

# *United States Sentencing Commission*



## **PROPOSED GUIDELINE AMENDMENTS FOR PUBLIC COMMENT**

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*January 28, 1999*

Official text of the proposed amendments can be found in the November 30, 1998 edition of the Federal Register (Vol. 63, No. 229, Part ).

# INDEX TO PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES

## AMDT. NO.

## ISSUE

### **PART I:**

- 1        **Re-promulgation of Temporary, Emergency Telemarketing Fraud Amendment.**—This amendment proposes to re-promulgate the temporary, emergency telemarketing fraud amendment as a permanent amendment. The amendment proposes (1) a two-level increase and a minimum offense level of level 12 in the fraud guideline (§2F1.1) for offenses that involve sophisticated means; and (2) a two-level increase in the vulnerable victim guideline (§3A1.1) for offenses that involve a large number of vulnerable victims.

### **PART II, The Economic Crime Package:**

- 2        **The Theft, Property Destruction, and Fraud Package.**—This portion of the proposed Economic Crime Package (A) consolidates the theft, property destruction, and fraud guidelines; (B) proposes a new loss table for theft and fraud cases, with more than minimal planning “built in”; and (C) clarifies the loss definition.
- 3        **The Tax Package.**—This portion of the proposed Economic Crime Package (A) proposes increases in the tax table that are similar to the table presented in the consolidated theft, property destruction, and fraud guideline, except at amounts between \$12,500 and \$80,000; and (B) presents an issue for comment regarding whether the Commission should amend the tax guidelines to generally conform the sophisticated concealment enhancement to the sophisticated means enhancement which was added to the fraud guideline in response to the Telemarketing Fraud Protection Act, Pub. L. 105–184.
- 4        **More than Minimal Planning Conforming Amendments.**—This portion of the proposed Economic Crime Package makes conforming changes that necessarily follow from the incorporation of more than minimal planning into the loss table.

5           **Amendments for Referring Guidelines.**—This portion of the proposed Economic Crime Package (A) presents a reference monetary table to be used as an alternative to the loss table in the proposed consolidated guideline for guidelines that already build in more than minimal planning; (B) sets out the guidelines that would refer to the reference monetary table; (C) presents options for amending the pornography and obscenity guidelines; (D) presents options for amending the copyright and structuring transactions guidelines; (E) presents options for amending §2B3.2 for offenses involving invasions of a protected computer; (F) consolidates the bank gratuity and principal gratuity guidelines; and (G) presents technical and conforming changes that follow from the consolidation of the theft, property destruction, and fraud guidelines.

### **PART III:**

6           **Conditions of Probation and Supervised Release.**—This amendment proposes to add a new mandatory condition to the probation and supervised release guidelines that requires a person convicted of a sex offense to report that person’s address and any change of residence to the probation officer, and to register as a sex offender in any state where the person works, resides, or is a student. (This new condition was added to 18 U.S.C. §§ 3563(a) and 3583(d) by the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. 105–119.)

### **PART IV, ISSUES FOR COMMENT:**

7           **Unauthorized Compensation.**—Issue for comment regarding whether the Commission should increase the guideline offense levels in §2C1.4 (Payment or Receipt of Unauthorized Compensation) in light of recent increases in the statutory maximum penalties for offenses involving unauthorized compensation.

8           **Cloning of Wireless Telephones.**—Issues for comment regarding (A) whether and how the Commission should amend the guideline for offenses involving the cloning of wireless telephone, including offenses involving an attempt or conspiracy to clone a wireless telephone; and (B) whether the Commission should adopt a special rule for cases involving stolen, unauthorized, or counterfeit access devices used in cloning offenses.

- 9           **Nuclear, Chemical, and Biological Weapons.**—Issues for comment regarding (A) whether §§2M5.1 (Evasion of Export Controls) and 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License) provide inadequate penalties for importation, attempted importation, exportation, and attempted exportation of nuclear, biological, and chemical weapons material; (B) how the Commission should amend the guidelines to cover new biological and chemical weapons offenses created by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, and the Chemical Weapons Convention Implementation Act of 1998, Pub. L. 105–277.
- 10           **Tax Privacy Issues.**—Issue for comment regarding whether and how the Commission should amend the guidelines to address new tax offenses created by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105–206, and the Taxpayer Browsing Protection Act, Pub. L. 105–35.

PART I—NOTICE OF PROPOSED RE-PROMULGATION OF TELEMARKETING FRAUD AMENDMENT AS PERMANENT AMENDMENT

1. **Synopsis of Proposed Amendment:** *On September 23, 1998, in response to directives contained in the Telemarketing Fraud Protection Act of 1998, Pub. L. 105–184, the Commission submitted to Congress a temporary, emergency amendment that provided (1) a two-level increase and a minimum offense level of level 12 in the fraud guideline (§2F1.1) for offenses that involve sophisticated means; and (2) a two-level increase in the vulnerable victim guideline (§3A1.1) for offenses that involve a large number of vulnerable victims. The amendment, particularly the sophisticated means enhancement, built upon and broadened an amendment submitted to Congress on May 1, 1998, which created an enhancement in §2F1.1 for sophisticated concealment. The Commission specified an effective date of November 1, 1998 for the emergency amendment.*

*The Commission proposes to re-promulgate this amendment as a permanent, non-emergency amendment and submit it to Congress not later than May 1, 1999. Under the terms of the congressionally granted authority, the emergency amendment is temporary unless re-promulgated in the next amendment cycle under regularly applicable amendment procedures. See Pub. L. 100–182, § 21, set forth as an editorial note under 28 U.S.C. § 994.*

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

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

~~(3) — 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 level 10, increase to level 10.~~

~~(4) — If the offense involved (A) the conscious or reckless risk of serious bodily injury, or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.~~

~~(5) — (A) If the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) if a substantial part of a fraudulent scheme was committed from outside the United States; or (C) if the offense otherwise involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.~~

~~(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~~

<sup>1</sup>This amendment is executed against §2F1.1 as amended by Amendment 577 (adding “sophisticated concealment” and “mass-marketing” as new specific offense characteristics).

~~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 the offense was committed through mass-marketing, increase by 2 levels.~~

(3) If the offense was committed through mass-marketing, increase by 2 levels.

(4) 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 level 10, increase to level 10.

(5) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(6) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(7) 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.

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Commentary

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Application Notes:

1. The adjustments in §2F1.1(b)(34) are alternative rather than cumulative. If in a particular case, however, both of the enumerated factors applied, an upward departure might be warranted.

\* \* \*

3. "Mass-marketing" as used in subsection (b)(3), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.

\* \* \*

~~34.~~ \* \* \*  
~~45.~~ Subsection (b)(~~34~~)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.

~~56.~~ Subsection (b)(~~34~~)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. 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, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to 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)).

~~67.~~ \* \* \*

~~78.~~ \* \* \*

~~910.~~ \* \* \*

~~1011.~~ \* \* \*

~~1112.~~ \* \* \*

~~1213.~~ \* \* \*

~~1314.~~ \* \* \*

~~14.~~ For purposes of subsection (b)(5)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

~~For purposes of subsection (b)(5)(C), "sophisticated concealment" means especially complex or especially intricate offense conduct in which deliberate steps are taken to make the offense, or its extent, difficult to detect. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts ordinarily indicates sophisticated concealment.~~

~~15.~~ "Financial institution," as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014; 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; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," as used above, 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.

- ~~16. An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.~~
- ~~17. "The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(6)(B), 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).~~
- ~~18. 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."~~
- ~~19. If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."~~
- ~~20. "Mass-marketing," as used in subsection (b)(7), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.~~
15. For purposes of subsection (b)(5)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.
- For purposes of subsection (b)(5)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.
- The enhancement for sophisticated means under subsection (b)(5)(C) requires conduct that is significantly more complex or intricate than the conduct that may form the basis for an enhancement for more than minimal planning under subsection (b)(2)(A).
- If the conduct that forms the basis for an enhancement under subsection (b)(5) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.
16. "Financial institution," as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014; 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; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," as used above, 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.

17. An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.
18. "The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(7)(B), 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).
19. 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".
20. If subsection (b)(7)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."

Background:

\* \* \*

Offenses that involve the use of transactions or accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum level of 12 is provided for these offenses.

Subsection (b)(5) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105-184.

\* \* \*

**§3A1.1. Hate Crime Motivation or Vulnerable Victim**

\* \* \*

- ~~(b) — If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.~~
- (b) (1) If the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase by 2 levels.

- (2) If (A) subdivision (1) applies; and (B) the offense involved a large number of vulnerable victims, increase the offense level determined under subdivision (1) by 2 additional levels.

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Commentary

Application Notes:

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2. For purposes of subsection (b), ~~"victim" includes any person~~ "vulnerable victim" means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.

Subsection (b) applies to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability. The adjustment would apply, for example, in a fraud case wherein which the defendant marketed an ineffective cancer cure or in a robbery wherein which the defendant selected a handicapped victim. But it would not apply in a case where the defendant sold fraudulent securities by mail to the general public and one of the victims happened to be senile. Similarly, for example, a bank teller is not an unusually vulnerable victim solely by virtue of the teller's position in a bank.

Do not apply subsection (b) if the ~~offense guideline specifically incorporates this factor~~ factor that makes the person a vulnerable victim is incorporated in the offense guideline. For example, if the offense guideline provides an enhancement for the age of the victim, this subsection would not be applied unless the victim was unusually vulnerable for reasons unrelated to age.

Background:

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Subsection (b)(2) implements, in a broader form, the instruction to the Commission in section 6(c)(3) of Public Law 105-184.

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

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Commentary

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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 United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

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**PART II—THE ECONOMIC CRIME PACKAGE**

In May, 1997, the Commission set as one of its priorities the systematic study and analysis of the guidelines for fraud, theft, and tax offenses. After approximately two years of data collection, analyses, public comment, and public hearings, the Commission developed a comprehensive "Economic Crime Package".

The Economic Crime Package is composed of the following: (A) the Theft, Property Destruction, and Fraud Package; (B) the Tax Package; (C) More than Minimal Planning Conforming Amendments; (D) Amendments for Referring Guidelines; and (E) other technical and conforming amendments.

In addition to seeking comment on the Economic Crime Package, the Commission invites suggestions for options, other than those presented in the Package, for treating theft, fraud, and tax offenses in the guidelines.

