2.5**

**Synopsis of Proposed Amendment:** Sections 2L2.2 and 2L2.5 are consolidated. No

change in offense level will result. Section 2L2.5 covers a rarely prosecuted statute that has the same base offense level as §2L2.2. Section 2L2.2 contains additional adjustments, but they do not apply to conduct covered by §2L2.5.

The 1993 Annual Report (FY 93) shows 186 cases sentenced under §2L2.2 (in 156 of those it was the primary guideline) and no cases sentenced under §2L2.5.

The 1994 Annual Report (FY 94) shows 266 cases sentenced under §2L2.2 (in 242 of those it was the primary guideline) and no cases sentenced under §2L2.5.

The 1995 Annual Report (FY 95) shows 402 cases sentenced under §2L2.2 (in 354 of those it was the primary guideline) and no cases sentenced under §2L2.5.

Consolidated Guideline:

**§2L2.2. Fraudulently Acquiring Documents Relating to Naturalization, Citizenship, or Legal Resident Status for Own Use; False Personation or Fraudulent Marriage by Alien to Evade Immigration Law; Fraudulently Acquiring or Improperly Using a United States Passport; Failure to Surrender Canceled Naturalization Certificate**

\* \* \*

Commentary

Statutory Provisions: 8 U.S.C. §§ 1160(b)(7)(A), 1185(a)(3), (5), 1325(b), (c); 18 U.S.C. §§ 911, 1015, 1028, 1423-~~1426~~1428, 1542-1544, 1546.

Guideline Deleted:

~~§2L2.5. Failure to Surrender Canceled Naturalization Certificate~~

~~(a) Base Offense Level: 6~~

~~Commentary~~

~~Statutory Provision: 18 U.S.C. § 1428.~~

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**(O) Consolidation of §§2M2.1 and 2M2.3**

**Synopsis of Proposed Amendment:** This amendment consolidates §§2M2.1 (Destruction of, or Production of Defective, War Material, Premises, or Utilities) and 2M2.3 (Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities) Consolidation is appropriate for two reasons. First, prosecutions under these statutes are infrequent. In FY 1990 through 1995, there were no cases sentenced under these guidelines. Second, although the statutes referenced to §§2M2.1 and 2M2.3 cover an extremely wide

range of conduct (e.g., from major sabotage designed to injure the United States to minor property damage by a disgruntled serviceman or a war protest group), the offenses covered by these two guidelines essentially are property damage offenses. An option for addressing the issue of the appropriate offense level is to add an application note explaining the circumstances under which a departure may be warranted.

Consolidated Guideline:

**§2M2.1. Destruction of, or Production of Defective, War Material, Premises, or Utilities**

(a) Base Offense Level (**Apply the greater**):

(1) **32**, if the defendant is convicted (A) under 18 U.S.C. § 2153 or §2154; or (B) under 42 U.S.C. § 2284 of acting with intent to injure the United States or aid a foreign nation; or

(2) **26**, otherwise.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2153, ~~2154~~-2156; 42 U.S.C. § 2284.

Application Note:

~~1. Violations of 42 U.S.C. § 2284 are included in this section where the defendant was convicted of acting with intent to injure the United States or aid a foreign nation.~~

[1. *Because this section covers a particularly wide range of conduct, it is not possible to include all of the potentially relevant circumstances in the offense level. Therefore, depending on the circumstances of the case, an upward or a downward departure may be warranted. For example, if the defendant was convicted under 18 U.S.C. § 2155 of throwing paint on defense equipment or supplies as an act of protest during peacetime, the offense level in subsection (a)(2) may overrepresent the seriousness of the offense. In that case, a downward departure may be warranted. However, if the defendant was convicted under 18 U.S.C. § 2153 of major sabotage of arms and munitions while the United States was at war, the offense level in subsection (a)(1) may underrepresent the seriousness of the offense. In that case, an upward departure may be warranted. Factors to be considered in determining the extent of the departure include whether the offense was committed while the United States was at war, whether the purpose of the offense was to injure the United States or aid a foreign nation or power, whether a substantial risk of death or physical injury was created, and the extent to which national security was threatened. See Chapter Five, Part K (Departures).]*

Deleted Guideline:

~~§2M2.3. Destruction of, or Production of Defective, National Defense Material, Premises, or Utilities~~

~~(a) Base Offense Level: **26**~~

~~Commentary~~

~~Statutory Provisions: 18 U.S.C. § 2155, 2156; 42 U.S.C. § 2284.~~

~~Application Note:~~

~~1. — Violations of 42 U.S.C. § 2284 not included in §2M2.1 are included in this section.~~

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## **(P) Deletion of §2M3.4**

**Synopsis of Proposed Amendment:** This amendment deletes §2M3.4 (Losing National Defense Information) as unnecessary and potentially counterproductive. This guideline covers an extremely rarely prosecuted offense. There have been no sentences recorded under this section since the guidelines took effect. Given that this offense could occur in a variety of circumstances (as well as could be used as a plea bargain offense for a more serious offense), it seems questionable whether the current §2M3.4 is adequate to provide an appropriate result. Given the rarity of this offense, deletion of this offense guideline is recommended. Any offenses currently handled under this section will be addressed by §2X5.1 (Other Offenses).

