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September 18, 2007

To all recipients of the *Guidelines Manual*:

As Chair of the United States Sentencing Commission, I am pleased to transmit this edition of the *Guidelines Manual*, which incorporates new amendments effective November 1, 2007. The 2007 amendments include some substantive, clarifying, and technical revisions to guidelines, policy statements, and commentary.

A supplement to Appendix C setting forth guideline amendments effective November 1, 2004, through November 1, 2007, and the reasons for those amendments, also is enclosed. You should already have the existing two-volume set of Appendix C, which chronicles guideline amendments effective November 1, 1987, through November 5, 2003, and the reasons for those amendments.

As always, the Commission encourages judges, probation officers, prosecuting and defense attorneys, and other interested individuals to submit suggestions for improving the guidelines. Please send comments to: United States Sentencing Commission, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, D.C. 20002-8002, Attention: Office of Publishing and Public Affairs.

Sincerely,

Ricardo H. Hinojosa

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# UNITED STATES SENTENCING COMMISSION **GUIDELINES MANUAL**

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This document contains the text of the *Guidelines Manual* incorporating amendments effective January 15, 1988; June 15, 1988; October 15, 1988; November 1, 1989; November 1, 1990; November 1, 1991; November 27, 1991; November 1, 1992; November 1, 1993; September 23, 1994; November 1, 1994; November 1, 1995; November 1, 1996; May 1, 1997; November 1, 1997; November 1, 1998; May 1, 2000; November 1, 2000; December 16, 2000; May 1, 2001; November 1, 2001; November 1, 2002; January 25, 2003; April 30, 2003; October 27, 2003; November 1, 2003; November 5, 2003; November 1, 2004; October 24, 2005; November 1, 2005; March 27, 2006; September 12, 2006; November 1, 2006; May 1, 2007; and November 1, 2007.

## RECOMMENDED CITATION FORM

United States Sentencing Commission Guidelines, Policy Statements, and Commentary may be cited as follows:

### **I. Full citation form**

United States Sentencing Commission, Guidelines Manual, §3E1.1 (Nov. 2007)

### **II. Abbreviated citation form**

[using USSG as the designated short form for United States Sentencing Guidelines]

- a guideline —  
USSG §2D1.1
- a policy statement —  
USSG §6A1.1, p.s.
- commentary designated as an application note —  
USSG §2B1.1, comment. (n.1)
- commentary designated as background —  
USSG §2B1.1, comment. (backg'd.)
- commentary designated as an introduction —  
USSG Ch.3, Pt.D, intro. comment.
- an appendix to the Guidelines Manual —  
USSG App. C

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## CHAPTER ONE - AUTHORITY AND GENERAL APPLICATION PRINCIPLES

### PART A - AUTHORITY

#### §1A1.1. Authority

The guidelines, policy statements, and commentary set forth in this Guidelines Manual, including amendments thereto, are promulgated by the United States Sentencing Commission pursuant to: (1) section 994(a) of title 28, United States Code; and (2) with respect to guidelines, policy statements, and commentary promulgated or amended pursuant to specific congressional directive, pursuant to the authority contained in that directive in addition to the authority under section 994(a) of title 28, United States Code.

#### Commentary

#### Application Note:

1. *Historical Review of Original Introduction.*—Part A of Chapter One originally was an introduction to the Guidelines Manual that explained a number of policy decisions made by the Commission when it promulgated the initial set of guidelines. This introduction was amended occasionally between 1987 and 2003. In 2003, as part of the Commission's implementation of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (the "PROTECT Act", Public Law 108–21), the original introduction was transferred to the Editorial Note at the end of this guideline. The Commission encourages the review of this material for context and historical purposes.

*Background:* The Sentencing Reform Act of 1984 changed the course of federal sentencing. Among other things, the Act created the United States Sentencing Commission as an independent agency in the Judicial Branch, and directed it to develop guidelines and policy statements for sentencing courts to use when sentencing offenders convicted of federal crimes. Moreover, it empowered the Commission with ongoing responsibilities to monitor the guidelines, submit to Congress appropriate modifications of the guidelines and recommended changes in criminal statutes, and establish education and research programs. The mandate rested on Congressional awareness that sentencing was a dynamic field that requires continuing review by an expert body to revise sentencing policies, in light of application experience, as new criminal statutes are enacted, and as more is learned about what motivates and controls criminal behavior.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 67 and 68); November 1, 1990 (see Appendix C, amendment 307); November 1, 1992 (see Appendix C, amendment 466); November 1, 1995 (see Appendix C, amendment 534); November 1, 1996 (see Appendix C, amendment 538); November 1, 2000 (see Appendix C, amendments 602 and 603); October 27, 2003 (see Appendix C, amendment 651).

Editorial Note: Chapter One, Part A, as in effect on November 1, 1987, read as follows:

CHAPTER ONE - INTRODUCTION  
AND GENERAL APPLICATION PRINCIPLES

PART A - INTRODUCTION

1. Authority

The United States Sentencing Commission ("Commission") is an independent agency in the judicial branch composed of seven voting and two non-voting, ex officio members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code.

2. The Statutory Mission

The Comprehensive Crime Control Act of 1984 foresees guidelines that will further the basic purposes of criminal punishment, *i.e.*, deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender. It delegates to the Commission broad authority to review and rationalize the federal sentencing process.

The statute contains many detailed instructions as to how this determination should be made, but the most important of them instructs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of 'bank robbery/committed with a gun/\$2500 taken.' An offender characteristic category might be 'offender with one prior conviction who was not sentenced to imprisonment.' The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons, to be determined by coordinating the offense behavior categories with the offender characteristic categories. The statute contemplates the guidelines will establish a range of sentences for every coordination of categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum imprisonment cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

The sentencing judge must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the judge to depart from the guidelines and sentence outside the range. In that case, the judge must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to see if the guideline was correctly applied. If the judge departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act requires the offender to serve virtually all of any prison sentence imposed, for it abolishes parole and substantially restructures good behavior adjustments.

The law requires the Commission to send its initial guidelines to Congress by April 13, 1987, and under the present statute they take effect automatically on November 1, 1987. Pub. L. No. 98-473, § 235, reprinted at 18 U.S.C. § 3551. The Commission may submit guideline amendments each year to Congress between the beginning of a regular session and May 1. The amendments will take effect automatically 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The Commission, with the aid of its legal and research staff, considerable public testimony, and written commentary, has developed an initial set of guidelines which it now transmits to Congress. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines by submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts throughout the nation.

3. The Basic Approach (Policy Statement)

To understand these guidelines and the rationale that underlies them, one must begin with the three objectives that Congress, in enacting the new sentencing law, sought to achieve. Its basic objective was to enhance the ability of the criminal justice system to reduce crime through an effective, fair sentencing system. To achieve this objective, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases by 'good time' credits. In addition, the parole commission is permitted to determine how much of the remainder of any prison sentence an offender actually will serve. This usually results in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence handed down by the court.

Second, Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.

Honesty is easy to achieve: The abolition of parole makes the sentence imposed by the court the sentence the offender will serve. There is a tension, however, between the mandate of uniformity (treat similar cases alike) and the mandate of proportionality (treat different cases differently) which, like the historical tension between law and equity, makes it difficult to achieve both goals simultaneously. Perfect

uniformity -- sentencing every offender to five years -- destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that lumps together armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, is far too broad.

At the same time, a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect. A bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected (and therefore may already be counted, to a different degree, in the punishment for the underlying offense); and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies, depending on how much other harm has occurred. (Thus, one cannot easily assign points for each kind of harm and simply add them up, irrespective of context and total amounts.)

The larger the number of subcategories, the greater the complexity that is created and the less workable the system. Moreover, the subcategories themselves, sometimes too broad and sometimes too narrow, will apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system of subcategories, would have to make a host of decisions about whether the underlying facts are sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different judges will apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to eliminate.

In view of the arguments, it is tempting to retreat to the simple, broad-category approach and to grant judges the discretion to select the proper point along a broad sentencing range. Obviously, however, granting such broad discretion risks correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. That is to say, such an approach risks a return to the wide disparity that Congress established the Commission to limit.

In the end, there is no completely satisfying solution to this practical stalemate. The Commission has had to simply balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any ultimate system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the moral principle of 'just deserts.' Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Thus, if a defendant is less culpable, the defendant deserves less punishment. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. Defendants sentenced under this scheme should receive the punishment that most effectively lessens the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of these points of view have urged the Commission to choose between them, to accord one primacy over the other. Such a choice would be profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor. A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation. As a practical matter, in most sentencing decisions both philosophies may prove consistent with the same result.

For now, the Commission has sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that uses data estimating the existing sentencing system as a starting point. It has analyzed data drawn from 10,000 presentence investigations, crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and resulting statistics, and data from other relevant sources, in order to determine which distinctions are important in present practice. After examination, the Commission has accepted, modified, or rationalized the more important of these distinctions.

This empirical approach has helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, is short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit many distinctions that some may believe important, yet they include most of the major distinctions that statutes and presentence data suggest make a significant difference in sentencing decisions. Important distinctions that are ignored in existing practice probably occur rarely. A sentencing judge may take this unusual case into account by departing from the guidelines.

The Commission's empirical approach has also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of moral consensus might make it difficult to say exactly what punishment is deserved for a particular crime, specified in minute detail. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient, readily available data might make it difficult to say exactly what punishment will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a moral or crime-control perspective.

The Commission has not simply copied estimates of existing practice as revealed by the data (even though establishing offense values on this basis would help eliminate disparity, for the data represent averages). Rather, it has departed from the data at different points for various important reasons. Congressional statutes, for example, may suggest or require departure, as in the case of the new drug law that imposes increased and mandatory minimum sentences. In addition, the data may reveal inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from present practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these initial guidelines are but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission has developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, and therefore effective, sentencing system.

#### 4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-writing process has required the Commission to resolve a host of important policy questions, typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction will briefly discuss several of those issues. Commentary in the guidelines explains others.

##### (a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense with which the defendant was charged and of which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken \$50,000, injured a teller, refused to stop when ordered, and raced away damaging property during escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a real offense system. After all, the present sentencing system is, in a sense, a real offense system. The sentencing court (and the parole commission) take account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process, given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable, and, in the Commission's view, risked return to wide disparity in practice.

The Commission therefore abandoned the effort to devise a 'pure' real offense system and instead experimented with a 'modified real offense system,' which it published for public comment in a September 1986 preliminary draft.

This version also foundered in several major respects on the rock of practicality. It was highly complex and its mechanical rules for adding harms (e.g., bodily injury added the same punishment irrespective of context) threatened to work considerable unfairness. Ultimately, the Commission decided that it could not find a practical or fair and efficient way to implement either a pure or modified real offense system of the sort it originally wanted, and it abandoned that approach.

The Commission, in its January 1987 Revised Draft and the present guidelines, has moved closer to a 'charge offense' system. The system is not, however, pure; it has a number of real elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law have forced the Commission to write guidelines that are descriptive of generic conduct rather than tracking purely statutory language. For another, the guidelines, both through specific offense characteristics and adjustments, take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken.

Finally, it is important not to overstate the difference in practice between a real and a charge offense system. The federal criminal

system, in practice, deals mostly with drug offenses, bank robberies and white collar crimes (such as fraud, embezzlement, and bribery). For the most part, the conduct that an indictment charges approximates the real and relevant conduct in which the offender actually engaged.

The Commission recognizes its system will not completely cure the problems of a real offense system. It may still be necessary, for example, for a court to determine some particular real facts that will make a difference to the sentence. Yet, the Commission believes that the instances of controversial facts will be far fewer; indeed, there will be few enough so that the court system will be able to devise fair procedures for their determination. See *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978) (permitting introduction of hearsay evidence at sentencing hearing under certain conditions), *on remand*, 458 F. Supp. 388 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979) (holding that the government need not prove facts at sentencing hearing beyond a reasonable doubt), *cert. denied*, 444 U.S. 1073 (1980).

The Commission also recognizes that a charge offense system has drawbacks of its own. One of the most important is its potential to turn over to the prosecutor the power to determine the sentence by increasing or decreasing the number (or content) of the counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin, or theft of \$10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of \$30,000. Further, a sentencing court may control any inappropriate manipulation of the indictment through use of its power to depart from the specific guideline sentence. Finally, the Commission will closely monitor problems arising out of count manipulation and will make appropriate adjustments should they become necessary.

(b) Departures.

