

Combined Theft, Fraud, Property Destruction Guideline

Synopsis of Proposed Amendment: This amendment consolidates the three guidelines covering theft (§2B1.1), property destruction (§2B1.3), and fraud (§2F1.1). There are several important points to note with respect to the proposal:

1. **BASE OFFENSE LEVEL:** A base offense level of level 6 has been bracketed to indicate that the Commission invites comment on alternative proposals. The current base offense level for theft and property destruction offenses is level 4, while for fraud it is level 6. The proposal provides, in subsection (b)(2), for a two-level decrease for theft and property destruction offenses in which the loss is less than \$2,000.
2. **UNDELIVERED U.S. MAIL:** The floor of level 6 for the theft of undelivered United States mail in subsection (b)(6) will need to be deleted if the Commission decides on a base offense level of level 6 but does not include a decrease for small-scale theft and property destruction offenses.
3. **CHARITABLE ORGANIZATION ENHANCEMENT:** Please note that options for resolving the circuit conflict discussed at the October and November meetings are presented in the circuit conflicts document.
4. **VIOLATION OF A JUDICIAL ORDER:** The document presents two options for the current enhancement on the violation of a judicial order, another factor that relates to a circuit conflict discussed by the Commission. Option 1 retains the enhancement in subsection (b)(7)(B). Option 2 deletes the enhancement and substitutes an encouraged upward departure provision in Application Note 11 (in lieu of an enhancement). The encouraged upward departure is provided as an option because of the infrequency with which the current enhancement applies. In fiscal year 1996, the charitable organization enhancement and the violation of a judicial order enhancement, combined, applied in only 153 cases (3% of all fraud cases in that fiscal year). [Note that these options are structural only and do not resolve the circuit conflict regarding “judicial process”. Options to resolve this conflict are presented in the circuit conflicts document.]
5. **FINANCIAL INSTITUTION AND GROSS RECEIPTS ENHANCEMENTS:** The financial institution and gross receipts enhancements in subsections (b)(11) and (b)(12) have been reworked to reflect Commissioner input at the October meeting.
6. **PLACE HOLDERS FOR OTHER ISSUES:** Place holders have been noted for the loss table, the loss definition, and a sophisticated concealment enhancement, all of which are dependent on other Commission policy choices.
7. **EMBEZZLEMENTS FROM UNIONS AND PENSION PLANS:** The current application note in §2B1.1 dealing with theft and embezzlement from unions and employee benefit or pension plans has been moved to §3B1.3 (Abuse of Position of Trust or Use of Special Skill) where it appears to more appropriately fit.
8. **Cross References:** An additional cross reference to the bribery and gratuity guidelines has been added at the suggestion of the Department of Justice to address situations in which a fraud statute may be used (perhaps for jurisdictional reasons) to prosecute conduct the essence of which involves bribery. An issue for comment also has been included to serve

as a placeholder, and invite comment on, the concept of a more generally applicable cross reference that would apply whenever a broadly applicable fraud statute (e.g., 18 U.S.C. § 1001) is used to reach conduct that is more specifically addressed in another Chapter Two guideline.

9. The enhancement in subsection (b)(9) involving conscious or reckless risk of serious bodily injury contains two proposed substantive changes. First, it proposes to insert the bracketed language "of death" prior to the term "serious bodily injury" because, as a practical matter, a risk of serious bodily injury is likely to also entail a risk of death. Second, an increase in the "floor" offense level is proposed.
10. The enhancement in subsection (b)(10), relating to "chop shops," contains two options. Option 1, added at the request of the Department of Justice, would add a two-level enhancement for this conduct, in addition to the existing "floor" offense level of level 14. Option 2 would retain the current policy (i.e., minimum offense level of 14).
11. The enhancement in subsection (b)(12), relating to gross receipts from financial institutions, is presented in the form previously approved for public comment at the November meeting.