**(A) THE THEFT, PROPERTY DESTRUCTION, AND FRAUD PACKAGE**

2. **Synopsis of Proposed Amendment:** *The “Theft, Property Destruction, and Fraud Package” has the following principal features: (A) a consolidated theft, fraud, and property destruction guideline; (B) a new loss table for fraud and theft offenses, with more than minimal planning “built in”; and (C) a clarified loss definition.*

*The new consolidated guideline begins with a base offense level of level 6. This base offense level has the effect of increasing the base offense level for theft and property destruction cases. However, this increase will be offset, for the most part, by a higher floor offense level in the new loss table for these offenses. The current loss table for theft and property destruction has its first offense level increase at amounts exceeding \$100, whereas the offense level increase in the new loss table will begin at amounts exceeding \$2000.*

*The proposed guideline also provides for a loss table that builds more than minimal planning into the table, instead of maintaining this factor as a separate two-level enhancement. The first level from the former enhancement is built in at amounts exceeding \$10,000; the second level is built in at amounts exceeding \$20,000.*

*The proposed loss table also provides an increase in offense level severity beginning at amounts exceeding \$40,000. Because more than minimal planning is built into the loss table, the package also presents options for departure language that would either prohibit or discourage a departure from the guideline range based on more than minimal planning, or lack thereof.*

*The enhancement for sophisticated means is included in the consolidated guideline based on the assumption that the enhancement, promulgated as a temporary, emergency amendment effective November 1, 1998, will be re-promulgated as a permanent amendment during the next amendment cycle. (See, Part I– Notice of Re-Promulgation of Telemarketing Fraud Amendment as Permanent Amendment.) Other changes in the guideline structure include (A) the addition of risk of death to the risk of serious bodily injury enhancement and an increase in the floor offense level from level 13 to level 14 in this enhancement; (B) options for a floor offense level and offense level increase for the gross receipts enhancement; and (C) options for a bribery cross reference and other, general cross references.*

*The clarified loss definition begins with the general rule that loss is the greater of actual loss or intended loss. The loss definition also: (A) defines “actual loss,” “reasonably foreseeable,” and “intended loss”; (B) provides flexibility in determining the loss amount, giving consideration to a number of factors; (C) provides that gain shall be used instead of loss if gain is greater than loss and more accurately reflects the seriousness of the offense; (D) provides rules for crediting amounts the defendant paid back to the victim; (E) provides special rules relating to certain kinds of cases, such as “Ponzi” schemes; (F) presents options on whether interest can be considered in the loss calculation; and (G) sets out upward and downward departure considerations.*

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**~~PART B - OFFENSES INVOLVING PROPERTY~~**

**~~1. THEFT, EMBEZZLEMENT, RECEIPT OF STOLEN PROPERTY, AND PROPERTY DESTRUCTION~~**

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*Introductory Commentary*

~~These sections address the most basic forms of property offenses: theft, embezzlement, 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.~~

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

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

~~(b) Specific Offense Characteristics~~

~~(1) If the loss exceeded \$100, increase the offense level as follows:~~

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
<del>(A)</del>	<del>\$100 or less</del>	<del>no increase</del>
<del>(B)</del>	<del>More than \$100</del>	<del>add <b>1</b></del>
<del>(C)</del>	<del>More than \$1,000</del>	<del>add <b>2</b></del>
<del>(D)</del>	<del>More than \$2,000</del>	<del>add <b>3</b></del>
<del>(E)</del>	<del>More than \$5,000</del>	<del>add <b>4</b></del>
<del>(F)</del>	<del>More than \$10,000</del>	<del>add <b>5</b></del>
<del>(G)</del>	<del>More than \$20,000</del>	<del>add <b>6</b></del>
<del>(H)</del>	<del>More than \$40,000</del>	<del>add <b>7</b></del>
<del>(I)</del>	<del>More than \$70,000</del>	<del>add <b>8</b></del>
<del>(J)</del>	<del>More than \$120,000</del>	<del>add <b>9</b></del>
<del>(K)</del>	<del>More than \$200,000</del>	<del>add <b>10</b></del>
<del>(L)</del>	<del>More than \$350,000</del>	<del>add <b>11</b></del>
<del>(M)</del>	<del>More than \$500,000</del>	<del>add <b>12</b></del>
<del>(N)</del>	<del>More than \$800,000</del>	<del>add <b>13</b></del>
<del>(O)</del>	<del>More than \$1,500,000</del>	<del>add <b>14</b></del>
<del>(P)</del>	<del>More than \$2,500,000</del>	<del>add <b>15</b></del>
<del>(Q)</del>	<del>More than \$5,000,000</del>	<del>add <b>16</b></del>
<del>(R)</del>	<del>More than \$10,000,000</del>	<del>add <b>17</b></del>
<del>(S)</del>	<del>More than \$20,000,000</del>	<del>add <b>18</b></del>
<del>(T)</del>	<del>More than \$40,000,000</del>	<del>add <b>19</b></del>
<del>(U)</del>	<del>More than \$80,000,000</del>	<del>add <b>20</b></del>

~~(2) If the theft was from the person of another, increase by **2** levels.~~

~~(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**.~~

~~(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 **4** levels.~~

~~(5) If the offense involved an organized scheme to steal vehicles or vehicle parts, and the~~

offense level as determined above is less than level ~~14~~, increase to level ~~14~~.

~~(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 the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit any foreign government, foreign instrumentality, or foreign agent, increase by 2 levels:~~

~~(8) If the offense involved theft of property from a national cemetery, increase by 2 levels.~~

~~(c) Cross Reference~~

~~(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.~~

#### Commentary

~~*Statutory Provisions:* 18 U.S.C. §§ 225, 553(a)(1), 641, 656, 657, 659, 662, 664, 1702, 1708, 1831, 1832, 2113(b), 2312-2317; 29 U.S.C. § 501(c). For additional statutory provision(s), see Appendix A (Statutory Index).~~

#### ~~*Application Notes:*~~

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

~~"Trade secret" is defined in 18 U.S.C. § 1839(3).~~

~~"Foreign instrumentality" and "foreign agent" are defined in 18 U.S.C. § 1839(1) and (2), respectively.~~

~~"National cemetery" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.~~

~~2. "Loss" means the value of the property taken, damaged, or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim. Loss does not include the interest that could have been earned had~~

~~the funds not been stolen. When property is damaged, the loss is the cost of repairs, not to exceed the loss had the property been destroyed. Examples: (1) In the case of a theft of a check or money order, the loss is the loss that would have occurred if the check or money order had been cashed. (2) In the case of a defendant apprehended taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately.~~

~~Where the offense involved making a fraudulent loan or credit card application, or other unlawful conduct involving a loan or credit card, the loss is to be determined under the principles set forth in the Commentary to §2F1.1 (Fraud and Deceit).~~

~~In certain cases, an offense may involve a series of transactions without a corresponding increase in loss. For example, a defendant may embezzle \$5,000 from a bank and conceal this embezzlement by shifting this amount from one account to another in a series of nine transactions over a six-month period. In this example, the loss is \$5,000 (the amount taken), not \$45,000 (the sum of the nine transactions), because the additional transactions did not increase the actual or potential loss.~~

~~In stolen property offenses (receiving, transporting, transferring, transmitting, or possessing stolen property), the loss is the value of the stolen property determined as in a theft offense.~~

~~In an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer" as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), "loss" includes the reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.~~

~~In the case of a partially completed offense (e.g., an offense involving a completed theft that is part of a larger, attempted theft), 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.~~

3. ~~For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based upon the approximate number of victims and the average loss to each victim, or on more general factors such as the scope and duration of the offense.~~

4. ~~The loss includes any unauthorized charges made with stolen credit cards, but in no event less than \$100 per card. See Commentary to §§2X1.1 (Attempt, Solicitation, or Conspiracy) and 2F1.1 (Fraud and Deceit).~~

5. ~~Controlled substances should be valued at their estimated street value.~~

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).~~

7. ~~"From the person of another" refers to property, taken without the use of force, that was being held by another person or was within arms' reach. Examples include pick-pocketing or non-forcible purse-snatching, such as the theft of a purse from a shopping cart.~~

8. ~~Subsection (b)(5), referring to an "organized scheme to steal 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.~~

9. ~~"Financial institution," as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014; 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; any~~

~~health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," as used above, 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.~~

~~10. An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.~~

~~11. "The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(6)(B), 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).~~

~~12. 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."~~

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

~~14. If the offense involved theft or embezzlement from an employee pension or welfare benefit plan (a violation of 18 U.S.C. § 664) and the defendant was a fiduciary of the benefit plan, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) 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.~~

~~—— If the offense involved theft or embezzlement from a labor union (a violation of 29 U.S.C. § 501(c)) 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 §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply.~~

~~15. In cases where the loss determined under subsection (b)(1) does not fully capture the harmfulness of the conduct, an upward departure may be warranted. For example, the theft of personal information or writings (e.g., medical records, educational records, a diary) may involve a substantial invasion of a privacy interest that would not be addressed by the monetary loss provisions of subsection (b)(1).~~

~~16. 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 where the defendant sought the stolen information to further a broader criminal purpose.~~

~~Background: The value of the property stolen plays an important role in determining sentences for theft and other~~

~~offenses involving stolen property because it is an indicator of both the harm to the victim and the gain to the defendant. Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.~~

~~— 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.~~

~~— 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.~~

~~— 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 (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.~~

~~— Subsection (b)(6)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.~~

~~— Subsection (b)(6)(B) implements the instruction to the Commission in section 2507 of Public Law 101-647.~~

~~— Subsection (b)(8) implements the instruction to the Commission in section 2 of Public Law 105-101.~~

~~§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.~~

~~(4) If property of a national cemetery was damaged or destroyed, 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).~~

~~(d) Special Instruction~~



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

Commentary

~~Statutory Provisions: 18 U.S.C. §§ 1030(a)(5), 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).~~

~~"National cemetery" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.~~

~~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 or interference with a telecommunications network may cause an interruption in service to thousands of people for several hours, with attendant life-threatening delay in the delivery of emergency medical treatment or disruption of other important governmental or private services. In such cases, an upward departure may be warranted. See §§5K2.2 (Physical Injury), 5K2.7 (Disruption of Governmental Function), and 5K2.14 (Public Welfare).~~

~~Background: Subsection (b)(4) implements the instruction to the Commission in section 2 of Public Law 105-101.~~

~~Subsection (d) implements the instruction to the Commission in section 805(c) of Public Law 104-132.~~

**PART F - OFFENSES INVOLVING FRAUD OR DECEIT**

**§2F1.1. Fraud and Deceit; Forgery; 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) If the loss exceeded \$2,000, increase the offense level as follows:~~

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
<del>(A)</del>	<del>\$2,000 or less</del>	<del>no increase</del>
<del>(B)</del>	<del>More than \$2,000</del>	<del>add 1</del>
<del>(C)</del>	<del>More than \$5,000</del>	<del>add 2</del>
<del>(D)</del>	<del>More than \$10,000</del>	<del>add 3</del>
<del>(E)</del>	<del>More than \$20,000</del>	<del>add 4</del>

<del>(F)</del>	<del>More than \$40,000</del>	<del>add 5</del>
<del>(G)</del>	<del>More than \$70,000</del>	<del>add 6</del>
<del>(H)</del>	<del>More than \$120,000</del>	<del>add 7</del>
<del>(I)</del>	<del>More than \$200,000</del>	<del>add 8</del>
<del>(J)</del>	<del>More than \$350,000</del>	<del>add 9</del>
<del>(K)</del>	<del>More than \$500,000</del>	<del>add 10</del>
<del>(L)</del>	<del>More than \$800,000</del>	<del>add 11</del>
<del>(M)</del>	<del>More than \$1,500,000</del>	<del>add 12</del>
<del>(N)</del>	<del>More than \$2,500,000</del>	<del>add 13</del>
<del>(O)</del>	<del>More than \$5,000,000</del>	<del>add 14</del>
<del>(P)</del>	<del>More than \$10,000,000</del>	<del>add 15</del>
<del>(Q)</del>	<del>More than \$20,000,000</del>	<del>add 16</del>
<del>(R)</del>	<del>More than \$40,000,000</del>	<del>add 17</del>
<del>(S)</del>	<del>More than \$80,000,000</del>	<del>add 18.</del>

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

~~(3) If the offense was committed through mass-marketing, increase by 2 levels.~~