The new sentencing statute permits a court to depart from a guideline-specified sentence only when it finds 'an aggravating or mitigating circumstance ...that was not adequately taken into consideration by the Sentencing Commission . . .'. 18 U.S.C. § 3553(b). Thus, in principle, the Commission, by specifying that it had adequately considered a particular factor, could prevent a court from using it as grounds for departure. In this initial set of guidelines, however, the Commission does not so limit the courts' departure powers. The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, Socio-Economic Status), the third sentence of §5H1.4, and the last sentence of §5K2.12, list a few factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two basic reasons. First is the difficulty of foreseeing and capturing a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that in the initial set of guidelines it need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so, the Commission, over time, will be able to create more accurate guidelines that specify precisely where departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's sentencing data indicate make a significant difference in sentencing at the present time. Thus, for example, where the presence of actual physical injury currently makes an important difference in final sentences, as in the case of robbery, assault, or arson, the guidelines specifically instruct the judge to use this factor to augment the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data do not permit the Commission, at this time, to conclude that the factor is empirically important in relation to the particular offense. Of course, a factor (say physical injury) may nonetheless sometimes occur in connection with a crime (such as fraud) where it does not often occur. If, however, as the data indicate, such occurrences are rare, they are precisely the type of events that the court's departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed. Of course, the Commission recognizes that even its collection and analysis of 10,000 presentence reports are an imperfect source of data sentencing estimates. Rather than rely heavily at this time upon impressionistic accounts, however, the Commission believes it wiser to wait and collect additional data from our continuing monitoring process that may demonstrate how the guidelines work in practice before further modification.

It is important to note that the guidelines refer to three different kinds of departure. The first kind, which will most frequently be used, is in effect an interpolation between two adjacent, numerically oriented guideline rules. A specific offense characteristic, for example, might require an increase of four levels for serious bodily injury but two levels for bodily injury. Rather than requiring a court to force middle instances into either the 'serious' or the 'simple' category, the guideline commentary suggests that the court may interpolate and select a midpoint increase of three levels. The Commission has decided to call such an interpolation a 'departure' in light of the legal views that a guideline providing for a range of increases in offense levels may violate the statute's 25 percent rule (though others have presented contrary legal arguments). Since interpolations are technically departures, the courts will have to provide reasons for their selection, and it will be subject to review for 'reasonableness' on appeal. The Commission believes, however, that a simple reference by the court to the 'mid-category' nature of the facts will typically provide sufficient reason. It does not foresee serious practical problems arising out of the application of the appeal provisions to this form of departure.

The second kind involves instances in which the guidelines provide specific guidance for departure, by analogy or by other numerical or non-numerical suggestions. For example, the commentary to §2G1.1 (Transportation for Prostitution), recommends a downward adjustment of eight levels where commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions, and that the courts of appeals may prove more likely to find departures ‘unreasonable’ where they fall outside suggested levels.

A third kind of departure will remain unguided. It may rest upon grounds referred to in Chapter 5, Part H, or on grounds not mentioned in the guidelines. While Chapter 5, Part H lists factors that the Commission believes may constitute grounds for departure, those suggested grounds are not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly unusual.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas, and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts have urged the Commission not to attempt any major reforms of the agreement process, on the grounds that any set of guidelines that threatens to radically change present practice also threatens to make the federal system unmanageable. Others, starting with the same facts, have argued that guidelines which fail to control and limit plea agreements would leave untouched a ‘loophole’ large enough to undo the good that sentencing guidelines may bring. Still other commentators make both sets of arguments.

The Commission has decided that these initial guidelines will not, in general, make significant changes in current plea agreement practices. The court will accept or reject any such agreements primarily in accordance with the rules set forth in Fed.R.Crim.P. 11(e). The Commission will collect data on the courts’ plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate.

The Commission nonetheless expects the initial set of guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. Insofar as a prosecutor and defense attorney seek to agree about a likely sentence or range of sentences, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which judges will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation. Since they will have before them the norm, the relevant factors (as disclosed in the plea agreement), and the reason for the agreement, they will find it easier than at present to determine whether there is sufficient reason to accept a plea agreement that departs from the norm.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to ‘reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . .’ 28 U.S.C. § 994(j). Under present sentencing practice, courts sentence to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission’s view are ‘serious.’ If the guidelines were to permit courts to impose probation instead of prison in many or all such cases, the present sentences would continue to be ineffective.

The Commission’s solution to this problem has been to write guidelines that classify as ‘serious’ (and therefore subject to mandatory prison sentences) many offenses for which probation is now frequently given. At the same time, the guidelines will permit the sentencing court to impose short prison terms in many such cases. The Commission’s view is that the definite prospect of prison, though the term is short, will act as a significant deterrent to many of these crimes, particularly when compared with the status quo where probation, not prison, is the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through six, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels seven through ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement or intermittent confinement). For offense levels eleven and twelve, the court must impose at least one half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

(e) Multi-Count Convictions.

The Commission, like other sentencing commissions, has found it particularly difficult to develop rules for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The reason it is difficult is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for

example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to life sentences of imprisonment—sentences that neither ‘just deserts’ nor ‘crime control’ theories of punishment would find justified.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment when multiple offenses that are the subjects of separate counts take place.

These rules are set out in Chapter Three, Part D. They essentially provide: (1) When the conduct involves fungible items, e.g., separate drug transactions or thefts of money, the amounts are added and the guidelines apply to the total amount. (2) When nonfungible harms are involved, the offense level for the most serious count is increased (according to a somewhat diminishing scale) to reflect the existence of other counts of conviction.

The rules have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures where necessary to produce a mitigated sentence.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These criminal statutes pose two problems. First, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it cannot comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission has sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses are particularly important in light of the need for enforcement of the general regulatory scheme. The Commission has sought to treat these offenses in these initial guidelines. It will address the less common regulatory offenses in the future.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses, dividing them into four categories.

First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper treatment of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense is as follows:

- (1) The guideline provides a low base offense level (6) aimed at the first type of recordkeeping or reporting offense. It gives the court the legal authority to impose a punishment ranging from probation up to six months of imprisonment.
- (2) Specific offense characteristics designed to reflect substantive offenses that do occur (in respect to some regulatory offenses), or that are likely to occur, increase the offense level.
- (3) A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will be treated like the substantive offense.

The Commission views this structure as an initial effort. It may revise its approach in light of further experience and analysis of regulatory crimes.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission began by estimating the average sentences now being served within each category. It also examined the sentence specified in congressional statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission’s forthcoming detailed report will contain a comparison between estimates of existing sentencing practices and sentences under the guidelines.

While the Commission has not considered itself bound by existing sentencing practice, it has not tried to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences in many instances will approximate existing practice, but adherence

to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons now receive probation, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who now receive probation from those who receive more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a current sentencing practice of very wide variability in which some defendants receive probation while others receive several years in prison for the same offense. Moreover, inasmuch as those who currently plead guilty often receive lesser sentences, the guidelines also permit the court to impose lesser sentences on those defendants who accept responsibility and those who cooperate with the government.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the new drug law and the career offender provisions of the sentencing law, require the Commission to promulgate rules that will lead to substantial prison population increases. These increases will occur irrespective of any guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum, or career offender, sentences), will lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons, estimate at approximately 10 percent, over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table. For technical and practical reasons it has 43 levels. Each row in the table contains levels that overlap with the levels in the preceding and succeeding rows. By overlapping the levels, the table should discourage unnecessary litigation. Both prosecutor and defendant will realize that the difference between one level and another will not necessarily make a difference in the sentence that the judge imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether \$10,000 or \$11,000 was obtained as a result of a fraud. At the same time, the rows work to increase a sentence proportionately. A change of 6 levels roughly doubles the sentence irrespective of the level at which one starts. The Commission, aware of the legal requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months, also wishes to permit courts the greatest possible range for exercising discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the judge within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many, rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation as to which category an offender fell within would become more likely. Where a table has many smaller monetary distinctions, it minimizes the likelihood of litigation, for the importance of the precise amount of money involved is considerably less.

5. A Concluding Note

The Commission emphasizes that its approach in this initial set of guidelines is one of caution. It has examined the many hundreds of criminal statutes in the United States Code. It has begun with those that are the basis for a significant number of prosecutions. It has sought to place them in a rational order. It has developed additional distinctions relevant to the application of these provisions, and it has applied sentencing ranges to each resulting category. In doing so, it has relied upon estimates of existing sentencing practices as revealed by its own statistical analyses, based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from existing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with these guidelines will lead to additional information and provide a firm empirical basis for revision.

Finally, the guidelines will apply to approximately 90 percent of all cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in this initial set of guidelines. They will, however, be addressed in the near future. Their exclusion from this initial submission does not reflect any judgment about their seriousness. The Commission has also deferred promulgation of guidelines pertaining to fines, probation and other sanctions for organizational defendants, with the exception of antitrust violations. The Commission also expects to address this area in the near future."

Amendments

1989 Amendments

Amendment 67 amended Subpart 4(b) in the first sentence of the first paragraph by striking "...that was" and inserting "of a kind, or to a degree,"; in the second sentence of the last paragraph by striking "Part H" and inserting "Part K (Departures)"; and in the third sentence of the last paragraph by striking "Part H" and inserting "Part K".

Amendment 68 amended Subpart 4(b) in the first sentence of the fourth paragraph by striking "three" and inserting "two"; in the fourth paragraph by striking the second through eighth sentences as follows:

"The first kind, which will most frequently be used, is in effect an interpolation between two adjacent, numerically oriented guideline rules. A specific offense characteristic, for example, might require an increase of four levels for serious bodily injury but two levels for bodily injury. Rather than requiring a court to force middle instances into either the 'serious' or the 'simple'

category, the guideline commentary suggests that the court may interpolate and select a midpoint increase of three levels. The Commission has decided to call such an interpolation a 'departure' in light of the legal views that a guideline providing for a range of increases in offense levels may violate the statute's 25 percent rule (though other have presented contrary legal arguments). Since interpolations are technically departures, the courts will have to provide reasons for their selection, and it will be subject to review for 'reasonableness' on appeal. The Commission believes, however, that a simple reference by the court to the 'mid-category' nature of the facts will typically provide sufficient reason. It does not foresee serious practical problems arising out of the application of the appeal provisions to this form of departure.;

in the first sentence of the fifth paragraph by striking "second" and inserting "first"; and in the first sentence of the sixth paragraph by striking "third" and inserting "second".

#### 1990 Amendment

Amendment 307 amended Subparts 2 through 5 to read as follows:

##### "2. The Statutory Mission

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of 'bank robbery/committed with a gun/\$2500 taken.' An offender characteristic category might be 'offender with one prior conviction not resulting in imprisonment.' The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

##### 3. The Basic Approach (Policy Statement)

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity and the mandate of proportionality. Simple uniformity -- sentencing every offender to five years -- destroys proportionality.

Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example: a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected; and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.

The larger the number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.

In view of the arguments, it would have been tempting to retreat to the simple, broad category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.

In the end, there was no completely satisfying solution to this problem. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of 'just deserts.' Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical 'crime control' considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts

philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

#### 4. The Guidelines' Resolution of Major Issues (Policy Statement)

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues; commentary in the guidelines explains others.

##### (a) Real Offense vs. Charge Offense Sentencing.

One of the most important questions for the Commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ('real offense' sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convicted ('charge offense' sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken \$50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The Commission's initial efforts in this direction, carried out in the spring and early summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated 'real harm' facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In its initial set of guidelines submitted to Congress in April 1987, the Commission moved closer to a charge offense system. This system, however, does contain a significant number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendant's sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of \$10,000, the same as a single-

count indictment charging sale of 300 grams of heroin or theft of \$30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary.

(b) Departures.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds ‘an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.’ 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), and the last sentence of §5K2.12 (Coercion and Duress) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts’ legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission’s data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (e.g., physical injury) may infrequently occur in connection with a particular crime (e.g., fraud). Such rare occurrences are precisely the type of events that the courts’ departure powers were designed to cover -- unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. For example, the Commentary to §2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures ‘unreasonable’ where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

(c) Plea Agreements.

Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement. Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the plea agreement process on the grounds that any set of guidelines that threatened to change pre-guidelines practice radically also threatened to make the federal system unmanageable. Others argued that guidelines that failed to control and limit plea agreements would leave untouched a ‘loophole’ large enough to undo the good that sentencing guidelines would bring.