It should also be noted that the order in which the enhancements under the consolidation are placed may affect the ultimate offense level in any given case, because of the multiple offense level "floors" that are involved (e.g., the enhancements in subsections (b)(3) - (b)(5) may not have an additive effect in cases affected by one of the enhancement in (b)(7) - (b)(12), that imposes a minimum or "floor" offense level).

In addition to combining the theft and fraud guidelines and the above-mentioned substantive changes, this draft also reorganizes and updates the applicable commentary. Definitions of terms, other than the definition of loss, are collected under application note 1 and are presented in alphabetical order. Otherwise, application notes generally appear in the same sequential order as the relevant enhancements appear in the guideline.

Finally, this draft makes a number of stylistic and grammatical changes in the language of the current affected guidelines to enhance clarity and consistency (e.g., in subsection (b)(3), the language is changed from "if the theft was from the person of another" to "if the offense involved theft from the person of another"). These changes are intended to be non-substantive, but it is always possible that the change will produce an unintended substantive effect.

PART B - ECONOMIC OFFENSES INVOLVING PROPERTY THEFT, PROPERTY DESTRUCTION, OR FRAUD

1. THEFT, EMBEZZLEMENT, RECEIPT OF STOLEN PROPERTY, AND PROPERTY DESTRUCTION, AND FRAUD

Introductory Commentary

These sections address ~~the most~~ basic forms of property offenses: theft, embezzlement, fraud, forgery, counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States), transactions in stolen goods, and simple property damage or destruction. (Arson is dealt with separately in Part K, Offenses Involving Public Safety.) These guidelines apply to offenses prosecuted under a wide variety of federal statutes, as well as offenses that arise under the Assimilative Crimes Act.

Consolidated Guideline:

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

- (a) Base Offense Level: [6]
- (b) Specific Offense Characteristics
 - (1) LOSS TABLE - TO BE INSERTED
 - [(2) If (A) the offense involved theft, embezzlement, transactions in stolen property, or property damage or destruction; and (B) the total amount of the [loss] involved in the offense was less than [\$2,000], decrease by 2 levels.]
 - (3) If the offense involved theft from the person of another, increase by 2 levels.
 - (4) 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 levels.
 - (5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.
 - [(6) If (A)(i) undelivered United States mail was taken or destroyed, or the taking or destruction of such item was an object of the offense; or (ii) the property stolen, destroyed, received, transported, transferred, transmitted, or possessed was undelivered United States mail; and (B) the offense level as determined above is less

than level **6**, increase to level **6**.]

[Option 1 for judicial process:

- (7) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; or (B) a violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by **2** levels. If the resulting offense level is less than **10**, increase to level **10**.]

[Option 2 for judicial process:

- (7) If the offense involved ~~(A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines,~~ increase by **2** levels. If the resulting offense level is less than **10**, increase to level **10**.]

- (8) [PLACE HOLDER FOR SOPHISTICATED CONCEALMENT ENHANCEMENT TO REPLACE FRAUD SOC ON USE OF FOREIGN BANK ACCOUNTS OR TRANSACTIONS]

- (9) If the offense involved (A) the conscious or reckless risk [of death] or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm), increase by **2** levels. If the resulting offense level is less than level ~~[13][14]~~, increase to level ~~[13][14]~~.

- (10) If (A) the offense involved an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts, [Option 1: increase by **2** levels. If the resulting offense level as determined above is less than level **14**, increase to level **14**.] [Option 2: and (B) the offense level as determined above is less than level **14**, increase to level **14**.]

- (11) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by **4** levels. If the resulting offense level is less than level **24**, increase to level **24**.

- (12) If (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense; and (B) the offense level as determined above is less than level **24**, increase to level **24**.

(c) Cross References

- (1) If (A) a firearm, destructive device, explosive material, or controlled substance 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 a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or

Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate, if the resulting offense level is greater than that determined above.

(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.

[(3) If the offense involved (A) commercial bribery, or (B) bribery, gratuity, or a related offense involving a public official, apply §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) or a guideline from Chapter Two, part C (Offenses Involving Public Officials), as appropriate, if the resulting offense level is greater than that determined above.]