~~(4) 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 level 10, increase to level 10.~~

~~(5) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.~~

~~(6) If the offense involved (A) the conscious or reckless risk of serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.~~

~~(7) 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.~~

~~(c) Special Instruction~~

~~(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4), 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; 18 U.S.C. §§ 225, 285-289, 471-473, 500, 510, 659, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4), 1031, 1341-1344, 2314, 2315. For additional statutory provision(s), see Appendix A (Statutory Index).~~

~~Application Notes:~~

- ~~1. The adjustments in §2F1.1(b)(4) are alternative rather than cumulative. If in a particular case, however, both of the enumerated factors applied, an upward departure might be warranted.~~
- ~~2. "More than minimal planning" (subsection (b)(2)(A)) is defined in the Commentary to §1B1.1 (Application Instructions).~~
- ~~3. "Mass-marketing," as used in subsection (b)(3), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.~~
- ~~4. "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.~~
- ~~5. Subsection (b)(4)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.~~
- ~~6. Subsection (b)(4)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. 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, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to 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)).~~
- ~~7. Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).~~
- ~~8. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred. Consistent with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy), if 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. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell~~

~~\$40,000 in worthless securities, or representing that a forged check for \$40,000 was genuine, the loss would be \$40,000.~~

~~There are, however, instances where additional factors are to be considered in determining the loss or intended loss:~~

~~(a) Fraud Involving Misrepresentation of the Value of an Item or Product Substitution~~

~~A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth \$40,000 and the stock is worth only \$10,000, the loss is the amount by which the stock was overvalued (i.e., \$30,000). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is~~

~~the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.~~

~~(b) Fraudulent Loan Application and Contract Procurement Cases~~

~~In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used.~~

~~In some cases, the loss determined above may significantly understate or overstate the seriousness of the defendant's conduct. For example, where the defendant substantially understated his debts to obtain a loan, which he nevertheless repaid, the loss determined above (zero loss) will tend not to reflect adequately the risk of loss created by the defendant's conduct. Conversely, a defendant may understate his debts to a limited degree to obtain a loan (e.g., to expand a grain export business), which he genuinely expected to repay and for which he would have qualified at a higher interest rate had he made truthful disclosure, but he is unable to repay the loan because of some unforeseen event (e.g., an embargo imposed on grain exports) which would have caused a default in any event. In such a case, the loss determined above may overstate the seriousness of the defendant's conduct. Where the loss determined above significantly understates or overstates the seriousness of the defendant's conduct, an upward or downward departure may be warranted.~~

~~(c) Consequential Damages in Procurement Fraud and Product Substitution Cases~~

~~In contrast to other types of cases, loss in a procurement fraud or product substitution case includes not only direct damages, but also consequential damages that were reasonably foreseeable. For example, in a case involving a defense product substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose, plus the government's reasonably foreseeable cost of rectifying the actual or potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable. Inclusion of reasonably foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.~~

~~(d) Diversion of Government Program Benefits~~

~~In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses.~~

~~(e) Davis-Bacon Act Cases~~

~~In a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.~~

~~9. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.~~

~~10. 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.~~

~~11. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:~~

~~(a) a primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm;~~

~~(b) false statements were made for the purpose of facilitating some other crime;~~

~~(c) the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma;~~

~~(d) the offense endangered national security or military readiness;~~

~~(e) the offense caused a loss of confidence in an important institution;~~

~~(f) the offense involved the knowing endangerment of the solvency of one or more victims.~~

~~In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an~~

~~instrument that was so obviously fraudulent that no one would seriously consider honoring it. In such cases, a downward departure may be warranted.~~

~~12. Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. Where 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 §2F1.1. In the case of an offense involving false identification documents or access devices, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.~~

- ~~13. If the fraud exploited vulnerable victims, an enhancement will apply. See §3A1.1 (Hate Crime Motivation or Vulnerable Victim).~~
- ~~14. 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 §2F3.1 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.~~
- ~~15. For purposes of subsection (b)(5)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.~~
- ~~For purposes of subsection (b)(5)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.~~
- ~~The enhancement for sophisticated means under subsection (b)(5)(C) requires conduct that is significantly more complex or intricate than the conduct that may form the basis for an enhancement for more than minimal planning under subsection (b)(2)(A).~~
- ~~If the conduct that forms the basis for an enhancement under subsection (b)(5) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.~~
- ~~16. "Financial institution," as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014; 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, any health, medical or hospital insurance association, brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," as used above, 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.~~
- ~~17. An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.~~
- ~~18. "The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(7)(B);~~

~~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).~~

- ~~19. 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."~~
- ~~20. If subsection (b)(7)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."~~

~~**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.~~

~~Empirical analyses of pre-guidelines practice showed that the most important factors that determined sentence length were the amount of loss and whether the offense was an isolated crime of opportunity or was sophisticated or repeated. Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.~~

~~The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in frauds involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.~~

~~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 their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm. 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.~~

~~Offenses that involve the use of transactions or accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum level of 12 is provided for these offenses.~~

~~Subsection (b)(5) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105-184.~~

~~Subsection (b)(6)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.~~

~~Subsection (b)(7)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.~~

~~Subsection (b)(7)(B) implements the instruction to the Commission in section 2507 of Public Law 101-647.~~

~~Subsection (c) implements the instruction to the Commission in section 805(c) of Public Law 104-132.~~

## PART B - BASIC ECONOMIC OFFENSES

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

#### *Introductory Commentary*

*These sections address basic forms of property offenses: theft, embezzlement, fraud, forgery, counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States), insider trading, 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.*

#### **§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving 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) If the loss exceeded \$2,000, increase the offense level as follows:

<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A) More than \$2,000	add <b>1</b>
(B) More than \$5,000	add <b>2</b>
(C) More than \$10,000	add <b>4</b>
(D) More than \$20,000	add <b>6</b>
(E) More than \$40,000	add <b>8</b>
(F) More than \$80,000	add <b>10</b>
(G) More than \$200,000	add <b>12</b>
(H) More than \$500,000	add <b>14</b>
(I) More than \$1,200,000	add <b>16</b>
(J) More than \$2,500,000	add <b>18</b>
(K) More than \$7,500,000	add <b>20</b>
(L) More than \$20,000,000	add <b>22</b>
(M) More than \$50,000,000	add <b>24</b>
(N) More than \$100,000,000	add <b>26</b> .

(2) If the offense involved theft from the person of another, increase by **2** levels.

(3) 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.

(4) 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.

(5) If the offense was committed through mass-marketing, increase by **2** levels.



- (6) If (A) the offense involved theft of property from a national cemetery; or (B) property of a national cemetery was damaged or destroyed, increase by **2** levels.
- (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**.
- (8) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (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) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
- (10) If (A) the offense involved an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts, 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**.
- [Gross Receipts Option 1: (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**.]
- [Gross Receipts Option 2: (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, increase by **2** levels. If the resulting offense level is less than level **24**, increase to level **24**.]

[Note: The Commission also has the option to keep the current 4-level enhancement (as well as the floor) gross receipts SOC]

(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 (A) arson; or (B) property destruction by use of explosives, apply §2K1.4 (Arson: Property Destruction by Use of Explosives).
- [(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 most appropriate[, if the resulting offense level is greater than that determined above].]
- [(4) If (A) none of subdivisions (1), (2), or (3) of this subsection apply; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, 1341, 1342, or 1343); and (C) the conduct set forth in the count of conviction is more specifically covered by another guideline in Chapter Two, apply that other guideline.]

(d) Special Instruction

- (1) If the defendant was 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.*

*"Mass-marketing," means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or*

services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.

"National cemetery" means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

"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-forcible purse-snatching, such as the theft of a purse from a shopping cart.

2. For purposes of subsection (b)(1)—

(A) General Rule. Loss is the greater of the actual loss or the intended loss.

"Actual loss" means the reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). "Reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances of the particular case, should have known would likely follow, in the ordinary course of events, as a result of that conduct.

"Intended loss" means the pecuniary harm intended to be caused by the conduct for which the defendant is accountable under §1B1.3, even if that harm would have been unlikely or impossible to accomplish (e.g., as in a government sting operation).

(B) Determination of Loss. The court need not determine the precise amount of the loss. Rather, it need only make a reasonable estimate of that amount, based on available information and using, as appropriate and practicable under the circumstances to best effectuate the general rule in subdivision (A), factors such as the following:

(i) The fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, or destroyed; or if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing property taken or otherwise unlawfully acquired or destroyed.

(ii) The cost of repairs to damaged property, not to exceed the replacement cost had the property been destroyed.

(iii) The approximate number of victims multiplied by the average loss to each victim.

(iv) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

(C) Gain. The court shall use gain instead of loss under subsection (b)(1) if both (i) gain is greater than loss (which may be zero); and (ii) gain more accurately reflects the seriousness of the offense.

(D) Credits Against Loss. Except as provided in subdivision (F)(i), loss shall be reduced by the value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the defendant knew or should have known that the offense had been detected.

*In the case of collateral, the value of the economic benefit is the amount the victim has recovered as of the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the value is its fair market value as of the time of sentencing.*

*In any other case, the value of the economic benefit is its fair market value as of the time of transfer to the victim.*

*However, in cases in which the economic benefit transferred to the victim has little or no value to the victim because it is substantially different from what the victim intended to receive, loss shall not be reduced by the value of that economic benefit.*

*For purposes of this subdivision: (i) "economic benefit" includes money, property, or services performed; and (ii) "transferred" means pledged or otherwise provided as collateral, returned, or otherwise conveyed.*

Option 1:

- [(E) *Opportunity Costs. Interest (of any kind), anticipated profits, and other opportunity costs shall not be included in determining loss. However, there may be cases in which the amount of interest, anticipated profits, and other opportunity costs is so substantial that not including that amount as part of the loss would substantially understate the seriousness of the offense or the culpability of the defendant. In such cases, an upward departure may be warranted.*]

Option 2:

- [(E) *Interest. Interest shall be included in determining loss only if it is bargained for as part of a lending transaction that is involved in the offense. The court shall include any such interest that is accrued and unpaid as of the time the defendant knew or should have known that the offense had been detected.*]
- [(F) *Special Rules. The following special rules shall be used to assist in determining actual loss in the cases indicated:*
- (i) *Fraudulent Investment Schemes. In a case involving a fraudulent investment scheme, such as a Ponzi scheme, actual loss is the sum of the net actual losses of each victim who lost all or part of that victim's principal investment as a result of the fraudulent investment scheme. Because this subdivision provides, in cases covered hereunder, for determination of the net loss of each victim, subdivision (D), relating generally to credits against loss, shall not apply to such cases.*
  - (ii) *Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes. In a case involving stolen or counterfeit credit cards (*see* 15 U.S.C. § 1602(k)), stolen or counterfeit access devices (*see* 18 U.S.C. § 1029(e)(1)), or purloined numbers or codes, the actual loss includes any unauthorized charges made with the credit cards, access devices, or numbers or codes. The actual loss determined for each such credit card, access device, or number or code shall be not less than \$100.*
  - (iii) *Diversion of Government Program Benefits. In a case involving diversion of government program benefits, actual loss is the value of the benefits diverted from intended recipients or uses.*

- (iv) Davis-Bacon Act Cases. In a case involving a Davis-Bacon Act violation (*i.e.*, a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the actual loss is the difference between the legally required and actual wages paid.
- (G) Upward Departure Considerations. There may be cases in which the loss substantially understates the seriousness of the offense or the culpability of the defendant. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:
- (i) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.
  - (ii) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest.
  - (iii) The offense created a risk of substantial loss beyond the loss determined above.
  - (iv) The offense (I) endangered national security or military readiness; or (II) caused a loss of confidence in an important institution.
  - (v) The offense (I) endangered the solvency or financial security of one or more victims; or (II) impacted numerous victims and the loss determination substantially understates the aggregate harm.
- (H) Downward Departure Considerations. There also may be cases in which the loss substantially overstates the seriousness of the offense or the culpability of the defendant. In such cases, a downward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a downward departure is warranted:
- (i) The primary objective of the offense was a mitigating, non-monetary objective. For example, the primary objective of the offense was to fund medical treatment for a sick parent. [However, if, in addition to that primary objective, a substantial objective of the offense was to benefit the defendant economically, a downward departure would not be warranted.]
  - (ii) The defendant made complete, or substantially complete, restitution prior to the time the defendant knew or should have known that the offense had been detected.
- (I) Appropriate Deference. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. Accordingly, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

3. In some cases in which the amount of intended loss exceeds the actual loss, whether some of the intended loss would have occurred may be speculative. In such cases, the offense level ordinarily applicable to that amount of intended loss sometimes must be reduced, in accordance with §2X1.1 (Conspiracies, Attempts, Solicitations). Specifically, in a case involving only inchoate offense conduct (*i.e.*, a case in which the defendant was convicted only of an attempt, conspiracy, or solicitation, and in which the offense involved only intended loss), a decrease of three levels sometimes may apply, as provided under §2X1.1.