The Commission decided not to make major changes in plea agreement practices in the initial guidelines, but rather to provide guidance by issuing general policy statements concerning the acceptance of plea agreements in Chapter Six, Part B (Plea Agreements). The rules set forth in Fed. R. Crim. P. 11(e) govern the acceptance or rejection of such agreements. The Commission will collect data on the courts’ plea practices and will analyze this information to determine when and why the courts accept or reject plea agreements and whether plea agreement practices are undermining the intent of the Sentencing Reform Act. In light of this information and analysis, the Commission will seek to further regulate the plea agreement process as appropriate. Importantly, if the policy statements relating to plea agreements are followed, circumvention of the Sentencing Reform Act and the guidelines should not occur.

The Commission expects the guidelines to have a positive, rationalizing impact upon plea agreements for two reasons. First, the guidelines create a clear, definite expectation in respect to the sentence that a court will impose if a trial takes place. In the event a prosecutor and defense attorney explore the possibility of a negotiated plea, they will no longer work in the dark. This fact alone should help to reduce irrationality in respect to actual sentencing outcomes. Second, the guidelines create a norm to which courts will likely refer when they decide whether, under Rule 11(e), to accept or to reject a plea agreement or recommendation.

(d) Probation and Split Sentences.

The statute provides that the guidelines are to 'reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . .' 28 U.S.C. § 994(j). Under pre-guidelines sentencing practice, courts sentenced to probation an inappropriately high percentage of offenders guilty of certain economic crimes, such as theft, tax evasion, antitrust offenses, insider trading, fraud, and embezzlement, that in the Commission's view are 'serious.'

The Commission's solution to this problem has been to write guidelines that classify as serious many offenses for which probation previously was frequently given and provide for at least a short period of imprisonment in such cases. The Commission concluded that the definite prospect of prison, even though the term may be short, will serve as a significant deterrent, particularly when compared with pre-guidelines practice where probation, not prison, was the norm.

More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through six, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels seven through ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one-half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

(e) Multi-Count Convictions.

The Commission, like several state sentencing commissions, has found it particularly difficult to develop guidelines for sentencing defendants convicted of multiple violations of law, each of which makes up a separate count in an indictment. The difficulty is that when a defendant engages in conduct that causes several harms, each additional harm, even if it increases the extent to which punishment is warranted, does not necessarily warrant a proportionate increase in punishment. A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment. If it did, many of the simplest offenses, for reasons that are often fortuitous, would lead to sentences of life imprisonment -- sentences that neither just deserts nor crime control theories of punishment would justify.

Several individual guidelines provide special instructions for increasing punishment when the conduct that is the subject of that count involves multiple occurrences or has caused several harms. The guidelines also provide general rules for aggravating punishment in light of multiple harms charged separately in separate counts. These rules may produce occasional anomalies, but normally they will permit an appropriate degree of aggravation of punishment for multiple offenses that are the subjects of separate counts.

These rules are set out in Chapter Three, Part D (Multiple Counts). They essentially provide: (1) when the conduct involves fungible items (e.g., separate drug transactions or thefts of money), the amounts are added and the guidelines apply to the total amount; (2) when nonfungible harms are involved, the offense level for the most serious count is increased (according to a diminishing scale) to reflect the existence of other counts of conviction. The guidelines have been written in order to minimize the possibility that an arbitrary casting of a single transaction into several counts will produce a longer sentence. In addition, the sentencing court will have adequate power to prevent such a result through departures.

(f) Regulatory Offenses.

Regulatory statutes, though primarily civil in nature, sometimes contain criminal provisions in respect to particularly harmful activity. Such criminal provisions often describe not only substantive offenses, but also more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information. These statutes pose two problems: first, which criminal regulatory provisions should the Commission initially consider, and second, how should it treat technical or administratively-related criminal violations?

In respect to the first problem, the Commission found that it could not comprehensively treat all regulatory violations in the initial set of guidelines. There are hundreds of such provisions scattered throughout the United States Code. To find all potential violations would involve examination of each individual federal regulation. Because of this practical difficulty, the Commission sought to determine, with the assistance of the Department of Justice and several regulatory agencies, which criminal regulatory offenses were particularly important in light of the need for enforcement of the general regulatory scheme. The Commission addressed these offenses in the initial guidelines.

In respect to the second problem, the Commission has developed a system for treating technical recordkeeping and reporting offenses that divides them into four categories. First, in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper handling of any toxic substance. Second, the same failure may be accompanied by a significant likelihood that substantive harm will occur; it may make a release of a toxic substance more likely. Third, the same failure may have led to substantive harm. Fourth, the failure may represent an effort to conceal a substantive harm that has occurred.

The structure of a typical guideline for a regulatory offense provides a low base offense level (e.g., 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level. A specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will have the same offense level as the substantive offense.

(g) Sentencing Ranges.

In determining the appropriate sentencing ranges for each offense, the Commission estimated the average sentences served within each category under the pre-guidelines sentencing system. It also examined the sentences specified in federal statutes, in the parole guidelines, and in other relevant, analogous sources. The Commission's Supplementary Report on the Initial Sentencing Guidelines (1987) contains a comparison between estimates of pre-guidelines sentencing practice and sentences under the guidelines.

While the Commission has not considered itself bound by pre-guidelines sentencing practice, it has not attempted to develop an entirely new system of sentencing on the basis of theory alone. Guideline sentences, in many instances, will approximate average pre-guidelines practice and adherence to the guidelines will help to eliminate wide disparity. For example, where a high percentage of persons received probation under pre-guidelines practice, a guideline may include one or more specific offense characteristics in an effort to distinguish those types of defendants who received probation from those who received more severe sentences. In some instances, short sentences of incarceration for all offenders in a category have been substituted for a pre-guidelines sentencing practice of very wide variability in which some defendants received probation while others received several years in prison for the same offense. Moreover, inasmuch as those who pleaded guilty under pre-guidelines practice often received lesser sentences, the guidelines permit the court to impose lesser sentences on those defendants who accept responsibility for their misconduct. For defendants who provide substantial assistance to the government in the investigation or prosecution of others, a downward departure may be warranted.

The Commission has also examined its sentencing ranges in light of their likely impact upon prison population. Specific legislation, such as the Anti-Drug Abuse Act of 1986 and the career offender provisions of the Sentencing Reform Act of 1984 (28 U.S.C. § 994(h)), required the Commission to promulgate guidelines that will lead to substantial prison population increases. These increases will occur irrespective of the guidelines. The guidelines themselves, insofar as they reflect policy decisions made by the Commission (rather than legislated mandatory minimum or career offender sentences), are projected to lead to an increase in prison population that computer models, produced by the Commission and the Bureau of Prisons in 1987, estimated at approximately 10 percent over a period of ten years.

(h) The Sentencing Table.

The Commission has established a sentencing table that for technical and practical reasons contains 43 levels. Each level in the table prescribes ranges that overlap with the ranges in the preceding and succeeding levels. By overlapping the ranges, the table should discourage unnecessary litigation. Both prosecution and defense will realize that the difference between one level and another will not necessarily make a difference in the sentence that the court imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether \$10,000 or \$11,000 was obtained as a result of a fraud. At the same time, the levels work to increase a sentence proportionately. A change of six levels roughly doubles the sentence irrespective of the level at which one starts. The guidelines, in keeping with the statutory requirement that the maximum of any range cannot exceed the minimum by more than the greater of 25 percent or six months (28 U.S.C. § 994(b)(2)), permit courts to exercise the greatest permissible range of sentencing discretion. The table overlaps offense levels meaningfully, works proportionately, and at the same time preserves the maximum degree of allowable discretion for the court within each level.

Similarly, many of the individual guidelines refer to tables that correlate amounts of money with offense levels. These tables often have many rather than a few levels. Again, the reason is to minimize the likelihood of unnecessary litigation. If a money table were to make only a few distinctions, each distinction would become more important and litigation over which category an offender fell within would become more likely. Where a table has many small monetary distinctions, it minimizes the likelihood of litigation because the precise amount of money involved is of considerably less importance.

5. A Concluding Note

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and

sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from pre-guidelines sentencing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

Finally, the guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts. Because of time constraints and the nonexistence of statistical information, some offenses that occur infrequently are not considered in the guidelines. Their exclusion does not reflect any judgment regarding their seriousness and they will be addressed as the Commission refines the guidelines over time."

#### 1992 Amendment

Amendment 466 amended Subpart 4(b) in the first paragraph by inserting "§5H1.12 (Lack of Guidance as a Youth and Similar Circumstances)" after "§5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status)".

#### 1995 Amendment

Amendment 534 amended Subpart 4(d) in the second sentence of the third paragraph by striking "six" and inserting "eight"; and in the third sentence of the third paragraph by striking "seven through" and inserting "nine and".

#### 1996 Amendment

Amendment 538 amended Subpart 4(b) in the fourth paragraph by striking the third sentence as follows:

"For example, the Commentary to §2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved."

#### 2000 Amendments

Amendment 602 amended Subpart 4(b) in the fifth sentence of the first paragraph by striking "and" before "the last"; and by inserting ", and §5K2.19 (Post-Sentencing Rehabilitative Efforts)" after "(Coercion and Duress)".

Amendment 603 amended Subpart 4(d) by adding an asterisk at the end of the last paragraph after the period; and by adding at the end the following footnote:

"\*Note: Although the Commission had not addressed 'single acts of aberrant behavior' at the time the Introduction to the Guidelines Manual originally was written, it subsequently addressed the issue in Amendment 603, effective November 1, 2000. (See Supplement to Appendix C, Amendment 603.)".

**PART B - GENERAL APPLICATION PRINCIPLES****§1B1.1. Application Instructions**

Except as specifically directed, the provisions of this manual are to be applied in the following order:

- (a) Determine, pursuant to §1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See §1B1.2.
- (b) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.
- (c) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.
- (d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.
- (e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.
- (f) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.
- (g) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.
- (h) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.
- (i) Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

Commentary

Application Notes:

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

- (A) *"Abducted" means that a victim was forced to accompany an offender to a different location. For example, a bank robber's forcing a bank teller from the bank into a getaway car would constitute an abduction.*
- (B) *"Bodily injury" means any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought.*
- (C) *"Brandished" with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.*
- (D) *"Dangerous weapon" means (i) an instrument capable of inflicting death or serious bodily injury; or (ii) an object that is not an instrument capable of inflicting death or serious bodily injury but (I) closely resembles such an instrument; or (II) the defendant used the object in a manner that created the impression that the object was such an instrument (e.g. a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).*
- (E) *"Departure" means (i) for purposes other than those specified in subdivision (ii), imposition of a sentence outside the applicable guideline range or of a sentence that is otherwise different from the guideline sentence; and (ii) for purposes of §4A1.3 (Departures Based on Inadequacy of Criminal History Category), assignment of a criminal history category other than the otherwise applicable criminal history category, in order to effect a sentence outside the applicable guideline range. "Depart" means grant a departure.*
- "Downward departure" means departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence. "Depart downward" means grant a downward departure.*
- "Upward departure" means departure that effects a sentence greater than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise greater than the guideline sentence. "Depart upward" means grant an upward departure.*
- (F) *"Destructive device" means any article described in 26 U.S.C. § 5845(f) (including an explosive, incendiary, or poison gas - (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses).*
- (G) *"Firearm" means (i) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any*

*destructive device. A weapon, commonly known as a "BB" or pellet gun, that uses air or carbon dioxide pressure to expel a projectile is a dangerous weapon but not a firearm.*

- (H) *"Offense" means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context. The term "instant" is used in connection with "offense," "federal offense," or "offense of conviction," as the case may be, to distinguish the violation for which the defendant is being sentenced from a prior or subsequent offense, or from an offense before another court (e.g., an offense before a state court involving the same underlying conduct).*
- (I) *"Otherwise used" with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.*
- (J) *"Permanent or life-threatening bodily injury" means injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent. In the case of a kidnapping, for example, maltreatment to a life-threatening degree (e.g., by denial of food or medical care) would constitute life-threatening bodily injury.*
- (K) *"Physically restrained" means the forcible restraint of the victim such as by being tied, bound, or locked up.*
- (L) *"Serious bodily injury" means injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation. In addition, "serious bodily injury" is deemed to have occurred if the offense involved conduct constituting criminal sexual abuse under 18 U.S.C. § 2241 or § 2242 or any similar offense under state law.*
2. *Definitions of terms also may appear in other sections. Such definitions are not designed for general applicability; therefore, their applicability to sections other than those expressly referenced must be determined on a case by case basis.*
- The term "includes" is not exhaustive; the term "e.g." is merely illustrative.*
3. *The list of "Statutory Provisions" in the Commentary to each offense guideline does not necessarily include every statute covered by that guideline. In addition, some statutes may be covered by more than one guideline.*
4. (A) *Cumulative Application of Multiple Adjustments within One Guideline.—The offense level adjustments from more than one specific offense characteristic within an offense guideline are applied cumulatively (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. For example, in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the*

*adjustments for different degrees of bodily injury (subdivisions (A)-(E)) are not added together.*

- (B) *Cumulative Application of Multiple Adjustments from Multiple Guidelines.*—Absent an instruction to the contrary, enhancements under Chapter Two, adjustments under Chapter Three, and determinations under Chapter Four are to be applied cumulatively. In some cases, such enhancements, adjustments, and determinations may be triggered by the same conduct. For example, shooting a police officer during the commission of a robbery may warrant an injury enhancement under §2B3.1(b)(3) and an official victim adjustment under §3A1.2, even though the enhancement and the adjustment both are triggered by the shooting of the officer.
5. Where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level. *E.g.*, in §2A2.2(b)(2), if a firearm is both discharged and brandished, the provision applicable to the discharge of the firearm would be used.
6. *Use of Abbreviated Guideline Titles.*—Whenever a guideline makes reference to another guideline, a parenthetical restatement of that other guideline's heading accompanies the initial reference to that other guideline. This parenthetical is provided only for the convenience of the reader and is not intended to have substantive effect. In the case of lengthy guideline headings, such a parenthetical restatement of the guideline heading may be abbreviated for ease of reference. For example, references to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States) may be abbreviated as follows: §2B1.1 (Theft, Property Destruction, and Fraud).