(d) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4) or (5), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

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, 1983-1988, 1990c; 18 U.S.C. §§ 225, 285-289, 471-473, 500, 510, 511, 553(a)(1), (2), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025-1028, 1029, 1030(a)(5), 1031, 1341-1344, 1361, 1363, 1702, 1703, 1708, 1831, 1832, 2113(b), 2312-2317, 2321; 29 U.S.C. §§ 439, 461, 501(c), 1131. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline—

"Financial institution" means (A) any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014; (B) any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; (C) any health, medical or hospital insurance association; (D) brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; (E) futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and (F) any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "health, medical, or hospital insurance association," primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

"Firearm," and "destructive device" are defined in the Commentary to §1B1.1 (Application Instructions).

"Foreign instrumentality," "foreign agent," and "trade secret" have the meaning given those terms in 18 U.S.C. § 1839(1), (2), and (3), respectively.

"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 the offense. See 18 U.S.C. §§ 982(a)(4), 1344.

"Theft from the person of another" means the taking, without the use of force, of property that was being held by another person or was within arms' reach. Examples include pick-pocketing or non-forceful purse-snatching, such as the theft of a purse from a shopping cart.

["Undelivered United States mail" means mail, including mail that is in the addressee's mailbox, that has not been received by the addressee or the addressee's agent.]

2. *DISCUSSION OF LOSS [including downstream damages discussion from property destruction guideline]- TO BE INSERTED*
3. *Subsection (b)(7)(A) applies in the case of a misrepresentation that the defendant was an employee or authorized agents of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies include (A) the mail solicitation by a group of defendants of contributions to a non-existent famine relief organization; (B) the diversion by a defendant of donations given for a religiously affiliated school as a result of telephone solicitations to church members in which the defendant falsely claims to be a fundraiser for the school; and (C) the posing by a defendant as a federal collection agent in order to collect a delinquent student loan.*
4. *For purposes of subsection (b)(10), a [Option 1: two-level enhancement and a] minimum measure of loss is provided in the case of an ongoing, sophisticated operation (such as an auto theft ring or "chop shop") to steal vehicles or vehicle parts or to receive stolen vehicles or vehicle parts. "Vehicles" refers to all forms of vehicles, including aircraft and watercraft.*
5. *For purposes of subsection (b)(11), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit, payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of experiencing any of the conditions described in subdivisions (A) through (D) of this note.*
6. *For purposes of subsection (b)(12), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.*

7. *Subsection (b)(7)(A) applies in the case of a misrepresentation that the defendant was an employee or authorized agents of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies include (A) the mail solicitation by a group of defendants of contributions to a non-existent famine relief organization; (B) the diversion by a defendant of donations given for a religiously affiliated school as a result of telephone solicitations to church members in which the defendant falsely claims to be a fundraiser for the school; and (C) the posing by a defendant as a federal collection agent in order to collect a delinquent student loan.*

8. *[Option 1 for judicial process: The enhancements in subsection (b)(7) are alternative rather than cumulative; however, if both of the enumerated factors apply in a particular case, an upward departure may be warranted.*

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.*

10. *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, and false statements to a customs officer, for which §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 in which a fraudulent insurance claim was mailed might be prosecuted as mail fraud. [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.]*

Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. If the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply §2L2.1 or §2L2.2, as appropriate, rather than this guideline. [In the case of an offense involving false identification documents or access devices, an upward departure may be warranted if the actual loss does not adequately reflect the seriousness of the conduct.]

If 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 this guideline. Otherwise, in such cases, this guideline is to be applied, but a departure may be warranted.