Similarly, in the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud in which both actual loss and additional intended loss result), the offense level is to be determined, and may be decreased in some cases, in accordance with the provisions of §2X1.1, whether the defendant is convicted of the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. As explained more fully in Application Note 4 of the Commentary to §2X1.1, in such a case, a three-level decrease in the offense level for the intended loss sometimes may apply, except that the offense level for the intended loss, with or without a three-level decrease, shall not be used if it is less than the offense level for the actual loss.

[Options on Discouraged or Prohibited Departure Based on MMP:]

[4. *[Option 1: The Commission has determined that the amount of loss involved in a particular case is a more appropriate factor in distinguishing the seriousness of an offense than is the extent of planning. Accordingly, (A) a sentence below the applicable guideline range [Option 2: [ordinarily]] would not be warranted in a case merely because it involved only minimal planning; and (B) a sentence above the applicable guideline range [Option 2: [ordinarily]] would not be warranted in a case merely because it involved more than minimal planning.]*

5. *Subsection (b)(7)(A) applies in the case of a misrepresentation that the defendant was an employee or authorized agent 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 fund-raiser for the school; and (C) the posing by a defendant as a federal collection agent in order to collect a delinquent student loan.*

*Subsection (b)(7)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. 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, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to 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)).*

*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.*

7. *For purposes of subsection (b)(8)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.*

*For purposes of subsection (b)(8)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.*

*If the conduct that forms the basis for an enhancement under subsection (b)(8) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment*

under §3C1.1.

8. For purposes of subsection (b)(10), 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.
9. 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.
10. 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. "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.
11. Subsection (c)[(4)] provides a cross reference to another Chapter Two guideline in cases in which the defendant is convicted of a general fraud statute, and the conduct set forth in the count of conviction is more specifically covered by that other Chapter Two guideline. 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 (Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports) would be more apt, and false statements to a customs officer, for which §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) 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.  
  
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, pursuant to subsection (c)(3).
12. 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.

**Background:** This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, insider trading, 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.*

*The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline. Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.*

*Both direct and consequential pecuniary harm that is reasonably foreseeable to result from the offense will be taken into account in determining the loss. Accordingly, in any particular case, the determination of loss may include consideration of factors not specifically set forth in this guideline. For example, in an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer," as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), "loss" is the reasonably foreseeable pecuniary harm to the victim, which typically includes costs such as conducting a damage assessment and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service. The Commission does not intend that the cost to the government of prosecution and criminal investigation of an offense covered by this guideline will be included in the determination of loss, even if such costs are reasonably foreseeable.*

*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 an 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)(5) implements, in a broader form, the instruction to the Commission in section 6(b)(1) of Public Law 105–184. Subsection (b)(6) implements the instruction to the Commission in section 2 of Public Law 105–101. Subsection (b)(8) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184. 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)(1) implements the instruction to the Commission in section 805(c) of Public Law 104–132.*



(B) THE TAX PACKAGE

3. **Synopsis of Proposed Amendment:** *The following proposed amendment provides increases that are similar to the loss table presented in the consolidated theft, fraud, and property destruction guideline, except at amounts between \$12,500 and \$80,000.*

**§2T4.1. Tax Table**

	<u>Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
(A)	\$1,700 or less	6
(B)	More than \$1,700	7
(C)	More than \$3,000	8
(D)	More than \$5,000	9
(E)	More than \$8,000	10
(F)	More than \$13,500	11
(G)	More than \$23,500	12
(H)	More than \$40,000	13
(I)	More than \$70,000	14
(J)	More than \$120,000	15
(K)	More than \$200,000	16
(L)	More than \$325,000	17
(M)	More than \$550,000	18
(N)	More than \$950,000	19
(O)	More than \$1,500,000	20
(P)	More than \$2,500,000	21
(Q)	More than \$5,000,000	22
(R)	More than \$10,000,000	23
(S)	More than \$20,000,000	24
(T)	More than \$40,000,000	25
(U)	More than \$80,000,000	26.

**§2T4.1. Tax Table**

	<u>Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
(A)	\$2,000 or less	6
(B)	More than \$2,000	8
(C)	More than \$5,000	10
(D)	More than \$12,500	12
(E)	More than \$30,000	14
(F)	More than \$80,000	16
(G)	More than \$200,000	18
(H)	More than \$500,000	20
(I)	More than \$1,200,000	22
(J)	More than \$2,500,000	24
(K)	More than \$7,500,000	26
(L)	More than \$20,000,000	28
(M)	More than \$50,000,000	30
(N)	More than \$100,000,000	32.

\* \* \*

**Issue for Comment:** *On May 1, 1998, the Commission submitted to Congress an amendment that provided a two-level enhancement in the fraud guideline, §2F1.1, for sophisticated concealment. The Commission also submitted amendments that generally conformed the sophisticated means enhancement in §§2T1.1, 2T1.4 and 2T3.1 to the sophisticated concealment enhancement provided in the fraud guideline.*

*Subsequent to these amendments, the Congress enacted the Telemarketing Fraud Protection Act of 1998, Pub. L. 105–184. This Act required the Commission to act under emergency authority and, among other things, specifically required the Commission to provide “an additional appropriate sentencing enhancement, if [a telemarketing] offense involved sophisticated means, including but not*

*limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States.”*

*The Commission responded to this directive by building on the amendment to §2F1.1 that added sophisticated concealment. The new amendment, which was submitted to Congress in September, 1998, broadened the scope of the “sophisticated concealment” enhancement to cover “sophisticated means” of executing or concealing a fraud offense.*

*The Commission invites comment on whether it should amend §§2T1.1, 2T1.4, and 2T3.1 to generally conform the sophisticated concealment enhancement (and the accompanying commentary) to the sophisticated means enhancement added to the fraud guideline in response to the Telemarketing Fraud Protection Act. The Commission also invites comment on whether it should provide a minimum offense level of [12] for tax offenses that involve either sophisticated concealment or sophisticated means (if the Commission conforms the enhancement in §§2T1.1, 2T1.4, and 2T3.1).*

#### (C) MORE THAN MINIMAL PLANNING CONFORMING AMENDMENTS

4. **Synopsis of Proposed Amendment:** *The following amendment makes conforming changes that necessarily follow from the incorporation of more than minimal planning into the loss table. The amendment proposes to strike references to more than minimal planning in appropriate places throughout the guidelines.*

##### **§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.~~*

~~*"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 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.~~

4. \* \* \*
- Absent an instruction to the contrary, the adjustments from different guideline sections are applied cumulatively (added together). For example, the adjustments from §2F1.1(b)(2) (more than minimal planning) and §3B1.1 (Aggravating Role) are applied cumulatively.

\* \* \*

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

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

- (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 **42** levels.

\* \* \*

Commentary

\* \* \*

Application Notes:

1. ~~"More than minimal planning," "firearm," "Firearm" and "destructive device" are defined in the Commentary to §1B1.1 (Application Instructions).~~

\* \* \*

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

[Notes 14, 15 and 16 are redesignated as Notes 13, 14, and 15, respectively.]

\* \* \*

Background: The value of the property stolen plays an important role in determining sentences for theft and other

~~offenses involving stolen property because it is an indicator of both the harm to the victim and the gain to the defendant. Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.~~

~~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.~~

\* \* \*

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

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

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

~~(43) \* \* \*~~

Commentary

\* \* \*

Application Notes:

~~1. "More than minimal planning" is defined in the Commentary to §1B1.1 (Application Instructions).~~

\* \* \*

**§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.~~

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

~~2. "More than minimal planning" (subsection (b)(2)(A)) is defined in the Commentary to §1B1.1 (Application Instructions).~~

\* \* \*

~~4. "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.~~

\* \* \*

~~20. If subsection (b)(7)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."~~

[Note 3 is redesignated as Note 2, and Notes 5 through 19 are redesignated as Notes 3 through 17, respectively.]

Background:

\* \* \*

~~The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in frauds involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.~~

\* \* \*

**§3D1.3. Offense Level Applicable to Each Group of Closely Related Counts**

\* \* \*

Commentary

Application Notes:

\* \* \*

3. ~~When counts are grouped pursuant to §3D1.2(d), the offense guideline applicable to the aggregate behavior is used. If the counts in the Group are covered by different guidelines (e.g., theft and fraud), use the guideline that produces the highest offense level. Determine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B, and C apply based upon the combined offense behavior taken as a whole. Note that guidelines for similar property offenses have been coordinated to produce identical offense levels, at least when substantial property losses are involved. However, when small sums are involved the differing specific offense characteristics that require increasing the offense level to a certain minimum may affect the outcome. In addition, the adjustment for "more than minimal planning" frequently will apply to multiple count convictions for property offenses.~~

\* \* \*

**§3D1.5. Determining the Total Punishment**

\* \* \*

Illustrations of the Operation of the Multiple-Count Rules

\* \* \*

- 2. *Defendant B was convicted on the following seven counts: (1) theft of a \$2,000 check; (2) uttering the same \$2,000 check; (3) possession of a stolen \$1,200 check; (4) forgery of a \$600 check; (5) possession of a stolen \$1,000 check; (6) forgery of the same \$1,000 check; (7) uttering the same \$1,000 check. Counts 1, 3 and 5 involve offenses under Part B (Offenses Involving Property), while Counts 2, 4, 6 and 7 involve offenses under Part F (Offenses Involving Fraud and Deceit). For purposes of §3D1.2(d), fraud and theft are treated as offenses of the same kind, and therefore all counts are grouped into a single Group, for which the offense level depends on the aggregate harm. The total value of the checks is \$4,800. The fraud guideline is applied, because it produces an offense level that is as high as or higher than the theft guideline. The base offense level is 6; and 1 level is added because of the value of the property (§2F1.1(b)(1)); and 2 levels are added because the conduct involved repeated acts with some planning (§2F1.1(b)(2)(A)). The resulting offense level is 97.*