The 1993 Annual Report (FY 93) shows no cases sentenced under §2M3.4.

The 1994 Annual Report (FY 94) shows no cases sentenced under §2M3.4.

The 1995 Annual Report (FY 95) shows no cases sentenced under §2M3.4.

Guideline Deleted:

### **§2M3.4. — Losing National Defense Information**

————— (a) — Base Offense Level:

————— (1) — **18**, if top secret information was lost; or

————— (2) — **13**, otherwise.

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### Commentary

~~Statutory Provision: 18 U.S.C. § 793(f).~~

~~Application Note:~~

~~1. — See Commentary to §2M3.1.~~

~~Background: Offenses prosecuted under this statute generally do not involve subversive conduct on behalf of a foreign power, but rather the loss of classified information by the gross negligence of an employee of the federal government or a federal contractor.~~

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**(Q) Consolidation of §§2M3.5 and 2M6.2**

**Synopsis of Proposed Amendment:** Sections 2M3.5 (Tampering with Restricted Data Concerning Atomic Energy) and 2M6.2 (Violation of Other Federal Atomic Energy Agency Statutes, Rules, and Regulations) are rarely used guidelines that cover conduct relating to atomic energy. Currently, there seems to be some inconsistency in the offense levels between these guidelines. It is not clear why tampering with restricted data concerning atomic energy has an offense level of 24 (even if done with intent to injure the United States or aid a foreign nation) while violations of other federal atomic energy statutes, rules, or regulations have an offense level of 30 if committed with intent to injure the United States or aid a foreign nation. This amendment would remove this inconsistency by consolidating these guidelines. However, offenses that involve tampering with restricted data (which currently receive an offense level of 24) would receive an offense level of 30 if the offense were committed with intent to injure the United States or aid a foreign nation.

The 1993 Annual Report (FY 93) shows no cases sentenced under §2M3.5 and five cases sentenced under §2M6.2 (in four of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows no cases sentenced under §2M3.5 and two sentences under §2M6.2 (in one of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows no cases sentenced under §2M3.5 and three cases sentenced under §2M6.2 (in all of those it was the primary guideline).

Consolidated Guideline:

**§2M6.2. Tampering With Restricted Data Concerning Atomic Energy; Violation of Other Federal Atomic Energy Statutes, Rules, and Regulations**

- (a) Base Offense Level (Apply the ~~Greater~~**Greatest**):
- (1) **30**, if the offense was committed with intent to injure the United States or to aid a foreign nation; or
  - (2) **24**, if the offense involved tampering with restricted data concerning atomic energy; or
  - (~~3~~) **6**.

Commentary

Statutory Provisions: 42 U.S.C. §§ 2273, 2276.

*Application Note:*

1. *For purposes of this guideline, "tampering with restricted data concerning atomic energy" means conduct proscribed by 18 U.S.C. § 2276.*

\* \* \*

Guideline Deleted:

~~§2M3.5. Tampering with Restricted Data Concerning Atomic Energy~~

~~\_\_\_\_\_ (a) \_\_\_\_\_ Base Offense Level: 24~~

~~\_\_\_\_\_ Commentary~~

~~Statutory Provision: 42 U.S.C. § 2276.~~

~~Application Note:~~

~~1. See Commentary to §2M3.1.~~

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**(R) Consolidation of §§2N3.1 and 2F1.1**

**Synopsis of Proposed Amendment:** Section 2N3.1 (Odometer Laws and Regulations) is consolidated with §2F1.1 (Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) Currently, §2N3.1 has the same base offense level as §2F1.1 and is cross referenced to §2F1.1 if more than one vehicle was involved (one-vehicle cases are infrequent). Under this consolidation, fraud by odometer tampering involving one vehicle will be treated the same as other fraud (i.e., the specific offense characteristics for loss and more than minimal planning will apply, if warranted). There seems no reason to treat this type of fraud differently from other types of fraud.