11. *If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the continuing financial crimes enterprise.*

[Option 2 for judicial process:

12. *If the offense involved a violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, an upward departure may be warranted. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, an upward departure pursuant to this note may be warranted, even if the defendant was not a specifically named party in that prior case. For example, an upward departure may be warranted in the case of a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product. However, an upward departure based on conduct addressed elsewhere in the guidelines (e.g., a violation of a condition of release, addressed in §2J1.7 (Offense Committed While on Release), or a violation of probation, addressed in §4A1.1 (Criminal History Category)) is not authorized under this note.]*
13. *In cases involving theft of information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), an upward departure may be warranted if the defendant sought the stolen property to further a broader criminal purpose.*

Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States). It also covers offenses involving altering or removing motor vehicle identification numbers, trafficking in automobiles or automobile parts with altered or obliterated identification numbers, odometer laws and regulations, obstructing correspondence, the falsification of documents or records relating to a benefit plan covered by the Employment Retirement Income Security Act, and the failure to maintain, or falsification of, documents required by the Labor Management Reporting and Disclosure Act.

Because federal fraud statutes often are 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. The specific offense characteristics [and cross references] contained in this guideline are designed with these considerations in mind.

[Note: Once decisions are made with respect to "loss", background commentary on loss can be added, if the Commission so directs.]

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.

Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under §2B3.1 (Robbery).

A minimum offense level of 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be 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 a minimum offense level.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Subsection (b)(9)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322. Subsection (b)(11) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73. Subsection (b)(12) implements the instruction to the Commission in section 2507 of Public Law 101–647. Subsection (d)(2) implements the instruction to the Commission in section 805(c) of Public Law 104–132.

[The deletion of current sections 2B1.1, 2B1.3, and 2F1.1, which would be required by the proposed consolidation, is not shown.]

Conforming Amendment to §1B1.1

§1B1.1. Application Instructions

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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):*

* * *

- (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.*

~~*"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.*~~

In an assault, for example, waiting to commit the offense when no witnesses were present

would not alone constitute more than minimal planning. By contrast, luring the victim to a specific location, or wearing a ski mask to prevent identification, would constitute more than minimal planning.

In a commercial burglary, for example, checking the area to make sure no witnesses were present would not alone constitute more than minimal planning. By contrast, obtaining building plans to plot a particular course of entry, or disabling an alarm system, would constitute more than minimal planning.

~~In a theft, going to a secluded area of a store to conceal the stolen item in one's pocket would not alone constitute more than minimal planning. However, repeated instances of such thefts on several occasions would constitute more than minimal planning. Similarly, fashioning a special device to conceal the property, or obtaining information on delivery dates so that an especially valuable item could be obtained, would constitute more than minimal planning.~~

~~In an embezzlement, a single taking accomplished by a false book entry would constitute only minimal planning. On the other hand, creating purchase orders to, and invoices from, a dummy corporation for merchandise that was never delivered would constitute more than minimal planning, as would several instances of taking money, each accompanied by false entries.~~

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; Fraud and Deceit; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States).**

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Conforming Amendment to §3B1.3 to move illustrations relating to abuse of trust from theft guideline to abuse of trust adjustment:

§3B1.3. Abuse of Position of Trust or Use of Special Skill

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Commentary

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3. *The following additional illustrations of an abuse of a position of trust pertain to theft or embezzlement from employee pension or welfare benefit plans or labor unions:*

(A) *If the offense involved theft or embezzlement from an employee pension or welfare benefit plan and the defendant was a fiduciary of the benefit plan, an adjustment under this section for abuse of a position of trust will apply. "Fiduciary of the benefit plan" is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.*

(B) *If the offense involved theft or embezzlement from a labor union and the defendant was a union officer or occupied a position of trust in the union (as set forth in 29 U.S.C. § 501(a)), an adjustment under this section for an abuse of a position of trust will apply.*

* * *

[Note: References in all guidelines that refer to the loss table in §2F1.1 would need to be changed to §2B1.1, as well.]

Issues for Comment:

a) The Commission invites comment on whether Application Note 9 in the proposed amendment should be alternatively stated in the guideline as an explicit cross reference to apply the most applicable guideline, if the resulting offense level is greater than the offense level obtained under the proposed guideline.

b) The Commission invites comment on whether any of the specific offense characteristics in this proposed consolidated guideline should be eliminated because of infrequency of use or other good reason. If any such factor should be eliminated, should it be replaced with commentary encouraging departure?