\* \* \*

(D) AMENDMENTS FOR REFERRING GUIDELINES

- 5. **Synopsis of Proposed Amendment:** *Currently, many guideline provisions refer to the loss tables in the theft (§2B1.1) and fraud (§2F1.1) guidelines. In general, the following amendments show how the guidelines that refer to either §2B1.1 or §2F1.1 are proposed to be amended if the Commission were to adopt the consolidated guideline.*

*The proposed amendment accomplishes the following: (A) presents a reference monetary table to be used as an alternative to the loss table in the consolidated guideline for guidelines that already build in more than minimal planning; (B) sets out the guidelines that would refer to this new reference monetary table; (C) presents three options for amending the pornography and obscenity guidelines; (D) presents two options for amending the copyright and structuring transactions guidelines; (E) presents two options for amending §2B3.2 for offenses involving the invasion of a protected computer; (F) consolidates the bank gratuity and principal gratuity guidelines; and (G) presents technical and conforming amendments that would be required if the Commission consolidates the theft, fraud, and property destruction guidelines.*

5(A). REFERENCE MONETARY TABLE

CHAPTER TWO - OFFENSE CONDUCT

\* \* \*

PART X - OTHER OFFENSES

\* \* \*

6. REFERENCE MONETARY TABLE

§2X6.1. Reference Monetary Table

	<u>Amount</u> (Apply the Greatest)	<u>Increase in Level</u>
(A)	More than \$2,000	add 1
(B)	More than \$5,000	add 2
(C)	More than \$10,000	add 3
(D)	More than \$20,000	add 4
(E)	More than \$40,000	add 6

(F)	More than \$80,000	add 8
(G)	More than \$200,000	add 10
(H)	More than \$500,000	add 12
(I)	More than \$1,200,000	add 14
(J)	More than \$2,500,000	add 16
(K)	More than \$7,500,000	add 18
(L)	More than \$20,000,000	add 20
(M)	More than \$50,000,000	add 22
(N)	More than \$100,000,000	add 24.

\* \* \*

5(B). GUIDELINES THAT WILL REFER TO REFERENCE MONETARY TABLE

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

\* \* \*

(b) Specific Offense Characteristics

- (1) If the face value of the counterfeit items exceeded \$2,000, increase by the corresponding number of levels from the table at ~~§2F1.1 (Fraud and Deceit)~~ in §2X6.1 (Reference Monetary Table).

\* \* \*

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

\* \* \*

(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)~~ §2X6.1 (Reference Monetary Table).

\* \* \*

**§2F1.2. Insider Trading**

\* \* \*

(b) Specific Offense Characteristic

- ~~(1) Increase by the number of levels from the table in §2F1.1 corresponding to the gain resulting from the offense.~~

- (1) If the gain resulting from the offense exceeded \$2,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

\* \* \*

**§2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery**

\* \* \*

(b) Specific Offense Characteristics

- (1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded \$2,000, increase ~~the offense level~~ by the corresponding number of levels from the table in ~~§2F1.1~~ §2X6.1 (Reference Monetary Table).

\* \* \*

**§2B3.3. Blackmail and Similar Forms of Extortion**

\* \* \*

(b) Specific Offense Characteristic

- (1) If the greater of the amount obtained or demanded exceeded \$2,000, increase by the corresponding number of levels from the table in ~~§2F1.1~~ §2X6.1 (Reference Monetary Table).

\* \* \*

**§2Q2.1. Offenses Involving Fish, Wildlife, and Plants**

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

- (3) (If more than one applies, use the greater):

- (A) If the market value of the fish, wildlife, or plants exceeded \$2,000, increase ~~the offense level~~ by the corresponding number of levels from the table in ~~§2F1.1 (Fraud and Deceit)~~ §2X6.1 (Reference Monetary Table), [but in no event more than **[18]** levels]; or

\* \* \*

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

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

- (2) (If more than one applies, use the greater):

- (A) If the value of the payment, the benefit received or to be received in return for the



payment, or the loss to the government from the offense, whichever is greatest, exceeded \$2,000, increase by the corresponding number of levels from the table in ~~§2F1.1 (Fraud and Deceit)~~§2X6.1 (Reference Monetary Table).

\* \* \*

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

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

(2) (If more than one applies, use the greater):

- (A) 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)~~§2X6.1 (Reference Monetary Table).

\* \* \*

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

\* \* \*

(b) Specific Offense Characteristic

(1) (If more than one applies, use the greater):

- (A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded \$2,000, increase by the corresponding number of levels from the table in ~~§2F1.1 (Fraud and Deceit)~~§2X6.1 (Reference Monetary Table); or

\* \* \*

§2E5.1. **Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan; Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations**

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

- ~~(2) Increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.~~

- (2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater, exceeded \$2,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

\* \* \*

5(C). PORNOGRAPHY AND OBSCENITY GUIDELINES

§2G2.2. **Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic**

\* \* \*

[Option 1:

- (b) Specific Offense Characteristics

\* \* \*

- (2) If the offense involved distribution, increase by the number of levels from the table in §2F1.1+§2X6.1 (Reference Monetary Table) corresponding to the retail value of the material, but in no event by less than 5 levels.

[Option 2:

- (b) Specific Offense Characteristics

\* \* \*

- (2) If the offense involved distribution, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the retail value of the material, but in no event by less than 5 levels.

[Option 3:

- (b) Specific Offense Characteristics

\* \* \*

- (2) If the offense involved distribution, increase by ~~the number of levels from the table in §2F1.1~~ corresponding to the retail value of the material, but in no event by less than 5 levels.

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

4. *Subsection (b)(2) provides a five-level enhancement if the offense involved distribution. If the offense involved distribution by a large-scale commercial enterprise [(i.e., a commercial enterprise distributing material having a retail value that is more than [\$40,000])], an upward departure may be warranted.*

\* \* \*

**§2G3.1. Importing, Mailing, or Transporting Obscene Matter**

\* \* \*

[Option 1:

(b) Specific Offense Characteristics

(1) If the offense involved an act related to distribution for pecuniary gain, increase by the number of levels from the table in §2F1.1§2X6.1 (Reference Monetary Table) corresponding to the retail value of the material, but in no event by less than **[5]** levels.

[Option 2:

(b) Specific Offense Characteristics

(1) If the offense involved an act related to distribution for pecuniary gain, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the retail value of the material, but in no event by less than **5** levels.

[Option 3:

(b) Specific Offense Characteristics

(1) If the offense involved an act related to distribution for pecuniary gain, increase by ~~the number of levels from the table in §2F1.1~~ corresponding to the retail value of the material; ~~but in no event by less than [5]~~ levels.

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

2. *Subsection (b)(1) provides a [five-level] enhancement if the offense involved an act related to distribution for pecuniary gain. If the offense involved distribution by a large-scale commercial enterprise [(i.e., a commercial enterprise distributing material having a retail value that is more than [\$40,000])], an upward departure may be warranted.*

\* \* \*

**§2G3.2. Obscene Telephone Communications for a Commercial Purpose; Broadcasting Obscene Material**

\* \* \*

[Option 1:

(b) Specific Offense Characteristics

\* \* \*

~~(2) If 6 plus the offense level from the table at 2F1.1(b)(1) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.~~

(2) If 6 plus the number of levels from the table in §2X6.1 (Reference Monetary Table) corresponding to the volume of commerce attributable to the defendant results in a greater offense level than the offense level determined above, increase to the greater offense level.

\* \* \*

[Option 2:

~~(2) If 6 plus the offense level from the table at 2F1.1(b)(1) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.~~

(2) If 6 plus the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the volume of commerce attributable to the defendant results in a greater offense level than the offense level determined above, increase to the greater offense level.

[Option 3:

~~(2) If 6 plus the offense level from the table at 2F1.1(b)(1) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.~~

\* \* \*

Commentary

\* \* \*

~~*Background:* Subsection (b)(1) provides an enhancement where an obscene telephonic communication was received by a minor less than 18 years of age or where a broadcast was made during a time when such minors were likely to receive it. Subsection (b)(2) provides an enhancement for large-scale "dial-a-porn" or obscene broadcasting operations that results in an offense level comparable to the offense level for such operations under §2G3.1 (Importing, Mailing, or Transporting Obscene Matter). The extent to which the obscene material was distributed is approximated by the volume of commerce attributable to the defendant.~~

Application Notes:

1. Subsection (b)(1) provides an enhancement where an obscene telephonic communication was received by a minor less than 18 years of age or where a broadcast was made during a time when such minors were likely to receive it.
2. If the offense involved communications or broadcasting operations by a large-scale commercial enterprise [(i.e.,

*a commercial enterprise engaging in a volume of commerce having a value that is more than [\$40,000]), an upward departure may be warranted.*

\* \* \*

5(D). COPYRIGHT AND STRUCTURING TRANSACTIONS

**§2B5.3. Criminal Infringement of Copyright or Trademark**

\* \* \*

[Option 1:

(b) Specific Offense Characteristic

- (1) If the retail value of the infringing items exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit)§2X6.1 (Reference Monetary Table).

[Option 2: Maintains current reference to the fraud table.]

**§2S1.3. Structuring Transactions to Evade Reporting Requirements; Failure to Report Cash or Monetary Transactions; Failure to File Currency and Monetary Instrument Report; Knowingly Filing False Reports**

[Option 1:

- (a) ~~Base Offense Level: 6 plus the number of offense levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the funds.~~
- (a) Base Offense Level: 6 plus the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table), if the value of the funds exceeded \$2,000.

[Option 2:

- (a) ~~Base Offense Level: 6 plus the number of offense levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the funds.~~
- (a) Base Offense Level: 6 plus the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit), if the value of the funds exceeded \$2,000.

5(E). TRESPASS OFFENSES INVOLVING INVASION OF PROTECTED COMPUTERS

**§2B2.3. Trespass**

\* \* \*

[Option 1:

(b) Specific Offense Characteristics

\* \* \*

- ~~(3) If the offense involved invasion of a protected computer resulting in a loss exceeding \$2000, increase the offense level by the number of levels from the table in §2F1.1 corresponding to the loss.~~
- (3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion exceeded \$2,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

[Option 2:

- ~~(3) If the offense involved invasion of a protected computer resulting in a loss exceeding \$2000, increase the offense level by the number of levels from the table in §2F1.1 corresponding to the loss.~~
- (3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

5(F). CONSOLIDATION OF BANK GRATUITY AND PRINCIPAL GRATUITY GUIDELINES

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

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

- (2) (If more than one applies, use the greater):
  - ~~(A) 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).~~
  - (A) If the value of the unlawful payment exceeded \$2,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).
  - (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.

\* \* \*

Commentary

Statutory Provisions: 18 U.S.C. §§ 201(c)(1), 212-214, 217. 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. 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 canceling a farm debt.

\* \* \*

~~§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.

5(G). TECHNICAL AND CONFORMING AMENDMENTS

§1B1.1. **Application Instructions**

\* \* \*

Commentary

Application Notes:

\* \* \*

4.

\* \* \*

Absent an instruction to the contrary, the adjustments from different guideline sections are applied cumulatively (added together). For example, the adjustments from §2F1.1(b)(2) (more than minimal planning) and §3B1.1 (Aggravating Role) are applied cumulatively.