**Historical Note:** Effective November 1, 1987. Amended effective January 15, 1988 (*see* Appendix C, amendment 1); November 1, 1989 (*see* Appendix C, amendments 69-72 and 303); November 1, 1990 (*see* Appendix C, amendment 361); November 1, 1991 (*see* Appendix C, amendment 388); November 1, 1993 (*see* Appendix C, amendment 497); November 1, 1997 (*see* Appendix C, amendments 545 and 546); November 1, 2000 (*see* Appendix C, amendments 591 and 601); November 1, 2001 (*see* Appendix C, amendment 617); October 27, 2003 (*see* Appendix C, amendment 651); November 1, 2003 (*see* Appendix C, amendment 661); November 1, 2006 (*see* Appendix C, amendment 684).

### §1B1.2. **Applicable Guidelines**

- (a) Determine the offense guideline section in Chapter Two (Offense Conduct) applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted). However, in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, determine the offense guideline section in Chapter Two applicable to the stipulated offense.

Refer to the Statutory Index (Appendix A) to determine the Chapter Two offense

guideline, referenced in the Statutory Index for the offense of conviction. If the offense involved a conspiracy, attempt, or solicitation, refer to §2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, use the most analogous guideline. See §2X5.1 (Other Offenses). The guidelines do not apply to any count of conviction that is a Class B or C misdemeanor or an infraction. See §1B1.9 (Class B or C Misdemeanors and Infractions).

- (b) After determining the appropriate offense guideline section pursuant to subsection (a) of this section, determine the applicable guideline range in accordance with §1B1.3 (Relevant Conduct).
- (c) A plea agreement (written or made orally on the record) containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s).
- (d) A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

#### Commentary

#### Application Notes:

1. *This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). The court is to use the Chapter Two guideline section referenced in the Statutory Index (Appendix A) for the offense of conviction. However, (A) in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the Chapter Two offense guideline section applicable to the stipulated offense is to be used; and (B) for statutory provisions not listed in the Statutory Index, the most analogous guideline, determined pursuant to §2X5.1 (Other Offenses), is to be used.*

*In the case of a particular statute that proscribes only a single type of criminal conduct, the offense of conviction and the conduct proscribed by the statute will coincide, and the Statutory Index will specify only one offense guideline for that offense of conviction. In the case of a particular statute that proscribes a variety of conduct that might constitute the subject of different offense guidelines, the Statutory Index may specify more than one offense guideline for that particular statute, and the court will determine which of the referenced guideline sections is most appropriate for the offense conduct charged in the count of which the defendant was convicted. If the offense involved a conspiracy, attempt, or solicitation, refer to §2X1.1 (Attempt, Solicitation, or Conspiracy) as well as the guideline referenced in the Statutory Index for the substantive offense. For statutory provisions not listed in the Statutory Index, the most analogous guideline is to be used. See §2X5.1 (Other Offenses).*

*As set forth in the first paragraph of this note, an exception to this general rule is that if a plea*

*agreement (written or made orally on the record) contains a stipulation that establishes a more serious offense than the offense of conviction, the guideline section applicable to the stipulated offense is to be used. A factual statement or a stipulation contained in a plea agreement (written or made orally on the record) is a stipulation for purposes of subsection (a) only if both the defendant and the government explicitly agree that the factual statement or stipulation is a stipulation for such purposes. However, a factual statement or stipulation made after the plea agreement has been entered, or after any modification to the plea agreement has been made, is not a stipulation for purposes of subsection (a). The sentence that shall be imposed is limited, however, to the maximum authorized by the statute under which the defendant is convicted. See Chapter Five, Part G (Implementing the Total Sentence of Imprisonment). For example, if the defendant pleads guilty to theft, but admits the elements of robbery as part of the plea agreement, the robbery guideline is to be applied. The sentence, however, may not exceed the maximum sentence for theft. See H. Rep. 98-1017, 98th Cong., 2d Sess. 99 (1984).*

*The exception to the general rule has a practical basis. In a case in which the elements of an offense more serious than the offense of conviction are established by a plea agreement, it may unduly complicate the sentencing process if the applicable guideline does not reflect the seriousness of the defendant's actual conduct. Without this exception, the court would be forced to use an artificial guideline and then depart from it to the degree the court found necessary based upon the more serious conduct established by the plea agreement. The probation officer would first be required to calculate the guideline for the offense of conviction. However, this guideline might even contain characteristics that are difficult to establish or not very important in the context of the actual offense conduct. As a simple example, §2B1.1 (Theft, Property Destruction, and Fraud) contains monetary distinctions which are more significant and more detailed than the monetary distinctions in §2B3.1 (Robbery). Then, the probation officer might need to calculate the robbery guideline to assist the court in determining the appropriate degree of departure in a case in which the defendant pled guilty to theft but admitted committing robbery. This cumbersome, artificial procedure is avoided by using the exception rule in guilty or nolo contendere plea cases where it is applicable.*

*As with any plea agreement, the court must first determine that the agreement is acceptable, in accordance with the policies stated in Chapter Six, Part B (Plea Agreements). The limited exception provided here applies only after the court has determined that a plea, otherwise fitting the exception, is acceptable.*

2. *Section 1B1.2(b) directs the court, once it has determined the applicable guideline (i.e., the applicable guideline section from Chapter Two) under §1B1.2(a) to determine any applicable specific offense characteristics (under that guideline), and any other applicable sentencing factors pursuant to the relevant conduct definition in §1B1.3. Where there is more than one base offense level within a particular guideline, the determination of the applicable base offense level is treated in the same manner as a determination of a specific offense characteristic. Accordingly, the "relevant conduct" criteria of §1B1.3 are to be used, unless conviction under a specific statute is expressly required.*
3. *Subsections (c) and (d) address circumstances in which the provisions of Chapter Three, Part D (Multiple Counts) are to be applied although there may be only one count of conviction. Subsection (c) provides that in the case of a stipulation to the commission of additional offense(s), the guidelines are to be applied as if the defendant had been convicted of an additional count for each of the offenses stipulated. For example, if the defendant is convicted*

*of one count of robbery but, as part of a plea agreement, admits to having committed two additional robberies, the guidelines are to be applied as if the defendant had been convicted of three counts of robbery. Subsection (d) provides that a conviction on a conspiracy count charging conspiracy to commit more than one offense is treated as if the defendant had been convicted of a separate conspiracy count for each offense that he conspired to commit. For example, where a conviction on a single count of conspiracy establishes that the defendant conspired to commit three robberies, the guidelines are to be applied as if the defendant had been convicted on one count of conspiracy to commit the first robbery, one count of conspiracy to commit the second robbery, and one count of conspiracy to commit the third robbery.*

4. *Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. Note, however, if the object offenses specified in the conspiracy count would be grouped together under §3D1.2(d) (e.g., a conspiracy to steal three government checks) it is not necessary to engage in the foregoing analysis, because §1B1.3(a)(2) governs consideration of the defendant's conduct.*

**Historical Note:** Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 2); November 1, 1989 (see Appendix C, amendments 73-75 and 303); November 1, 1991 (see Appendix C, amendment 434); November 1, 1992 (see Appendix C, amendment 438); November 1, 2000 (see Appendix C, amendment 591); November 1, 2001 (see Appendix C, amendments 613 and 617).

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

- (a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

- (1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
- (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

- (2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;
  - (3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and
  - (4) any other information specified in the applicable guideline.
- (b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

1. *The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator.*
2. *A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.*

*In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:*

- (i) *in furtherance of the jointly undertaken criminal activity; and*
- (ii) *reasonably foreseeable in connection with that criminal activity.*

*Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the "jointly undertaken criminal activity") is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant's agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in*

*furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.*

*In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.*

*Note that the criminal activity that the defendant agreed to jointly undertake, and the reasonably foreseeable conduct of others in furtherance of that criminal activity, are not necessarily identical. For example, two defendants agree to commit a robbery and, during the course of that robbery, the first defendant assaults and injures a victim. The second defendant is accountable for the assault and injury to the victim (even if the second defendant had not agreed to the assault and had cautioned the first defendant to be careful not to hurt anyone) because the assaultive conduct was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).*

*With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.*

*The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes, aids, abets, counsels, commands, induces, procures, or willfully causes; such conduct is addressed under subsection (a)(1)(A).*

*A defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant joining the conspiracy, even if the defendant knows of that conduct (e.g., in the case of a defendant who joins an ongoing drug distribution conspiracy knowing that it had been selling two kilograms of cocaine per week, the cocaine sold prior to the defendant joining the conspiracy is not included as relevant conduct in determining the defendant's offense level). The Commission does not foreclose the possibility that there may be some unusual set of circumstances in which the exclusion of such conduct may not adequately reflect the defendant's culpability; in such a case, an upward departure may be warranted.*

*Illustrations of Conduct for Which the Defendant is Accountable*

(a) *Acts and omissions aided or abetted by the defendant*

- (1) *Defendant A is one of ten persons hired by Defendant B to off-load a ship containing marihuana. The off-loading of the ship is interrupted by law enforcement officers and one ton of marihuana is seized (the amount on the ship as well as the amount off-loaded). Defendant A and the other off-loaders are arrested and convicted of importation of marihuana. Regardless of the number of bales he personally unloaded, Defendant A is accountable for the entire one-ton quantity of marihuana. Defendant A aided and abetted the off-loading of the*

*entire shipment of marihuana by directly participating in the off-loading of that shipment (i.e., the specific objective of the criminal activity he joined was the off-loading of the entire shipment). Therefore, he is accountable for the entire shipment under subsection (a)(1)(A) without regard to the issue of reasonable foreseeability. This is conceptually similar to the case of a defendant who transports a suitcase knowing that it contains a controlled substance and, therefore, is accountable for the controlled substance in the suitcase regardless of his knowledge or lack of knowledge of the actual type or amount of that controlled substance.*

*In certain cases, a defendant may be accountable for particular conduct under more than one subsection of this guideline. As noted in the preceding paragraph, Defendant A is accountable for the entire one-ton shipment of marihuana under subsection (a)(1)(A). Defendant A also is accountable for the entire one-ton shipment of marihuana on the basis of subsection (a)(1)(B) (applying to a jointly undertaken criminal activity). Defendant A engaged in a jointly undertaken criminal activity (the scope of which was the importation of the shipment of marihuana). A finding that the one-ton quantity of marihuana was reasonably foreseeable is warranted from the nature of the undertaking itself (the importation of marihuana by ship typically involves very large quantities of marihuana). The specific circumstances of the case (the defendant was one of ten persons off-loading the marihuana in bales) also support this finding. In an actual case, of course, if a defendant's accountability for particular conduct is established under one provision of this guideline, it is not necessary to review alternative provisions under which such accountability might be established.*

(b) *Acts and omissions aided or abetted by the defendant; requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable*

- (1) *Defendant C is the getaway driver in an armed bank robbery in which \$15,000 is taken and a teller is assaulted and injured. Defendant C is accountable for the money taken under subsection (a)(1)(A) because he aided and abetted the act of taking the money (the taking of money was the specific objective of the offense he joined). Defendant C is accountable for the injury to the teller under subsection (a)(1)(B) because the assault on the teller was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable in connection with that criminal activity (given the nature of the offense).*