The 1993 Annual Report (FY 93) shows 5,963 cases sentenced under §2F1.1 (in 5,696 of those it was the primary guideline) and 17 cases sentenced under §2N3.1 (in all of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 6,235 cases sentenced under §2F1.1 (in 5,952 of those it was the primary guideline) and eight cases sentenced under §2N3.1 (in seven of those it was the primary guideline).

The 1995 Annual Report (FY 95) shows 6,339 cases sentenced under §2F1.1 (in 6,019 of those it was the primary guideline) and two cases sentenced under §2N3.1 (in both of those it was the primary guideline).

Consolidated Guideline:

**§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States**

\* \* \*

*Statutory Provisions:* 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78d, 78j, 78ff, 80b-6, 1644, 1983-1988, 1990c; 18 U.S.C. §§ 225, 285-289, 471-473, 500, 510, 659, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1031, 1341-1344, 2314, 2315. For additional statutory provision(s), *see* Appendix A (Statutory Index).

\* \* \*

*Background:* This guideline is designed to apply to a wide variety of fraud cases. The statutory maximum term of imprisonment for most such offenses is five years. The guideline does not link offense characteristics to specific code sections. Because federal fraud statutes are so broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity.

*This guideline also covers offenses relating to odometer laws and regulations.*

\* \* \*

Guideline Deleted:

~~§2N3.1. — Odometer Laws and Regulations~~

~~———— (a) — Base Offense Level: 6~~

~~———— (b) — Cross Reference~~

~~———— (1) — If the offense involved more than one vehicle, apply §2F1.1 (Fraud and Deceit).~~

~~———— Commentary~~

~~Statutory Provisions: 15 U.S.C. §§ 1983-1988, 1990c.~~

~~Background: The base offense level takes into account the deceptive aspect of the offense assuming a single vehicle was involved. If more than one vehicle was involved, the guideline for fraud and deception, §2F1.1, is to be applied because it is designed to deal with a pattern or scheme.~~

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**(S) Consolidation of §§2T1.1 and 2T1.6**

**Synopsis of Proposed Amendment:** Sections 2T1.1 (Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents) and 2T1.6 (Failing to Collect or Truthfully Account for and Pay Over Tax) are consolidated. Section 2T1.6 is an infrequently prosecuted tax offense involving an employer failing to collect or truthfully account for any tax required to be paid over.

Both guidelines have the same base offense level. In most cases, there will be no change in offense level, which is based on the tax loss, because §2T1.1(b)(1) and (2) will not apply to conduct under §2T1.6. However, currently §2T1.6 contains a cross reference to §2B11 (Larceny, Embezzlement, and Other Forms of Theft) if the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it. Application of that cross reference could result in offense levels one or two levels greater for offenses under §2T1.6. That cross reference no longer exists under the consolidation, and the consolidation does not provide an enhancement for offenses involving embezzlement.

The 1993 Annual Report (FY 93) shows 302 cases sentenced under §2T1.1 (in 225 of those it was the primary guideline) and five cases sentenced under §2T1.6 (in all of those it was the primary guideline).

The 1994 Annual Report (FY 94) shows 528 cases sentenced under §2T1.1 (in 413 of those it was the primary guideline) and no cases sentenced under §2T1.6.

The 1995 Annual Report (FY 95) shows 517 cases sentenced under §2T1.1 (in 405 of those it was the primary guideline) and five cases sentenced under §2T1.6 (in all of those it was the primary guideline).

Consolidated Guideline:

**§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents; Failing to Collect or Truthfully Account for and Pay Over Tax**

\* \* \*

(c) Special Instructions

\* \* \*

- (5) If the offense involved failing to collect or truthfully account for any pay over tax, the tax loss is the amount of tax not collected or accounted for and paid over.
- (56) The tax loss is not reduced by any payment of the tax subsequent to the commission of the offense.

Commentary

Statutory Provisions: 26 U.S.C. §§ 7201, 7202, 7203 (other than a violation based upon 26 U.S.C. § 60501), 7206 (other than a violation based upon 26 U.S.C. § 60501 or § 7206(2)), and 7207. For additional statutory provision(s) see Appendix A (Statutory Index).