\* \* \*

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

\* \* \*

Commentary

Application Notes:

\* \* \*

- 5. *If the offense guideline includes creating a risk or danger of harm as a specific offense characteristic, whether that risk or danger was created is to be considered in determining the offense level. See, e.g., §2K1.4 (Arson; Property Damage by Use of Explosives); §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides). If, however, the guideline refers only to harm sustained (e.g., §2A2.2 (Aggravated Assault); §2B3.1 (Robbery)) or to actual, attempted or intended harm (e.g., ~~§2F1.1 (Fraud and Deceit)~~ §2B1.1 (Theft, Property Destruction, and Fraud); §2X1.1 (Attempt, Solicitation, or Conspiracy)), the risk created enters into the determination of the offense level only insofar as it is incorporated into the base offense level. Unless clearly indicated by the guidelines, harm that is merely risked is not to be treated as the equivalent of harm that occurred. When not adequately taken into account by the applicable offense guideline, creation of a risk may provide a ground for imposing a sentence above the applicable guideline range. See generally §1B1.4 (Information to be Used in Imposing Sentence); §5K2.0 (Grounds for Departure). The extent to which harm that was attempted or intended enters into the determination of the offense level should be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) and the applicable offense guideline.*

\* \* \*

[Chapter Two is amended by striking “§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)” wherever it appears and inserting “§2B1.1 (Theft, Property Destruction, and Fraud)”; and by striking “§2F1.1(Fraud and Deceit)” wherever it appears and inserting “§2B1.1 (Theft, Property Destruction, and Fraud)”.]

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

\* \* \*

Commentary

Application Notes:

\* \* \*

- 2. *"Loss" is discussed in the Commentary to §2B1.1 (~~Larceny, Embezzlement, and Other Forms of Theft~~ Theft, Property Destruction, and Fraud) and includes both actual and intended loss. The value of "the benefit received or to be received" means the net value of such benefit. Examples: (1) A government employee, in return for a \$500 bribe, reduces the price of a piece of surplus property offered for sale by the government from \$10,000 to \$2,000; the value of the benefit received is \$8,000. (2) A \$150,000 contract on which \$20,000 profit was made was awarded in return for a bribe; the value of the benefit received is \$20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the above examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.*

\* \* \*

**§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:

\* \* \*



3. "Loss" is discussed in the Commentary to §2B1.1 (~~Larceny, Embezzlement, and Other Forms of Theft~~**Theft, Property Destruction, and Fraud**) and includes both actual and intended loss.

\* \* \*

~~§2F1.2.~~ **Insider Trading**

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

~~(b) Specific Offense Characteristic~~

~~(1) Increase by the number of levels from the table in §2F1.1 corresponding to the gain resulting from the offense.~~

~~Commentary~~

~~Statutory Provisions: 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5. For additional statutory provision(s), see Appendix A (Statutory Index).~~

~~Application Note:~~

~~1. Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) should be applied only if the defendant occupied and abused a position of special trust. Examples might include a corporate president or an attorney who misused information regarding a planned but unannounced takeover attempt. It typically would not apply to an ordinary "tippee."~~

~~Background: This guideline applies to certain violations of Rule 10b-5 that are commonly referred to as "insider trading." Insider trading is treated essentially as a sophisticated fraud. Because the victims and their losses are difficult if not impossible to identify, the gain, i.e., the total increase in value realized through trading in securities by the defendant and persons acting in concert with him or to whom he provided inside information, is employed instead of the victims' losses.~~

~~Certain other offenses, e.g., 7 U.S.C. § 13(e), that involve misuse of inside information for personal gain also may appropriately be covered by this guideline.~~

\* \* \*

**CHAPTER TWO - OFFENSE CONDUCT**

**PART B - OFFENSES INVOLVING PROPERTY**

\* \* \*

**§2B1.4. Insider Trading**

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

(b) Specific Offense Characteristic

(1) Increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the gain resulting from the offense.

Commentary

Statutory Provisions: 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

- I. Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) should be applied only if the defendant occupied and abused a position of special trust. Examples might include a corporate president or an attorney who misused information regarding a planned but unannounced takeover attempt. It typically would not apply to an ordinary "tippee."

Background: This guideline applies to certain violations of Rule 10b-5 that are commonly referred to as "insider trading." Insider trading is treated essentially as a sophisticated fraud. Because the victims and their losses are difficult if not impossible to identify, the gain, *i.e.*, the total increase in value realized through trading in securities by the defendant and persons acting in concert with him or to whom he provided inside information, is employed instead of the victims' losses.

Certain other offenses, *e.g.*, 7 U.S.C. § 13(e), that involve misuse of inside information for personal gain also may appropriately be covered by this guideline.

**§2B5.3. Criminal Infringement of Copyright or Trademark**

\* \* \*

Commentary

\* \* \*

Background: This guideline treats copyright and trademark violations much like fraud. Note that the enhancement is based on the value of the infringing items, ~~which will generally exceed the loss or gain due to the offense.~~

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

- (a) Base Offense Level:

\* \* \*

- (2) if the conduct was theft or destruction 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

\* \* \*

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~~ ~~Theft, Property Destruction, and Fraud~~) ~~or §2B1.3 (Property Damage or Destruction)~~ is to be applied.

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

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

\* \* \*

(2)

\* \* \*

(3) 2 plus the offense level from §2F1.1 (Fraud and Deceit) if the offense was committed in connection with a scheme to defraud, or,

(4) 2 plus the offense level from §2B1.3 (Property Damage or Destruction).

(b) Specific Offense Characteristics

\* \* \*

(2) If the base offense level is not determined under (a)(43), and the offense occurred on a national cemetery, increase by 2 levels.

\* \* \*

**§2N2.1. Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product**

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

2. The cross reference at subsection (b)(1) addresses cases in which the offense involved theft, property destruction, and fraud. The cross reference at subsection (b)(2) addresses cases in which the offense was committed in furtherance of, or to conceal, an offense covered by another offense guideline (e.g., theft, bribery, revealing trade secrets, or destruction of property bribery).

\* \* \*

**§2N3.1. Odometer Laws and Regulations**

\* \* \*

Commentary

\* \* \*

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, §2B1.1 (Theft, Property Destruction, and Fraud) is to be applied because it is designed to deal with a pattern or scheme.

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

\* \* \*

Commentary

Application Notes:

\* \* \*

4. 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.

\* \* \*

**§3D1.2. Groups of Closely Related Counts**

\* \* \*

(d)

\* \* \*

§§2B1.1, ~~2B1.3~~2B1.4, 2B4.1, 2B5.1, 2B5.3, 2B6.1;  
§§2C1.1, 2C1.2, 2C1.7;  
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;  
§§2E4.1, 2E5.1;  
~~§§2F1.1, 2F1.2;~~

\* \* \*

**§3D1.3. Offense Level Applicable to Each Group of Closely Related Counts**

\* \* \*

(b) In the case of counts grouped together pursuant to §3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve offenses of the same general type to which different guidelines apply (~~e.g., theft and fraud~~), apply the offense guideline that produces the highest offense level.

\* \* \*

Commentary

Application Notes:

\* \* \*

- 3. When counts are grouped pursuant to §3D1.2(d), the offense guideline applicable to the aggregate behavior is used. If the counts in the Group are covered by different guidelines (~~e.g., theft and fraud~~), use the guideline that produces the highest offense level. Determine whether the specific offense characteristics or adjustments from Chapter Three, Parts A, B, and C apply based upon the combined offense behavior taken as a whole. Note that guidelines for similar property offenses have been coordinated to produce identical offense levels, at least when substantial property losses are involved. However, when small sums are involved the differing specific offense characteristics that require increasing the offense level to a certain minimum may affect the outcome. In addition, the adjustment for "more than minimal planning" frequently will apply to multiple count convictions for property offenses.

\* \* \*

**§3D1.5. Determining the Total Punishment**

\* \* \*

Illustrations of the Operation of the Multiple-Count Rules

\* \* \*

- ~~2. Defendant B was convicted on the following seven counts: (1) theft of a \$2,000 check; (2) uttering the same \$2,000 check; (3) possession of a stolen \$1,200 check; (4) forgery of a \$600 check; (5) possession of a stolen \$1,000 check; (6) forgery of the same \$1,000 check; (7) uttering the same \$1,000 check. Counts 1, 3 and 5 involve offenses under Part B (Offenses Involving Property), while Counts 2, 4, 6 and 7 involve offenses under Part F (Offenses Involving Fraud and Deceit). For purposes of §3D1.2(d), fraud and theft are treated as offenses of the same kind, and therefore all counts are grouped into a single Group, for which the offense level depends on the aggregate harm. The total value of the checks is \$4,800. The fraud guideline is applied, because it produces an offense level that is as high as or higher than the theft guideline. The base offense level is 6; 1 level is added because of the value of the property (§2F1.1(b)(1)); and 2 levels are added because the conduct involved repeated acts with some planning (§2F1.1(b)(2)(A)). The resulting offense level is 9.~~

- ~~32.~~ \* \* \*

- 43. Defendant D was convicted of four counts arising out of a scheme pursuant to which he received kickbacks from subcontractors. The counts were as follows: (1) The defendant received \$27,000 from subcontractor A relating to contract X (Mail Fraud). (2) The defendant received \$12,000 from subcontractor A relating to contract X (Commercial Bribery). (3) The defendant received \$15,000 from subcontractor A relating to contract Y (Mail Fraud). (4) The defendant received \$20,000 from subcontractor B relating to contract Z (Commercial Bribery). The mail fraud counts are covered by ~~§2F1.1 (Fraud and Deceit)~~§2B1.1 (Theft, Property Destruction, and Fraud). The bribery counts are covered by §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), which treats the offense as a sophisticated fraud. The total money involved is \$74,000, which results in an offense level of 14 under either §2B4.1 or §2F1.1. Since these two guidelines produce identical offense levels, the combined offense level is 14.

\* \* \*

[Chapter Eight is amended by striking “Larceny, Embezzlement, and Other Forms of Theft” wherever it appears and inserting “Theft, Property Destruction, and Fraud”.]

[Chapter Eight is amended by striking “§2F1.1(Fraud and Deceit)” wherever it appears and inserting “§2B1.1 (Theft,

Property Destruction, and Fraud)”.]

**§8A1.2. Application Instructions - Organizations**

\* \* \*

Commentary

Application Notes:

\* \* \*

3.