*As noted earlier, a defendant may be accountable for particular conduct under more than one subsection. In this example, Defendant C also is accountable for the money taken on the basis of subsection (a)(1)(B) because the taking of money was in furtherance of the jointly undertaken criminal activity (the robbery) and was reasonably foreseeable (as noted, the taking of money was the specific objective of the jointly undertaken criminal activity).*

- (c) Requirement that the conduct of others be in furtherance of the jointly undertaken criminal activity and reasonably foreseeable; scope of the criminal activity
- (1) *Defendant D pays Defendant E a small amount to forge an endorsement on an \$800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a down payment in a scheme to fraudulently obtain \$15,000 worth of merchandise. Defendant E is convicted of forging the \$800 check and is accountable for the forgery of this check under subsection (a)(1)(A). Defendant E is not accountable for the \$15,000 because the fraudulent scheme to obtain \$15,000 was not in furtherance of the criminal activity he jointly undertook with Defendant D (i.e., the forgery of the \$800 check).*
  - (2) *Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains \$20,000. Defendant G fraudulently obtains \$35,000. Each is convicted of mail fraud. Defendants F and G each are accountable for the entire amount (\$55,000). Each defendant is accountable for the amount he personally obtained under subsection (a)(1)(A). Each defendant is accountable for the amount obtained by his accomplice under subsection (a)(1)(B) because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable in connection with that criminal activity.*
  - (3) *Defendants H and I engaged in an ongoing marijuana importation conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marijuana. Defendant J is accountable for the entire single shipment of marijuana he helped import under subsection (a)(1)(A) and any acts and omissions in furtherance of the importation of that shipment that were reasonably foreseeable (see the discussion in example (a)(1) above). He is not accountable for prior or subsequent shipments of marijuana imported by Defendants H or I because those acts were not in furtherance of his jointly undertaken criminal activity (the importation of the single shipment of marijuana).*
  - (4) *Defendant K is a wholesale distributor of child pornography. Defendant L is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Similarly, Defendant M is a retail-level dealer who purchases child pornography from Defendant K and resells it, but otherwise operates independently of Defendant K. Defendants L and M are aware of each other's criminal activity but operate independently. Defendant N is Defendant K's assistant who recruits customers for Defendant K and frequently supervises the deliveries to Defendant K's customers. Each defendant is convicted of a count charging conspiracy to distribute child pornography. Defendant K is accountable under subsection (a)(1)(A) for the entire quantity of child pornography sold to Defendants L and M. Defendant N also is accountable for the entire quantity sold to those defendants under subsection (a)(1)(B) because the entire quantity was within the scope of his jointly undertaken criminal activity and reasonably foreseeable. Defendant L is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K because the scope of his*

*jointly undertaken criminal activity is limited to that amount. For the same reason, Defendant M is accountable under subsection (a)(1)(A) only for the quantity of child pornography that he purchased from Defendant K.*

- (5) *Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under subsection (a)(1)(A) for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (i.e., the one delivery).*
- (6) *Defendant P is a street-level drug dealer who knows of other street-level drug dealers in the same geographic area who sell the same type of drug as he sells. Defendant P and the other dealers share a common source of supply, but otherwise operate independently. Defendant P is not accountable for the quantities of drugs sold by the other street-level drug dealers because he is not engaged in a jointly undertaken criminal activity with them. In contrast, Defendant Q, another street-level drug dealer, pools his resources and profits with four other street-level drug dealers. Defendant Q is engaged in a jointly undertaken criminal activity and, therefore, he is accountable under subsection (a)(1)(B) for the quantities of drugs sold by the four other dealers during the course of his joint undertaking with them because those sales were in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity.*
- (7) *Defendant R recruits Defendant S to distribute 500 grams of cocaine. Defendant S knows that Defendant R is the prime figure in a conspiracy involved in importing much larger quantities of cocaine. As long as Defendant S's agreement and conduct is limited to the distribution of the 500 grams, Defendant S is accountable only for that 500 gram amount (under subsection (a)(1)(A)), rather than the much larger quantity imported by Defendant R.*
- (8) *Defendants T, U, V, and W are hired by a supplier to backpack a quantity of marihuana across the border from Mexico into the United States. Defendants T, U, V, and W receive their individual shipments from the supplier at the same time and coordinate their importation efforts by walking across the border together for mutual assistance and protection. Each defendant is accountable for the aggregate quantity of marihuana transported by the four defendants. The four defendants engaged in a jointly undertaken criminal activity, the object of which was the importation of the four backpacks containing marihuana (subsection (a)(1)(B)), and aided and abetted each other's actions (subsection (a)(1)(A)) in carrying out the jointly undertaken criminal activity. In contrast, if Defendants T, U, V, and W were hired individually, transported their individual shipments at different times, and otherwise operated independently, each defendant would be accountable only for the quantity of marihuana he personally transported (subsection (a)(1)(A)). As this example illustrates, in cases involving contraband (including controlled substances), the scope of the jointly undertaken criminal activity (and thus the accountability of the defendant for the contraband*

*that was the object of that jointly undertaken activity) may depend upon whether, in the particular circumstances, the nature of the offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.*

3. *"Offenses of a character for which §3D1.2(d) would require grouping of multiple counts," as used in subsection (a)(2), applies to offenses for which grouping of counts would be required under §3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in §3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply.*

*As noted above, subsection (a)(2) applies to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21 U.S.C. § 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by different statutory provisions, are of a character for which §3D1.2(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.*

4. *"Harm" includes bodily injury, monetary loss, property damage and any resulting harm.*
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., §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. In a case in which creation of risk is not adequately taken into account by the applicable offense guideline, an upward departure may be warranted. 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.*

6. A particular guideline (in the base offense level or in a specific offense characteristic) may expressly direct that a particular factor be applied only if the defendant was convicted of a particular statute. For example, in §2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), subsection (b)(2)(B) applies if the defendant "is convicted under 18 U.S.C. § 1956". Unless such an express direction is included, conviction under the statute is not required. Thus, use of a statutory reference to describe a particular set of circumstances does not require a conviction under the referenced statute. An example of this usage is found in §2A3.4(a)(2) ("if the offense was committed by the means set forth in 18 U.S.C. § 2242").

Unless otherwise specified, an express direction to apply a particular factor only if the defendant was convicted of a particular statute includes the determination of the offense level where the defendant was convicted of conspiracy, attempt, solicitation, aiding or abetting, accessory after the fact, or misprision of felony in respect to that particular statute. For example, §2S1.1(b)(2)(B) (which is applicable only if the defendant is convicted under 18 U.S.C. § 1956) would be applied in determining the offense level under §2X3.1 (Accessory After the Fact) in a case in which the defendant was convicted of accessory after the fact to a violation of 18 U.S.C. § 1956 but would not be applied in a case in which the defendant is convicted of a conspiracy under 18 U.S.C. § 1956(h) and the sole object of that conspiracy was to commit an offense set forth in 18 U.S.C. § 1957. See Application Note 3(C) of §2S1.1.

7. In the case of a partially completed offense (e.g., an offense involving an attempted theft of \$800,000 and a completed theft of \$30,000), the offense level is to be determined in accordance with §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to §2X1.1. Note, however, that Application Note 4 is not applicable where the offense level is determined under §2X1.1(c)(1).
8. For the purposes of subsection (a)(2), offense conduct associated with a sentence that was imposed prior to the acts or omissions constituting the instant federal offense (the offense of conviction) is not considered as part of the same course of conduct or common scheme or plan as the offense of conviction.

Examples: (1) The defendant was convicted for the sale of cocaine and sentenced to state prison. Immediately upon release from prison, he again sold cocaine to the same person, using the same accomplices and modus operandi. The instant federal offense (the offense of conviction) charges this latter sale. In this example, the offense conduct relevant to the state prison sentence is considered as prior criminal history, not as part of the same course of conduct or common scheme or plan as the offense of conviction. The prior state prison sentence is counted under Chapter Four (Criminal History and Criminal Livelihood). (2) The defendant engaged in two cocaine sales constituting part of the same course of conduct or common scheme or plan. Subsequently, he is arrested by state authorities for the first sale and by federal authorities for the second sale. He is convicted in state court for the first sale and sentenced to imprisonment; he is then convicted in federal court for the second sale. In this case, the cocaine sales are not separated by an intervening sentence. Therefore, under subsection (a)(2), the cocaine sale associated with the state conviction is considered as relevant conduct to the instant federal offense. The state prison sentence for that sale is not counted as a prior sentence; see §4A1.2(a)(1).

*Note, however, in certain cases, offense conduct associated with a previously imposed sentence may be expressly charged in the offense of conviction. Unless otherwise provided, such conduct will be considered relevant conduct under subsection (a)(1), not (a)(2).*

9. *"Common scheme or plan" and "same course of conduct" are two closely related concepts.*
  - (A) *Common scheme or plan. For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi. For example, the conduct of five defendants who together defrauded a group of investors by computer manipulations that unlawfully transferred funds over an eighteen-month period would qualify as a common scheme or plan on the basis of any of the above listed factors; *i.e.*, the commonality of victims (the same investors were defrauded on an ongoing basis), commonality of offenders (the conduct constituted an ongoing conspiracy), commonality of purpose (to defraud the group of investors), or similarity of modus operandi (the same or similar computer manipulations were used to execute the scheme).*
  - (B) *Same course of conduct. Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses. Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses. When one of the above factors is absent, a stronger presence of at least one of the other factors is required. For example, where the conduct alleged to be relevant is relatively remote to the offense of conviction, a stronger showing of similarity or regularity is necessary to compensate for the absence of temporal proximity. The nature of the offenses may also be a relevant consideration (*e.g.*, a defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct because such returns are only required at yearly intervals).*
10. *In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant is accountable includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.*

*Background: This section prescribes rules for determining the applicable guideline sentencing range, whereas §1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.*

*Subsection (a) establishes a rule of construction by specifying, in the absence of more explicit instructions in the context of a specific guideline, the range of conduct that is relevant to determining the applicable offense level (except for the determination of the applicable offense guideline, which*

is governed by §1B1.2(a)). No such rule of construction is necessary with respect to Chapters Four and Five because the guidelines in those Chapters are explicit as to the specific factors to be considered.

Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of §3D1.2(d), which provides for grouping together (*i.e.*, treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would *not* be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)

Subsections (a)(1) and (a)(2) adopt different rules because offenses of the character dealt with in subsection (a)(2) (*i.e.*, to which §3D1.2(d) applies) often involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing. For example, a pattern of embezzlement may consist of several acts of taking that cannot separately be identified, even though the overall conduct is clear. In addition, the distinctions that the law makes as to what constitutes separate counts or offenses often turn on technical elements that are not especially meaningful for purposes of sentencing. Thus, in a mail fraud case, the scheme is an element of the offense and each mailing may be the basis for a separate count; in an embezzlement case, each taking may provide a basis for a separate count. Another consideration is that in a pattern of small thefts, for example, it is important to take into account the full range of related conduct. Relying on the entire range of conduct, regardless of the number of counts that are alleged or on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses. Conversely, when §3D1.2(d) does not apply, so that convictions on multiple counts are considered separately in determining the guideline sentencing range, the guidelines prohibit aggregation of quantities from other counts in order to prevent "double counting" of the conduct and harm from each count of conviction. Continuing offenses present similar practical problems. The reference to §3D1.2(d), which provides for grouping of multiple counts arising out of a continuing offense when the offense guideline takes the continuing nature into account, also prevents double counting.

Subsection (a)(4) requires consideration of any other information specified in the applicable guideline. For example, §2A1.4 (Involuntary Manslaughter) specifies consideration of the defendant's state of mind; §2K1.4 (Arson; Property Damage By Use of Explosives) specifies consideration of the risk of harm created.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (*see* Appendix C, amendment 3); November 1, 1989 (*see* Appendix C, amendments 76-78 and 303); November 1, 1990 (*see* Appendix C, amendment 309); November 1, 1991 (*see* Appendix C, amendment 389); November 1, 1992 (*see* Appendix C, amendment 439); November 1, 1994 (*see* Appendix C, amendment 503); November 1, 2001 (*see* Appendix C, amendments 617 and 634); November 1, 2004 (*see* Appendix C, amendments 674).

**§1B1.4. Information to be Used in Imposing Sentence (Selecting a Point Within the Guideline Range or Departing from the Guidelines)**

In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law. See 18 U.S.C. § 3661.