Guideline Deleted:

~~§2T1.6. Failing to Collect or Truthfully Account for and Pay Over Tax~~

- ~~(a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax not collected or accounted for and paid over.~~
- ~~(b) Cross Reference~~
- ~~(1) Where the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it, apply §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) if the resulting offense level is greater than that determined above.~~

~~Commentary~~

~~Statutory Provision: 26 U.S.C. § 7202.~~

~~Application Note:~~

- ~~1. In the event that the employer not only failed to account to the Internal Revenue Service and pay over the tax, but also collected the tax from employees and did not account to them for~~

~~it, it is both tax evasion and a form of embezzlement. Subsection (b)(1) addresses such cases.~~

~~*Background:* The offense is a felony that is infrequently prosecuted. The failure to collect or truthfully account for the tax must be willful, as must the failure to pay. Where no effort is made to defraud the employee, the offense is a form of tax evasion, and is treated as such in the guidelines.~~

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## (T) Consolidation of §§2E4.1, 2T2.1, and 2T2.2

**Synopsis of Proposed Amendment:** Sections 2E4.1 (Unlawful Conduct Relating to Contraband Cigarettes), 2T2.1 (Non-Payment of [Alcohol and Tobacco] Taxes), and 2T2.2 (Regulatory Offenses) are consolidated. This amendment consolidates three infrequently applied guidelines.

Under this consolidation, the base offense level for §2T2.2 is raised from four to six, which is the base offense most typical for regulatory offenses. Otherwise, there is no substantive change.

The 1993 Annual Report (FY 93) shows no cases sentenced under §2E4.1, seven cases sentenced under §2T2.1 (in five of those it was the primary guideline), and no cases sentenced under §2T2.2.

The 1994 Annual Report (FY 94) shows 10 cases sentenced under §2E4.1 (in six of those it was the primary guideline), four cases sentenced under §2T2.1 (in one of those it was the primary guideline), and no cases sentenced under §2T2.2.

### Consolidated Guideline:

## 2. ALCOHOL AND TOBACCO TAXES

### Introductory Commentary

~~—This section deals with offenses contained in Parts I-IV of Subchapter J of Title 26, chiefly 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5691, and 5762, where the essence of the conduct is tax evasion or a regulatory violation. Because these offenses are no longer a major enforcement priority, no effort has been made to provide a section-by-section set of guidelines. Rather, the conduct is dealt with by dividing offenses into two broad categories: tax evasion offenses and regulatory offenses.~~

### §2T2.1. **Non-Payment of Taxes; Regulatory Offenses**

(a) Base Offense Level (Apply the Greatest):

(1) Level from §2T4.1 (Tax Table) corresponding to the tax loss;

- (2) 9, if the offense involved contraband cigarettes; or
- (3) 6, if there is no tax loss.

(b) Special Instruction

- (1) For purposes of this guideline, the "tax loss" is the total amount of taxes on the alcohol or tobacco that the taxpayer failed to pay, evaded, or attempted not to pay to evade.

\* \* \*

Commentary

Statutory Provisions: 18 U.S.C. §§ 2342(a), 2344(a); 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5691, 5671, 5762; ~~provided the conduct constitutes non-payment, evasion or attempted evasion of taxes.~~ For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. ~~The "tax loss" is the total amount of unpaid taxes that were due on the alcohol and/or tobacco, or that the defendant was attempting to evade.~~ *In the case of contraband cigarettes (as defined in 18 U.S.C. § 2341 (2)), the tax loss is the total amount of unpaid state excise taxes on the cigarettes.*
2. Offense conduct directed at more than tax evasion (e.g., theft or fraud) may warrant an upward departure.

Background: ~~The most frequently prosecuted conduct violating this section is~~ *This section covers a variety of offenses involving alcohol and tobacco, including evasion of alcohol and tobacco taxes, evasion of state excise taxes on cigarettes, operating an illegal still, and regulatory offenses.*—26 U.S.C. § 5601(a)(1).

Guidelines Deleted:

~~§2E4.1. **Unlawful Conduct Relating to Contraband Cigarettes**~~

~~\_\_\_\_\_ (a) Base Offense Level (Apply the greater):~~

~~\_\_\_\_\_ (1) **9**; or~~

~~\_\_\_\_\_ (2) the offense level from the table in §2T4.1 (Tax Table) corresponding to the amount of the tax evaded.~~

~~\_\_\_\_\_ Commentary~~

~~Statutory Provisions: 18 U.S.C. §§ 2342(a), 2344(a).~~

~~Application Note:~~

~~1. "Tax evaded" refers to state excise tax.~~

~~Background: The conduct covered by this section generally involves evasion of state excise taxes. At least 60,000 cigarettes must be involved. Because this offense is basically a tax matter, it is graded by use of the tax table in §2T4.1.~~

~~§2T2.2. **Regulatory Offenses**~~

~~\_\_\_\_\_ (a) Base Offense Level: **4**~~

~~\_\_\_\_\_ Commentary~~

~~Statutory Provisions: 26 U.S.C. §§ 5601, 5603-5605, 5661, 5671, 5762, provided the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes. For additional statutory provision(s), see Appendix A (Statutory Index).~~

~~Background: Prosecutions of this type are infrequent.~~