\* \* \*

- (i) *"Pecuniary loss" is derived from 18 U.S.C. § 3571(d) and is equivalent to the term "loss" as used in Chapter Two (Offense Conduct). See Commentary to §§2B1.1 (~~Larceny, Embezzlement, and Other Forms of Theft~~), 2F1.1 (Fraud and Deceit)(Theft, Property Destruction, and Fraud), and definitions of "tax loss" in Chapter Two, Part T (Offenses Involving Taxation).*

\* \* \*

**§8C2.1. Applicability of Fine Guidelines**

\* \* \*

- (a) §§2B1.1, ~~2B1.3~~2B1.4, 2B2.3, 2B4.1, 2B5.3, 2B6.1;  
 §§2C1.1, 2C1.2, 2C1.4, ~~2C1.6~~; 2C1.7;  
 §§2D1.7, 2D3.1, 2D3.2;  
 §§2E3.1, 2E4.1, 2E5.1, 2E5.3;  
 §§~~2F1.1~~, ~~2F1.2~~;

**APPENDIX A - STATUTORY INDEX**

\* \* \*

7 U.S.C. § 6	<del>2F1.1</del> 2B1.1
7 U.S.C. § 6b(A)	<del>2F1.1</del> 2B1.1
7 U.S.C. § 6b(B)	<del>2F1.1</del> 2B1.1
7 U.S.C. § 6b(C)	<del>2F1.1</del> 2B1.1
7 U.S.C. § 6c	<del>2F1.1</del> 2B1.1
7 U.S.C. § 6h	<del>2F1.1</del> 2B1.1
7 U.S.C. § 6o	<del>2F1.1</del> 2B1.1

\* \* \*

7 U.S.C. § 13(a)(2)	<del>2F1.1</del> 2B1.1
7 U.S.C. § 13(a)(3)	<del>2F1.1</del> 2B1.1
7 U.S.C. § 13(a)(4)	<del>2F1.1</del> 2B1.1

\* \* \*

7 U.S.C. § 13(d)	<del>2F1.2</del> 2B1.4
7 U.S.C. § 13(f)	<del>2F1.2</del> 2B1.4

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7 U.S.C. § 23	<del>2F1.1</del> 2B1.1
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7 U.S.C. § 270	<del>2F1.1</del> 2B1.1
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7 U.S.C. § 2024(b)	<del>2F1.1</del> 2B1.1	
7 U.S.C. § 2024(c)	<del>2F1.1</del> 2B1.1	
		* * *
12 U.S.C. § 631	<del>2F1.1</del> 2B1.1	
		* * *
15 U.S.C. § 50	<del>2F1.1</del> 2B1.1, 2J1.1, 2J1.5	
15 U.S.C. § 77e	<del>2F1.1</del> 2B1.1	
15 U.S.C. § 77q	<del>2F1.1</del> 2B1.1	
15 U.S.C. § 77x	<del>2F1.1</del> 2B1.1	
15 U.S.C. § 78j	<del>2F1.1</del> 2B1.1, <del>2F1.2</del> 2B1.4	
		* * *
15 U.S.C. § 80b-6	<del>2F1.1</del> 2B1.1	
15 U.S.C. § 158	<del>2F1.1</del> 2B1.1	
15 U.S.C. § 645(a)	<del>2F1.1</del> 2B1.1	
15 U.S.C. § 645(b)	2B1.1, <del>2F1.1</del>	
		* * *
15 U.S.C. § 714m(a)	<del>2F1.1</del> 2B1.1	
15 U.S.C. § 714m(b)	2B1.1, <del>2F1.1</del>	
		* * *
15 U.S.C. § 1644	<del>2F1.1</del> 2B1.1	
15 U.S.C. § 1681q	<del>2F1.1</del> 2B1.1	
15 U.S.C. § 1693n(a)	<del>2F1.1</del> 2B1.1	
15 U.S.C. § 1281	2B1.3 <del>1</del> (for offenses committed prior to July 5, 1994)	
		* * *
16 U.S.C. § 114	2B1.1, <del>2B1.3</del>	
16 U.S.C. § 117c	2B1.1, <del>2B1.3</del>	
16 U.S.C. § 123	2B1.1, <del>2B1.3</del> , 2B2.3	
16 U.S.C. § 146	2B1.1, <del>2B1.3</del> , 2B2.3	
16 U.S.C. § 413	2B1.1, <del>2B1.3</del>	
16 U.S.C. § 433	2B1.1, <del>2B1.3</del>	
		* * *
16 U.S.C. § 831t(b)	<del>2F1.1</del> 2B1.1	
16 U.S.C. § 831t(c)	<del>2F1.1</del> 2B1.1, 2X1.1	
		* * *
18 U.S.C. § 32(a),(b)	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2A5.1, 2A5.2, <del>2B1.3</del> 2B1.1, 2K1.4, 2X1.1	
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18 U.S.C. § 33	2A2.1, 2A2.2, <del>2B1.3</del> 2B1.1, 2K1.4	
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18 U.S.C. § 37	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2A5.1, 2A5.2, <del>2B1.3</del> 2B1.1, 2B3.1, 2K1.4,	

18 U.S.C. § 43	2X1.1 <del>2B1.3</del> 2B1.1	
		* * *
18 U.S.C. § 112(a)	2A2.1, 2A2.2, 2A2.3, 2A4.1, <del>2B1.3</del> 2B1.1, 2K1.4	
		* * *
18 U.S.C. § 152	2B4.1, <del>2F1.1</del> 2B1.1, 2J1.3	
18 U.S.C. § 153	2B1.1, <del>2F1.1</del>	
		* * *
18 U.S.C. § 217	2C1.62	
		* * *
18 U.S.C. § 500	2B1.1, 2B5.1, <del>2F1.1</del>	
18 U.S.C. § 501	2B1.1, 2B5.1, <del>2F1.1</del>	
18 U.S.C. § 502	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 503	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 505	<del>2F1.1</del> 2B1.1, 2J1.2	
18 U.S.C. § 506	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 507	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 508	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 509	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 510	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 513	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 514	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 642	<del>2B1.1</del> , 2B5.1, <del>2F1.1</del>	
		* * *
18 U.S.C. § 656	2B1.1, <del>2F1.1</del>	
18 U.S.C. § 657	2B1.1, <del>2F1.1</del>	
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18 U.S.C. § 659	2B1.1, <del>2F1.1</del>	
		* * *
18 U.S.C. § 663	2B1.1, <del>2F1.1</del>	
		* * *
18 U.S.C. § 665(a)	2B1.1, <del>2F1.1</del>	
		* * *
18 U.S.C. § 666(a)(1)(A)	2B1.1, <del>2F1.1</del>	
		* * *
18 U.S.C. § 709	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 712	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 911	<del>2F1.1</del> 2B1.1, 2L2.2	
		* * *
18 U.S.C. § 914	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 915	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 917	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 970(a)	<del>2B1.3</del> 2B1.1, 2K1.4	
		* * *
18 U.S.C. § 1001	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1002	<del>2F1.1</del> 2B1.1	



18 U.S.C. § 1003	2B1.1, 2B5.1, 2F1.1	
18 U.S.C. § 1004	2F1.1, 2B1.1	
18 U.S.C. § 1005	2F1.1, 2B1.1	
18 U.S.C. § 1006	2F1.1, 2B1.1, 2S1.3	
18 U.S.C. § 1007	2F1.1, 2B1.1, 2S1.3	
		* * *
18 U.S.C. § 1010	2F1.1, 2B1.1	
18 U.S.C. § 1011	2F1.1, 2B1.1	
18 U.S.C. § 1012	2B1.1, 2C1.3, 2F1.1	
18 U.S.C. § 1013	2F1.1, 2B1.1	
18 U.S.C. § 1014	2F1.1, 2B1.1	
18 U.S.C. § 1015	2F1.1, 2B1.1, 2J1.3, 2L2.1, 2L2.2	
18 U.S.C. § 1016	2F1.1, 2B1.1	
18 U.S.C. § 1017	2F1.1, 2B1.1	
18 U.S.C. § 1018	2F1.1, 2B1.1	
18 U.S.C. § 1019	2F1.1, 2B1.1	
18 U.S.C. § 1020	2F1.1, 2B1.1	
18 U.S.C. § 1021	2F1.1, 2B1.1	
18 U.S.C. § 1022	2F1.1, 2B1.1	
18 U.S.C. § 1023	2B1.1, 2F1.1	
		* * *
18 U.S.C. § 1025	2F1.1, 2B1.1	
18 U.S.C. § 1026	2F1.1, 2B1.1	
		* * *
18 U.S.C. § 1028	2F1.1, 2B1.1, 2L2.1, 2L2.2	
18 U.S.C. § 1029	2F1.1, 2B1.1	
		* * *
18 U.S.C. § 1030(a)(5)	2B1.1, 2B1.1	
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18 U.S.C. § 1030(a)(6)	2F1.1, 2B1.1	
		* * *
18 U.S.C. § 1031	2F1.1, 2B1.1	
18 U.S.C. § 1032	2B1.1, 2B4.1, 2F1.1	
18 U.S.C. § 1033	2B1.1, 2F1.1, 2J1.2	
18 U.S.C. § 1035	2F1.1, 2B1.1	
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18 U.S.C. § 1341	2B1.1, 2C1.7, 2F1.1	
18 U.S.C. § 1342	2B1.1, 2C1.7, 2F1.1	
18 U.S.C. § 1343	2B1.1, 2C1.7, 2F1.1	
18 U.S.C. § 1344	2F1.1, 2B1.1	
18 U.S.C. § 1347	2F1.1, 2B1.1	
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18 U.S.C. § 1361	2B1.1, 2B1.1	
18 U.S.C. § 1362	2B1.1, 2B1.1, 2K1.4	
18 U.S.C. § 1363	2B1.1, 2B1.1, 2K1.4	
		* * *
18 U.S.C. § 1422	2B1.1, 2C1.2, 2F1.1	
		* * *
18 U.S.C. § 1702	2B1.1, 2B1.1, 2H3.3	
18 U.S.C. § 1703	2B1.1, 2B1.1, 2H3.3	
18 U.S.C. § 1705	2B1.1, 2B1.1	
18 U.S.C. § 1706	2B1.1, 2B1.1	

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18 U.S.C. § 1704	2B1.1, <del>2F1.1</del>	* * *
18 U.S.C. § 1708	2B1.1, <del>2F1.1</del>	* * *
18 U.S.C. § 1712	<del>2F1.1</del> 2B1.1	* * *
18 U.S.C. § 1716C	<del>2F1.1</del> 2B1.1	* * *
18 U.S.C. § 1720	<del>2F1.1</del> 2B1.1	* * *
18 U.S.C. § 1728	<del>2F1.1</del> 2B1.1	* * *
18 U.S.C. § 1852	2B1.1, <del>2B1.3</del>	
18 U.S.C. § 1853	2B1.1, <del>2B1.3</del>	
18 U.S.C. § 1854	2B1.1, <del>2B1.3</del>	* * *
18 U.S.C. § 1857	<del>2B1.3</del> 2B1.1, 2B2.3	* * *
18 U.S.C. § 1902	<del>2F1.2</del> 2B1.4	* * *
18 U.S.C. § 1919	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1920	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1923	<del>2F1.1</del> 2B1.1	* * *
18 U.S.C. § 2072	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 2073	<del>2F1.1</del> 2B1.1	* * *
18 U.S.C. § 2197	<del>2F1.1</del> 2B1.1	* * *
18 U.S.C. § 2272	<del>2F1.1</del> 2B1.1	* * *
18 U.S.C. § 2275	<del>2B1.3</del> 2B1.1, 2K1.4	
18 U.S.C. § 2276	<del>2B1.3</del> 2B1.1, 2B2.1	* * *
18 U.S.C. § 2280	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, <del>2B1.3</del> 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1	
18 U.S.C. § 2281	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, <del>2B1.3</del> 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1	* * *
18 U.S.C. § 2314	2B1.1, <del>2F1.1</del>	
18 U.S.C. § 2315	2B1.1, <del>2F1.1</del>	
		* * *
18 U.S.C. § 2332a	2A1.1, 2A1.2, 2A1.3,	