*Commentary*

*Background:* This section distinguishes between factors that determine the applicable guideline sentencing range (§1B1.3) and information that a court may consider in imposing sentence within that range. The section is based on 18 U.S.C. § 3661, which recodifies 18 U.S.C. § 3577. The recodification of this 1970 statute in 1984 with an effective date of 1987 (99 Stat. 1728), makes it clear that Congress intended that no limitation would be placed on the information that a court may consider in imposing an appropriate sentence under the future guideline sentencing system. A court is not precluded from considering information that the guidelines do not take into account in determining a sentence within the guideline range or from considering that information in determining whether and to what extent to depart from the guidelines. For example, if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range and may provide a reason for an upward departure. Some policy statements do, however, express a Commission policy that certain factors should not be considered for any purpose, or should be considered only for limited purposes. See, e.g., Chapter Five, Part H (Specific Offender Characteristics).

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 4); November 1, 1989 (see Appendix C, amendment 303); November 1, 2000 (see Appendix C, amendment 604 ); November 1, 2004 (see Appendix C, amendment 674).

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

- (a) A cross reference (an instruction to apply another offense guideline) refers to the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions).
- (b)
  - (1) An instruction to use the offense level from another offense guideline refers to the offense level from the entire offense guideline (i.e., the base offense level, specific offense characteristics, cross references, and special instructions), except as provided in subdivision (2) below.
  - (2) An instruction to use a particular subsection or table from another offense guideline refers only to the particular subsection or table referenced, and not to the entire offense guideline.
- (c) If the offense level is determined by a reference to another guideline under subsection (a) or (b)(1) above, the adjustments in Chapter Three (Adjustments)

also are determined in respect to the referenced offense guideline, except as otherwise expressly provided.

- (d) A reference to another guideline under subsection (a) or (b)(1) above may direct that it be applied only if it results in the greater offense level. In such case, the greater offense level means the greater Chapter Two offense level, except as otherwise expressly provided.

#### Commentary

#### Application Notes:

1. *References to other offense guidelines are most frequently designated "Cross References," but may also appear in the portion of the guideline entitled "Base Offense Level" (e.g., §2D1.2(a)(1) and (2)), or "Specific Offense Characteristics" (e.g., §2A4.1(b)(7)). These references may be to a specific guideline, or may be more general (e.g., to the guideline for the "underlying offense"). Such references incorporate the specific offense characteristics, cross references, and special instructions as well as the base offense level. For example, if the guideline reads "2 plus the offense level from §2A2.2 (Aggravated Assault)," the user would determine the offense level from §2A2.2, including any applicable adjustments for planning, weapon use, degree of injury and motive, and then increase by 2 levels.*

*A reference may also be to a specific subsection of another guideline; e.g., the reference in §2D1.10(a)(1) to "3 plus the offense level from the Drug Quantity Table in §2D1.1". In such case, only the specific subsection of that other guideline is used.*

2. *A reference to another guideline may direct that such reference is to be used only if it results in a greater offense level. In such cases, the greater offense level means the offense level taking into account only the Chapter Two offense level, unless the offense guideline expressly provides for consideration of both the Chapter Two offense level and applicable Chapter Three adjustments. For situations in which a comparison involving both Chapters Two and Three is necessary, see the Commentary to §§2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions); 2E1.1 (Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations); and 2E1.2 (Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise).*
3. *A reference may direct that, if the conduct involved another offense, the offense guideline for such other offense is to be applied. Consistent with the provisions of §1B1.3 (Relevant Conduct), such other offense includes conduct that may be a state or local offense and conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place within the territorial or maritime jurisdiction of the United States. Where there is more than one such other offense, the most serious such offense (or group of closely related offenses in the case of offenses that would be grouped together under §3D1.2(d)) is to be used. For example, if a defendant convicted of possession of a firearm by a felon, to which §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) applies, is found to have possessed that*

*firearm during commission of a series of offenses, the cross reference at §2K2.1(c) is applied to the offense resulting in the greatest offense level.*

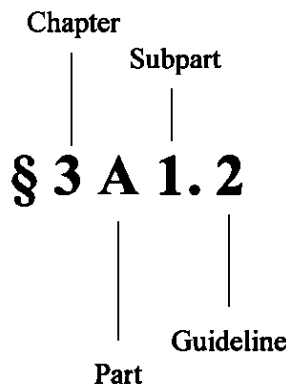
Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 79, 80, and 302); November 1, 1991 (see Appendix C, amendment 429); November 1, 1992 (see Appendix C, amendment 440); November 1, 1995 (see Appendix C, amendment 534); November 1, 1997 (see Appendix C, amendment 547); November 1, 2001 (see Appendix C, amendment 616); November 1, 2004 (see Appendix C, amendment 666).

**§1B1.6. Structure of the Guidelines**

The guidelines are presented in numbered chapters divided into alphabetical parts. The parts are divided into subparts and individual guidelines. Each guideline is identified by three numbers and a letter corresponding to the chapter, part, subpart and individual guideline.

The first number is the chapter, the letter represents the part of the chapter, the second number is the subpart, and the final number is the guideline. Section 2B1.1, for example, is the first guideline in the first subpart in Part B of Chapter Two. Or, §3A1.2 is the second guideline in the first subpart in Part A of Chapter Three. Policy statements are similarly identified.

To illustrate:



Historical Note: Effective November 1, 1987.

**§1B1.7. Significance of Commentary**

The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. See 18 U.S.C. § 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background

information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.

Commentary

*Portions of this document not labeled as guidelines or commentary also express the policy of the Commission or provide guidance as to the interpretation and application of the guidelines. These are to be construed as commentary and thus have the force of policy statements.*

*"[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Stinson v. United States, 508 U.S. 36, 38 (1993).*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1993 (see Appendix C, amendment 498).

**§1B1.8. Use of Certain Information**

- (a) Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.
- (b) The provisions of subsection (a) shall not be applied to restrict the use of information:
  - (1) known to the government prior to entering into the cooperation agreement;
  - (2) concerning the existence of prior convictions and sentences in determining §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender);
  - (3) in a prosecution for perjury or giving a false statement;
  - (4) in the event there is a breach of the cooperation agreement by the defendant; or
  - (5) in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities).

Commentary

Application Notes:

1. *This provision does not authorize the government to withhold information from the court but provides that self-incriminating information obtained under a cooperation agreement is not to be used to determine the defendant's guideline range. Under this provision, for example, if a defendant is arrested in possession of a kilogram of cocaine and, pursuant to an agreement to provide information concerning the unlawful activities of co-conspirators, admits that he assisted in the importation of an additional three kilograms of cocaine, a fact not previously known to the government, this admission would not be used to increase his applicable guideline range, except to the extent provided in the agreement. Although the guideline itself affects only the determination of the guideline range, the policy of the Commission, as a corollary, is that information prohibited from being used to determine the applicable guideline range shall not be used to depart upward. In contrast, subsection (b)(5) provides that consideration of such information is appropriate in determining whether, and to what extent, a downward departure is warranted pursuant to a government motion under §5K1.1 (Substantial Assistance to Authorities); e.g., a court may refuse to depart downward on the basis of such information.*
2. *Subsection (b)(2) prohibits any cooperation agreement from restricting the use of information as to the existence of prior convictions and sentences in determining adjustments under §4A1.1 (Criminal History Category) and §4B1.1 (Career Offender). The Probation Service generally will secure information relevant to the defendant's criminal history independent of information the defendant provides as part of his cooperation agreement.*
3. *On occasion the defendant will provide incriminating information to the government during plea negotiation sessions before a cooperation agreement has been reached. In the event no agreement is reached, use of such information in a sentencing proceeding is restricted by Rule 11(e)(6) (Inadmissibility of Pleas, Plea Discussions, and Related Statements) of the Federal Rules of Criminal Procedure and Rule 410 (Inadmissibility of Pleas, Plea Discussions, and Related Statements) of the Rules of Evidence.*
4. *As with the statutory provisions governing use immunity, 18 U.S.C. § 6002, this guideline does not apply to information used against the defendant in a prosecution for perjury, giving a false statement, or in the event the defendant otherwise fails to comply with the cooperation agreement.*
5. *This guideline limits the use of certain incriminating information furnished by a defendant in the context of a defendant-government agreement for the defendant to provide information concerning the unlawful activities of other persons. The guideline operates as a limitation on the use of such incriminating information in determining the applicable guideline range, and not merely as a restriction of the government's presentation of such information (e.g., where the defendant, subsequent to having entered into a cooperation agreement, provides such information to the probation officer preparing the presentence report, the use of such information remains protected by this section).*

6. *Unless the cooperation agreement relates to the provision of information concerning the unlawful activities of others, this guideline does not apply (i.e., an agreement by the defendant simply to detail the extent of his own unlawful activities, not involving an agreement to provide information concerning the unlawful activity of another person, is not covered by this guideline).*

Historical Note: Effective June 15, 1988 (see Appendix C, amendment 5). Amended effective November 1, 1990 (see Appendix C, amendment 308); November 1, 1991 (see Appendix C, amendment 390); November 1, 1992 (see Appendix C, amendment 441); November 1, 2004 (see Appendix C, amendment 674).

### **§1B1.9. Class B or C Misdemeanors and Infractions**

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

#### Commentary

#### Application Notes:

1. *Notwithstanding any other provision of the guidelines, the court may impose any sentence authorized by statute for each count that is a Class B or C misdemeanor or an infraction. A Class B misdemeanor is any offense for which the maximum authorized term of imprisonment is more than thirty days but not more than six months; a Class C misdemeanor is any offense for which the maximum authorized term of imprisonment is more than five days but not more than thirty days; an infraction is any offense for which the maximum authorized term of imprisonment is not more than five days.*
2. *The guidelines for sentencing on multiple counts do not apply to counts that are Class B or C misdemeanors or infractions. Sentences for such offenses may be consecutive to or concurrent with sentences imposed on other counts. In imposing sentence, the court should, however, consider the relationship between the Class B or C misdemeanor or infraction and any other offenses of which the defendant is convicted.*

Background: *For the sake of judicial economy, the Commission has exempted all Class B and C misdemeanors and infractions from the coverage of the guidelines.*

Historical Note: Effective June 15, 1988 (see Appendix C, amendment 6). Amended effective November 1, 1989 (see Appendix C, amendment 81).

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

- (a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (c) is applicable, a

reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized.

- (b) In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.
- (c) Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, and 702.

#### Commentary

#### Application Notes:

1. *Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range.*
2. *In determining the amended guideline range under subsection (b), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.*
3. *Under subsection (b), the amended guideline range and the term of imprisonment already served by the defendant limit the extent to which an eligible defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2). When the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate; however, in no case shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.*
4. *Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.*
5. *If the limitation in subsection (b) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range, the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release*

*that would have been appropriate in connection with a sentence under the amended guideline range.*

***Background:** Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."*

*This policy statement provides guidance for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."*

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

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

*The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines\* or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

\*So in original. Probably should be "to fall above the amended guidelines".

**Historical Note:** Effective November 1, 1989 (see Appendix C, amendment 306). Amended effective November 1, 1990 (see Appendix C, amendment 360); November 1, 1991 (see Appendix C, amendment 423); November 1, 1992 (see Appendix C, amendment 469); November 1, 1993 (see Appendix C, amendment 502); November 1, 1994 (see Appendix C, amendment 504); November 1, 1995 (see Appendix C, amendment 536); November 1, 1997 (see Appendix C, amendment 548); November 1, 2000 (see Appendix C, amendment 607); November 5, 2003 (see Appendix C, amendment 662); November 1, 2007 (see Appendix C, amendment 710).

**§1B1.11. Use of Guidelines Manual in Effect on Date of Sentencing (Policy Statement)**

- (a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.
- (b)
  - (1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.
  - (2) The Guidelines Manual in effect on a particular date shall be applied in its entirety. The court shall not apply, for example, one guideline section from one edition of the Guidelines Manual and another guideline section from a different edition of the Guidelines Manual. However, if a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.
  - (3) If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses.

Commentary

Application Notes:

1. Subsection (b)(2) provides that if an earlier edition of the Guidelines Manual is used, it is to be used in its entirety, except that subsequent clarifying amendments are to be considered.

Example: A defendant is convicted of an antitrust offense committed in November 1989. He is to be sentenced in December 1992. Effective November 1, 1991, the Commission raised the base offense level for antitrust offenses. Effective November 1, 1992, the Commission lowered the guideline range in the Sentencing Table for cases with an offense level of 8 and criminal history category of I from 2-8 months to 0-6 months. Under the 1992 edition of the Guidelines Manual (effective November 1, 1992), the defendant has a guideline range of 4-10 months (final offense level of 9, criminal history category of I). Under the 1989 edition of the Guidelines Manual (effective November 1, 1989), the defendant has a guideline range of 2-8 months (final offense level of 8, criminal history category of I). If the court determines that application of the 1992 edition of the Guidelines Manual would violate the ex post facto clause of the United States Constitution, it shall apply the 1989 edition of the Guidelines Manual in its entirety. It shall not apply, for example, the offense level of 8 and criminal history category of I from the 1989 edition of the Guidelines Manual in conjunction with the amended guideline range of 0-6 months for this offense level and criminal history category from the 1992 edition of the Guidelines Manual.