2A1.4, 2A1.5, 2A2.1,  
2A2.2, ~~2B1.3~~2B1.1, 2K1.4

		* * *
19 U.S.C. § 1434	<del>2F1.1</del> 2B1.1, 2T3.1	
19 U.S.C. § 1435	<del>2F1.1</del> 2B1.1, 2T3.1	
19 U.S.C. § 1436	<del>2F1.1</del> 2B1.1, 2T3.1	
		* * *
19 U.S.C. § 1919	<del>2F1.1</del> 2B1.1	
19 U.S.C. § 2316	<del>2F1.1</del> 2B1.1	
		* * *
20 U.S.C. § 1097(a)	2B1.1, <del>2F1.1</del>	
20 U.S.C. § 1097(b)	<del>2F1.1</del> 2B1.1	
		* * *
21 U.S.C. § 333(a)(2)	<del>2F1.1</del> 2B1.1, 2N2.1	
		* * *
22 U.S.C. § 1980(g)	<del>2F1.1</del> 2B1.1	
22 U.S.C. § 2197(n)	<del>2F1.1</del> 2B1.1	
		* * *
22 U.S.C. § 4221	<del>2F1.1</del> 2B1.1	
25 U.S.C. § 450d	2B1.1, <del>2F1.1</del>	
		* * *
26 U.S.C. § 7208	<del>2F1.1</del> 2B1.1	
		* * *
26 U.S.C. § 7214	2B1.1, 2C1.1, 2C1.2, <del>2F1.1</del>	
		* * *
26 U.S.C. § 7232	<del>2F1.1</del> 2B1.1	
		* * *
29 U.S.C. § 1141	2B1.1, 2B3.2, <del>2F1.1</del>	
		* * *
38 U.S.C. § 787	<del>2F1.1</del> 2B1.1	
		* * *
38 U.S.C. § 3502	<del>2F1.1</del> 2B1.1	
		* * *
41 U.S.C. § 423(e)	2B1.1, 2C1.1, 2C1.7, <del>2F1.1</del>	
		* * *
42 U.S.C. § 408	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1307(a)	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1307(b)	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1320a-7b	2B1.1, 2B4.1, <del>2F1.1</del>	
42 U.S.C. § 1383(d)(2)	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1383a(a)	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1383a(b)	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1395nn(a)	<del>2F1.1</del> 2B1.1	
		* * *
42 U.S.C. § 1395nn(c)	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1396h(a)	<del>2F1.1</del> 2B1.1	
		* * *
42 U.S.C. § 1760(g)	2B1.1, <del>2F1.1</del>	
42 U.S.C. § 1761(o)(1)	<del>2F1.1</del> 2B1.1	

42 U.S.C. § 1761(o)(2)	<del>2B1.1, 2F1.1</del>			
				* * *
42 U.S.C. § 3220(a)	<del>2F1.1</del> 2B1.1			
42 U.S.C. § 3220(b)	2B1.1, <del>2F1.1</del>			
42 U.S.C. § 3426	<del>2F1.1</del> 2B1.1			
				* * *
42 U.S.C. § 3791	2B1.1, <del>2F1.1</del>			
42 U.S.C. § 3792	<del>2F1.1</del> 2B1.1			
42 U.S.C. § 3795	2B1.1, <del>2F1.1</del>			
42 U.S.C. § 5157(a)	<del>2F1.1</del> 2B1.1			
				* * *
45 U.S.C. § 359(a)	<del>2F1.1</del> 2B1.1			
46 U.S.C. § 1276	<del>2F1.1</del> 2B1.1			
				* * *
49 U.S.C. § 121	<del>2F1.1</del> 2B1.1 (for offenses committed prior to July 5, 1994)			
				* * *
49 U.S.C. § 11903	<del>2F1.1</del> 2B1.1			
49 U.S.C. § 11904	<del>2F1.1</del> 2B1.1 (2B4.1 for offenses committed prior to January 1, 1996)			
				* * *
49 U.S.C. § 14912	<del>2F1.1</del> 2B1.1			
49 U.S.C. § 16102	<del>2F1.1</del> 2B1.1			
				* * *
49 U.S.C. § 80116	<del>2F1.1</del> 2B1.1			
				* * *

**PART III—CONDITIONS OF PROBATION AND SUPERVISED RELEASE**

6. **Synopsis of Proposed Amendment:** *In the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. 105–119, Congress amended sections 3563(a) and 3583(d) of title 18, United States Code, to add a new mandatory condition of probation for persons convicted of sex offenses. The new mandatory condition requires a person convicted of a sex offense (as described in 18 U.S.C. § 4042(c)(4)) to report that person’s address and any change of residence to the probation officer supervising the case and to register as a sex offender in any State where the person resides, works, or is a student. These amendments to sections 3563(a) and 3583(d) become effective one year after November 26, 1997.*

*The following proposed amendment would add this new condition to the mandatory conditions of probation and supervised release listed in §§5B1.3 and 5D1.3.*

**§5B1.3. Conditions of Probation**

(a) Mandatory Conditions\* --

\* \* \*

(9) a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student (see 18 U.S.C. § 3563(a)(8)).

\* \* \*

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

(a) Mandatory Conditions\* --

\* \* \*

- (7) a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student (see 18 U.S.C. § 3583(d)).

\* \* \*

**PART IV—ISSUES FOR COMMENT**

7. *UNAUTHORIZED COMPENSATION: As a result of enacted legislation, the maximum term of imprisonment for violations of 18 U.S.C. § 209 is now five years if the conduct is willful. Before that change, the maximum term of imprisonment for any violation of 18 U.S.C. § 209 was one year. The Commission invites comment on whether, in view of the increased maximum term of imprisonment for violations of 18 U.S.C. § 209, the guideline offense levels in §2C1.4 (Payment or Receipt of Unauthorized Compensation) should be increased, and, if so, by what amount.*

8. *CLONING OF WIRELESS TELEPHONES: (A). The Wireless Telephone Protection Act, Pub.L. 105-418 (the “Act”), provides a general directive to the Commission to review and amend, if appropriate, the sentencing guidelines and policy statements to provide an appropriate penalty for offenses involving the cloning of wireless telephones, including attempts and conspiracies. The Commission invites comment on whether and how it should amend the guidelines for offenses involving the cloning of wireless telephones, including offenses involving an attempt or conspiracy to clone a wireless telephone. See 18 U.S.C. § 1029(e)(9) (as amended by the Act).*

*Specifically, should the Commission amend §2F1.1 (Fraud), the guideline to which such offenses are referenced, to provide a tailored enhancement (specific offense characteristic) if the offense, including any relevant conduct, involved the use of hardware (a “copycat box”) or software which has been configured for altering or modifying a wireless telephone? If so, what should be the magnitude of such an enhancement? Should the Commission provide a specific offense characteristic in §2F1.1, or a cross reference to other offense guidelines, if the cloning offense facilitated, or was in connection with, another offense? If such a specific offense characteristic*

*or a cross reference is warranted, by how many levels should the sentence for such offenders be increased?*

*(B). If the Commission does not adopt a comprehensive revision of the guidelines and commentary for theft, property destruction, and fraud offenses, such as the comprehensive revision set forth in the Economic Crime Package proposed in Amendment 2, above (which, in the proposed loss definition, includes a special rule for access devices and purloined numbers), should the Commission nevertheless adopt a special rule for cases involving stolen, unauthorized, or counterfeit access devices used in cloning offenses? Such a special rule could, for example, provide for a minimal loss amount of \$100 in the case of each such access device.*

9. *NUCLEAR, CHEMICAL, AND BIOLOGICAL WEAPONS: Section 1423(a) of the Defense Authorization Act for Fiscal Year 1997 expressed the sense of Congress that the guidelines for the offenses of importation, attempted importation, exportation, and attempted exportation of nuclear, biological, and chemical weapons materials provide inadequate punishment for those offenses. Section 1423(b) of that Act urged the Commission to amend*

*the guidelines to increase the penalties for such offenses under (1) section 11 of the Export Administration Act of 1979 (50 U.S.C. App. 2410); (2) sections 38 and 40 of the Arms Export Control Act (22 U.S.C. §§ 2778 and 2780); (3) the International Economic Powers Act (50 U.S.C. 1701 et seq.); and (4) section 309(c) of the Nuclear Non-Proliferation Act of 1978 (22 U.S.C. § 2156a(c)).*

*The Commission invites comment on whether, as Congress suggests, the guidelines, particularly §§2M5.1 (Evasion of Export Controls) and 2M5.2 (Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License) provide inadequate penalties for these offenses. If the guidelines provide inadequate punishment, how should the Commission address that inadequacy? Should the base offense level be increased? Are there specific offense characteristics that should be added to the guidelines to take into account more egregious offense conduct? Alternatively, should encouraged upward departure commentary be added to these guidelines for cases in which more egregious conduct occurs?*

*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 by expanding the meaning of biological agents.*

*Section 201 of the Chemical Weapons Convention Implementation Act of 1998 creates a new offense at 18 U.S.C. § 229. The new offense makes it unlawful for a person knowingly (1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or (2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt or conspire to violate paragraph (1). The penalty, set out in 18 U.S.C. § 229A, is any term of years, or, if the death of another person results, death or life imprisonment.*

*The Commission also invites comment as to how the guidelines should be amended to cover 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 conduct that violates these statutes. If the Commission were to select this approach, what changes, if any, would be appropriate to accommodate these offenses? For example, should an alternative base offense level be added in the case of biological or chemical materials, weapons, or facilities? Are there specific offense characteristics that should be added to take into account the range of likely offense conduct? Should commentary encouraging an upward (or downward) departure be added for cases in which certain atypical conduct occurs?*

10. *TAX PRIVACY ISSUES: The Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105–206, created an offense, codified at 26 U.S.C. § 7217, that makes it unlawful for the President, Vice President, anyone employed in their executive offices, or certain other high-ranking officials of the executive branch to request the Internal Revenue Service to conduct or terminate an audit or other investigation of the tax liability of any person. The maximum term of imprisonment is 5 years.*

*The Act also amended 26 U.S.C. § 7213, which makes it unlawful for federal and state employees and certain other persons to disclose tax return information. The Act amended § 7213 to also make it unlawful to disclose tax-related computer software. The maximum term of imprisonment for such offenses is 5 years.*

*The Taxpayer Browsing Protection Act, Pub. L. 105–35, created an offense, codified at 26 U.S.C. § 7213A, that makes it unlawful for federal and state employees and certain other persons to inspect tax return information in any way other than that authorized under the Internal Revenue Code. The maximum term of imprisonment for such offenses is one year.*

*These new provisions are similar in nature to another tax offense, codified at 26 U.S.C. § 7216, which makes it unlawful for persons who are in the business of preparing tax returns to knowingly or recklessly disclose any such information or to use any such information for any purpose other than the preparation of the tax return. The*

*maximum term of imprisonment for such offenses is one year.*

*The Commission invites comment on whether and/or how the sentencing guidelines might be amended to address violations of 26 U.S.C. §§ 7213, 7213A, 7216, and 7217. One approach may be to rework the guideline pertaining to the interception of communications or eavesdropping, §2H3.1, because arguably all of the offenses described above implicate the privacy interests of the taxpayer whose tax information was the subject of the offense. An alternative approach would be to create a new guideline dealing with the invasion of privacy with respect to the audit, inspection, or disclosure of tax information. Are there other approaches that might be appropriate to address these offenses? The Commission invites alternative suggestions with proposed offense levels.*