2. *Under subsection (b)(1), the last date of the offense of conviction is the controlling date for ex post facto purposes. For example, if the offense of conviction (i.e., the conduct charged in the count of the indictment or information of which the defendant was convicted) was determined by the court to have been committed between October 15, 1991 and October 28, 1991, the date of October 28, 1991 is the controlling date for ex post facto purposes. This is true even if the defendant's conduct relevant to the determination of the guideline range under §1B1.3 (Relevant Conduct) included an act that occurred on November 2, 1991 (after a revised Guideline Manual took effect).*

*Background: Subsections (a) and (b)(1) provide that the court should apply the Guidelines Manual in effect on the date the defendant is sentenced unless the court determines that doing so would violate the ex post facto clause in Article I, § 9 of the United States Constitution. Under 18 U.S.C. § 3553, the court is to apply the guidelines and policy statements in effect at the time of sentencing. Although aware of possible ex post facto clause challenges to application of the guidelines in effect at the time of sentencing, Congress did not believe that the ex post facto clause would apply to amended sentencing guidelines. S. Rep. No. 225, 98th Cong., 1st Sess. 77-78 (1983). While the Commission concurs in the policy expressed by Congress, courts to date generally have held that the ex post facto clause does apply to sentencing guideline amendments that subject the defendant to increased punishment.*

*Subsection (b)(2) provides that the Guidelines Manual in effect on a particular date shall be applied in its entirety.*

*Subsection (b)(3) provides that where the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses, even if the revised edition results in an increased penalty for the first offense. Because the defendant completed the second offense after the amendment to the guidelines took effect, the ex post facto clause does not prevent determining the sentence for that count based on the amended guidelines. For example, if a defendant pleads guilty to a single count of embezzlement that occurred after the most recent edition of the Guidelines Manual became effective, the guideline range applicable in sentencing will encompass any relevant conduct (e.g., related embezzlement offenses that may have occurred prior to the effective date of the guideline amendments) for the offense of conviction. The same would be true for a defendant convicted of two counts of embezzlement, one committed before the amendments were enacted, and the second after. In this example, the ex post facto clause would not bar application of the amended guideline to the first conviction; a contrary conclusion would mean that such defendant was subject to a lower guideline range than if convicted only of the second offense. Decisions from several appellate courts addressing the analogous situation of the constitutionality of counting pre-guidelines criminal activity as relevant conduct for a guidelines sentence support this approach. See United States v. Ykema, 887 F.2d 697 (6th Cir. 1989) (upholding inclusion of pre-November 1, 1987, drug quantities as relevant conduct for the count of conviction, noting that habitual offender statutes routinely augment punishment for an offense of conviction based on acts committed before a law is passed), cert. denied, 493 U.S. 1062 (1990); United States v. Allen, 886 F.2d 143 (8th Cir. 1989) (similar); see also United States v. Cusack, 901 F.2d 29 (4th Cir. 1990) (similar).*

*Moreover, the approach set forth in subsection (b)(3) should be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped under §3D1.2(d). The ex post facto clause does not distinguish between groupable and nongroupable offenses, and unless that*

*clause would be violated, Congress's directive to apply the sentencing guidelines in effect at the time of sentencing must be followed. Under the guideline sentencing system, a single sentencing range is determined based on the defendant's overall conduct, even if there are multiple counts of conviction (see §§3D1.1-3D1.5, 5G1.2). Thus, if a defendant is sentenced in January 1992 for a bank robbery committed in October 1988 and one committed in November 1991, the November 1991 Guidelines Manual should be used to determine a combined guideline range for both counts. See generally United States v. Stephenson, 921 F.2d 438 (2d Cir. 1990) (holding that the Sentencing Commission and Congress intended that the applicable version of the guidelines be applied as a "cohesive and integrated whole" rather than in a piecemeal fashion).*

*Consequently, even in a complex case involving multiple counts that occurred under several different versions of the Guidelines Manual, it will not be necessary to compare more than two manuals to determine the applicable guideline range -- the manual in effect at the time the last offense of conviction was completed and the manual in effect at the time of sentencing.*

Historical Note: Effective November 1, 1992 (see Appendix C, amendment 442). Amended effective November 1, 1993 (see Appendix C, amendment 474).

#### **§1B1.12. Persons Sentenced Under the Federal Juvenile Delinquency Act (Policy Statement)**

The sentencing guidelines do not apply to a defendant sentenced under the Federal Juvenile Delinquency Act (18 U.S.C. §§ 5031-5042). However, the sentence imposed upon a juvenile delinquent may not exceed the maximum of the guideline range applicable to an otherwise similarly situated adult defendant unless the court finds an aggravating factor sufficient to warrant an upward departure from that guideline range. United States v. R.L.C., 503 U.S. 291 (1992). Therefore, a necessary step in ascertaining the maximum sentence that may be imposed upon a juvenile delinquent is the determination of the guideline range that would be applicable to a similarly situated adult defendant.

Historical Note: Effective November 1, 1993 (see Appendix C, amendment 475).

#### **§1B1.13. Reduction in Term of Imprisonment as a Result of Motion by Director of Bureau of Prisons (Policy Statement)**

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that—

- (1) (A) extraordinary and compelling reasons warrant the reduction; or
- (B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. § 3559(c) for the offense or offenses for which the defendant is imprisoned;

- (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
- (3) the reduction is consistent with this policy statement.

Commentary

Application Notes:

1. Application of Subsection (1)(A).—

(A) Extraordinary and Compelling Reasons.—*Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the following circumstances:*

- (i) *The defendant is suffering from a terminal illness.*
- (ii) *The defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.*
- (iii) *The death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children.*
- (iv) *As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i), (ii), and (iii).*

(B) Rehabilitation of the Defendant.—*Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of subdivision (1)(A).*

2. Application of Subdivision (3).—*Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.*

Background: *This policy statement implements 28 U.S.C. § 994(t).*

Historical Note: Effective November 1, 2006 (see Appendix C, amendment 683). Amended effective November 1, 2007 (see Appendix C, amendment 698).

## CHAPTER TWO - OFFENSE CONDUCT

### Introductory Commentary

*Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward. Certain factors relevant to the offense that are not covered in specific guidelines in Chapter Two are set forth in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), and C (Obstruction); Chapter Four, Part B (Career Offenders and Criminal Livelihood); and Chapter Five, Part K (Departures).*

Historical Note: Effective November 1, 1987.

**PART A - OFFENSES AGAINST THE PERSON****1. HOMICIDE****§2A1.1. First Degree Murder**

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

Commentary

*Statutory Provisions:* 18 U.S.C. §§ 1111, 1841(a)(2)(C), 1992(a)(7), 2113(e), 2118(c)(2), 2199, 2282A, 2291, 2332b(a)(1), 2340A; 21 U.S.C. § 848(e). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Applicability of Guideline.—This guideline applies in cases of premeditated killing. This guideline also applies when death results from the commission of certain felonies. For example, this guideline may be applied as a result of a cross reference (e.g., a kidnapping in which death occurs), or in cases in which the offense level of a guideline is calculated using the underlying crime (e.g., murder in aid of racketeering).
2. Imposition of Life Sentence.—
  - (A) Offenses Involving Premeditated Killing.—In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed. A downward departure would not be appropriate in such a case. A downward departure from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, as provided in 18 U.S.C. § 3553(e).
  - (B) Felony Murder.—If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. For example, a downward departure may be warranted if in robbing a bank, the defendant merely passed a note to the teller, as a result of which the teller had a heart attack and died. The extent of the departure should be based upon the defendant's state of mind (e.g., recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, departure below the minimum guideline sentence provided for second degree murder in §2A1.2 (Second Degree Murder) is not likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.
3. Applicability of Guideline When Death Sentence Not Imposed.—If the defendant is sentenced pursuant to 18 U.S.C. § 3591 *et seq.* or 21 U.S.C. § 848(e), a sentence of death may be

*imposed under the specific provisions contained in that statute. This guideline applies when a sentence of death is not imposed under those specific provisions.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 82); November 1, 1990 (see Appendix C, amendment 310); November 1, 1993 (see Appendix C, amendment 476); November 1, 2002 (see Appendix C, amendment 637); November 1, 2004 (see Appendix C, amendment 663); November 1, 2006 (see Appendix C, amendment 685); November 1, 2007 (see Appendix C, amendments 699 and 700).

### §2A1.2. Second Degree Murder

- (a) Base Offense Level: **38**

#### Commentary

Statutory Provisions: 18 U.S.C. §§ 1111, 1841(a)(2)(C), 2199, 2282A, 2291, 2332b(a)(1), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

#### Application Note:

1. Upward Departure Provision.—*If the defendant’s conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted. See §5K2.8 (Extreme Conduct).*

Historical Note: Effective November 1, 1987. Amended effective November 1, 2002 (see Appendix C, amendment 637); November 1, 2004 (see Appendix C, amendment 663); November 1, 2006 (see Appendix C, amendment 685); November 1, 2007 (see Appendix C, amendments 699 and 700).

### §2A1.3. Voluntary Manslaughter

- (a) Base Offense Level: **29**

#### Commentary

Statutory Provisions: 18 U.S.C. §§ 1112, 1841(a)(2)(C), 2199, 2291, 2332b(a)(1). For additional statutory provision(s), see Appendix A (Statutory Index).

Historical Note: Effective November 1, 1987. Amended effective November 1, 2002 (see Appendix C, amendment 637); November 1, 2004 (see Appendix C, amendment 663); November 1, 2006 (see Appendix C, amendment 685); November 1, 2007 (see Appendix C, amendment 699).

### §2A1.4. Involuntary Manslaughter

- (a) Base Offense Level:

- (1) **12**, if the offense involved criminally negligent conduct; or

- (2) (Apply the greater):
  - (A) **18**, if the offense involved reckless conduct; or
  - (B) **22**, if the offense involved the reckless operation of a means of transportation.
- (b) Special Instruction
  - (1) If the offense involved the involuntary manslaughter of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the involuntary manslaughter of each person had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1112, 1841(a)(2)(C), 2199, 2291, 2332b(a)(1). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. Definitions.—For purposes of this guideline:

*"Criminally negligent" means conduct that involves a gross deviation from the standard of care that a reasonable person would exercise under the circumstances, but which is not reckless. Offenses with this characteristic usually will be encountered as assimilative crimes.*

*"Means of transportation" includes a motor vehicle (including an automobile or a boat) and a mass transportation vehicle. "Mass transportation" has the meaning given that term in 18 U.S.C. § 1992(d)(7).*

*"Reckless" means a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation. "Reckless" includes all, or nearly all, convictions for involuntary manslaughter under 18 U.S.C. § 1112. A homicide resulting from driving a means of transportation, or similarly dangerous actions, while under the influence of alcohol or drugs ordinarily should be treated as reckless.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 2002 (see Appendix C, amendment 637); November 1, 2003 (see Appendix C, amendment 652); November 1, 2004 (see Appendix C, amendment 663); November 1, 2006 (see Appendix C, amendment 685); November 1, 2007 (see Appendix C, amendment 699).

**§2A1.5. Conspiracy or Solicitation to Commit Murder**

- (a) Base Offense Level: **33**

- (b) Specific Offense Characteristic
  - (1) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by **4** levels.
- (c) Cross References
  - (1) If the offense resulted in the death of a victim, apply §2A1.1 (First Degree Murder).
  - (2) If the offense resulted in an attempted murder or assault with intent to commit murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder).

Commentary

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

Historical Note: Effective November 1, 1990 (see Appendix C, amendment 311). Amended effective November 1, 2004 (see Appendix C, amendment 663).

\* \* \* \* \*

## 2. ASSAULT

### §2A2.1. Assault with Intent to Commit Murder; Attempted Murder

- (a) Base Offense Level:
  - (1) **33**, if the object of the offense would have constituted first degree murder; or
  - (2) **27**, otherwise.
- (b) Specific Offense Characteristics
  - (1) If (A) the victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) the victim sustained serious bodily injury, increase by **2** levels; or (C) the degree of injury is between that specified in subdivisions (A) and (B), increase by **3** levels.
  - (2) If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by **4** levels.

Commentary

*Statutory Provisions:* 18 U.S.C. §§ 113(a)(1), 351(c), 1113, 1116(a), 1751(c), 1841(a)(2)(C), 1992(a)(7), 2199, 2291. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"First degree murder" means conduct that, if committed within the special maritime and territorial jurisdiction of the United States, would constitute first degree murder under 18 U.S.C. § 1111.

"Permanent or life-threatening bodily injury" and "serious bodily injury" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

2. Upward Departure Provision.—If the offense created a substantial risk of death or serious bodily injury to more than one person, an upward departure may be warranted.

*Background:* This section applies to the offenses of assault with intent to commit murder and attempted murder. An attempted manslaughter, or assault with intent to commit manslaughter, is covered under §2A2.2 (Aggravated Assault).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 83 and 84); November 1, 1990 (see Appendix C, amendment 311); November 1, 1991 (see Appendix C, amendment 391); November 1, 1995 (see Appendix C, amendment 534); November 1, 2002 (see Appendix C, amendment 637); November 1, 2004 (see Appendix C, amendment 663); November 1, 2006 (see Appendix C, amendment 685); November 1, 2007 (see Appendix C, amendment 699).

**§2A2.2. Aggravated Assault**

(a) Base Offense Level: **14**

(b) Specific Offense Characteristics

(1) If the assault involved more than minimal planning, increase by **2** levels.

(2) If (A) a firearm was discharged, increase by **5** levels; (B) a dangerous weapon (including a firearm) was otherwise used, increase by **4** levels; (C) a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by **3** levels.

(3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	<u>Degree of Bodily Injury</u>	<u>Increase in Level</u>
(A)	Bodily Injury	add <b>3</b>
(B)	Serious Bodily Injury	add <b>5</b>

- (C) Permanent or Life-Threatening Bodily Injury add **7**
- (D) If the degree of injury is between that specified in subdivisions (A) and (B), add **4** levels; or
- (E) If the degree of injury is between that specified in subdivisions (B) and (C), add **6** levels.

However, the cumulative adjustments from application of subdivisions (2) and (3) shall not exceed **10** levels.

- (4) If the assault was motivated by a payment or offer of money or other thing of value, increase by **2** levels.
- (5) If the offense involved the violation of a court protection order, increase by **2** levels.
- (6) If the defendant was convicted under 18 U.S.C. § 111(b) or § 115, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(a)(2), (3), (6), 114, 115(a), (b)(1), 351(e), 1751(e), 1841(a)(2)(C), 1992(a)(7), 2199, 2291, 2332b(a)(1), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Aggravated assault" means a felonious assault that involved (A) a dangerous weapon with intent to cause bodily injury (i.e., not merely to frighten) with that weapon; (B) serious bodily injury; or (C) an intent to commit another felony.

"Brandished," "bodily injury," "firearm," "otherwise used," "permanent or life-threatening bodily injury," and "serious bodily injury," have the meaning given those terms in §1B1.1 (Application Instructions), Application Note 1.

"Dangerous weapon" has the meaning given that term in §1B1.1, Application Note 1, and includes any instrument that is not ordinarily used as a weapon (e.g., a car, a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury.

2. Application of Subsection (b)(1).—For purposes of subsection (b)(1), "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. For example, waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. By contrast, luring the victim to a

*specific location or wearing a ski mask to prevent identification would constitute more than minimal planning.*

3. *Application of Subsection (b)(2).—In a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).*
4. *Application of Official Victim Adjustment.—If subsection (b)(6) applies, §3A1.2 (Official Victim) also shall apply.*

*Background:* This guideline covers felonious assaults that are more serious than minor assaults because of the presence of an aggravating factor, *i.e.*, serious bodily injury, the involvement of a dangerous weapon with intent to cause bodily injury, or the intent to commit another felony. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder). This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1. Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

*An assault that involves the presence of a dangerous weapon is aggravated in form when the presence of the dangerous weapon is coupled with the intent to cause bodily injury. In such a case, the base offense level and the weapon enhancement in subsection (b)(2) take into account different aspects of the offense, even if application of the base offense level and the weapon enhancement is based on the same conduct.*

*Subsection (b)(6) implements the directive to the Commission in subsection 11008(e) of the 21<sup>st</sup> Century Department of Justice Appropriations Act (the "Act"), Public Law 107–273. The enhancement in subsection (b)(6) is cumulative to the adjustment in §3A1.2 (Official Victim) in order to address adequately the directive in section 11008(e)(2)(D) of the Act, which provides that the Commission shall consider "the extent to which sentencing enhancements within the Federal guidelines and the authority of the court to impose a sentence in excess of the applicable guideline range are adequate to ensure punishment at or near the maximum penalty for the most egregious conduct covered by" 18 U.S.C. §§ 111 and 115.*

*Historical Note:* Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 85 and 86); November 1, 1990 (see Appendix C, amendment 311); November 1, 1995 (see Appendix C, amendment 534); November 1, 1997 (see Appendix C, amendment 549); November 1, 2001 (see Appendix C, amendment 614); November 1, 2002 (see Appendix C, amendment 637); November 1, 2004 (see Appendix C, amendment 663); November 1, 2006 (see Appendix C, amendment 685); November 1, 2007 (see Appendix C, amendment 699).

### **§2A2.3. Minor Assault**

- (a) Base Offense Level:
  - (1) **7**, if the offense involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened; or
  - (2) **4**, otherwise.

- (b) Specific Offense Characteristic
  - (1) If (A) the victim sustained bodily injury, increase by **2** levels; or (B) the offense resulted in substantial bodily injury to an individual under the age of sixteen years, increase by **4** levels.
- (c) Cross Reference
  - (1) If the conduct constituted aggravated assault, apply §2A2.2 (Aggravated Assault).

Commentary

*Statutory Provisions:* 18 U.S.C. §§ 112, 115(a), 115(b)(1), 351(e), 1751(e), 2199, 2291. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Bodily injury", "dangerous weapon", and "firearm" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

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

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

2. Application of Subsection (b)(1).—Conduct that forms the basis for application of subsection (a)(1) also may form the basis for application of the enhancement in subsection (b)(1)(A) or (B).

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

Historical Note: Effective November 1, 1987. Amended effective October 15, 1988 (see Appendix C, amendment 64); November 1, 1989 (see Appendix C, amendments 87 and 88); November 1, 1995 (see Appendix C, amendment 510); November 1, 2004 (see Appendix C, amendment 663); November 1, 2007 (see Appendix C, amendment 699).

### §2A2.4. Obstructing or Impeding Officers

- (a) Base Offense Level: **10**
- (b) Specific Offense Characteristics
  - (1) If (A) the offense involved physical contact; or (B) a dangerous weapon

(including a firearm) was possessed and its use was threatened, increase by **3** levels.

(2) If the victim sustained bodily injury, increase by **2** levels.

(c) Cross Reference

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 1501, 1502, 2237(a)(1), (a)(2)(A), 3056(d). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline, "bodily injury", "dangerous weapon", and "firearm" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).
2. Application of Certain Chapter Three Adjustments.—The base offense level incorporates the fact that the victim was a governmental officer performing official duties. Therefore, do not apply §3A1.2 (Official Victim) unless, pursuant to subsection (c), the offense level is determined under §2A2.2 (Aggravated Assault). Conversely, the base offense level does not incorporate the possibility that the defendant may create a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement official (although an offense under 18 U.S.C. § 758 for fleeing or evading a law enforcement checkpoint at high speed will often, but not always, involve the creation of that risk). If the defendant creates that risk and no higher guideline adjustment is applicable for the conduct creating the risk, apply §3C1.2 (Reckless Endangerment During Flight).
3. Upward Departure Provision.—The base offense level does not assume any significant disruption of governmental functions. In situations involving such disruption, an upward departure may be warranted. See §5K2.7 (Disruption of Governmental Function).

Historical Note: Effective October 15, 1988 (see Appendix C, amendment 64). Amended effective November 1, 1989 (see Appendix C, amendments 89 and 90); November 1, 1992 (see Appendix C, amendment 443); November 1, 1997 (see Appendix C, amendment 550); November 1, 2004 (see Appendix C, amendment 663); November 1, 2005 (see Appendix C, amendment 679); November 1, 2007 (see Appendix C, amendment 699).

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### 3. CRIMINAL SEXUAL ABUSE AND OFFENSES RELATED TO REGISTRATION AS A SEX OFFENDER

Historical Note: Effective November 1, 1987. Amended effective November 1, 2007 (see Appendix C, amendment 701).

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

- (a) Base Offense Level:
  - (1) **38**, if the defendant was convicted under 18 U.S.C. § 2241(c); or
  - (2) **30**, otherwise.
- (b) Specific Offense Characteristics
  - (1) If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by **4** levels.
  - (2) If subsection (a)(2) applies and (A) the victim had not attained the age of twelve years, increase by **4** levels; or (B) the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.
  - (3) If the victim was (A) in the custody, care, or supervisory control of the defendant; or (B) a person held in the custody of a correctional facility, increase by **2** levels.
  - (4) (A) If the victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) if the victim sustained serious bodily injury, increase by **2** levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by **3** levels.
  - (5) If the victim was abducted, increase by **4** levels.
  - (6) If, to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, or if, to facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct, the offense involved (A) the knowing misrepresentation of a participant's identity; or (B) the use of a computer or an interactive computer service, increase by **2** levels.
- (c) Cross References
  - (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

- (2) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.
- (d) Special Instruction
- (1) If the offense occurred in the custody or control of a prison or other correctional facility and the victim was a prison official, the offense shall be deemed to have an official victim for purposes of subsection (c)(2) of §3A1.2 (Official Victim).

Commentary

Statutory Provisions: 18 U.S.C. §§ 2241, 2242. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Abducted", "permanent or life-threatening bodily injury", and "serious bodily injury" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "serious bodily injury" means conduct other than criminal sexual abuse, which already is taken into account in the base offense level under subsection (a).

"Custody or control" and "prison official" have the meaning given those terms in Application Note 4 of the Commentary to §3A1.2 (Official Victim).

"Child pornography" has the meaning given that term in 18 U.S.C. § 2256(8).

"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"Distribution" means any act, including possession with intent to distribute, production, transportation, and advertisement, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing, but does not include the mere solicitation of such material by a defendant.

"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"Participant" has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

"Prohibited sexual conduct" (A) means any sexual activity for which a person can be charged with a criminal offense; (B) includes the production of child pornography; and (C) does not include trafficking in, or possession of, child pornography.

"Victim" includes an undercover law enforcement officer.

2. Application of Subsection (b)(1).—

(A) Definitions.—For purposes of subsection (b)(1), "conduct described in 18 U.S.C. § 2241(a) or (b)" is engaging in, or causing another person to engage in, a sexual act with another person by: (A) using force against the victim; (B) threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; (C) rendering the victim unconscious; or (D) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the victim to appraise or control conduct was substantially impaired by drugs or alcohol.

(B) Application in Cases Involving a Conviction under 18 U.S.C. § 2241(c).—If the conduct that forms the basis for a conviction under 18 U.S.C. § 2241(c) is that the defendant engaged in conduct described in 18 U.S.C. § 2241(a) or (b), do not apply subsection (b)(1).

3. Application of Subsection (b)(3).—

(A) Care, Custody, or Supervisory Control.—Subsection (b)(3) is to be construed broadly and includes offenses involving a victim less than 18 years of age entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

4. Application of Subsection (b)(6).—

- (A) Misrepresentation of Participant's Identity.—*The enhancement in subsection (b)(6)(A) applies in cases involving the misrepresentation of a participant's identity to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.*

*The misrepresentation to which the enhancement in subsection (b)(6)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to (A) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (B) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.*

- (B) Use of a Computer or Interactive Computer Service.—*Subsection (b)(6)(B) provides an enhancement if a computer or an interactive computer service was used to (i) persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct; or (ii) facilitate transportation or travel, by a minor or a participant, to engage in prohibited sexual conduct. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.*

5. Application of Subsection (c)(1).—

- (A) In General.—*The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.*
- (B) Definition.—*For purposes of subsection (c)(1), "sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256(2).*

6. Upward Departure Provision.—*If a victim was sexually abused by more than one participant, an upward departure may be warranted. See §5K2.8 (Extreme Conduct).*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 91 and 92); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1993 (see Appendix C, amendment 477); November 1, 1995 (see Appendix C, amendment 511); November 1, 1997 (see Appendix C, amendment 545); November 1, 2000 (see Appendix C, amendments 592 and 601); November 1, 2001 (see Appendix C, amendment 615); November 1, 2003 (see Appendix C, amendment 661); November 1, 2004 (see Appendix C, amendment 664); November 1, 2007 (see Appendix C, amendment 701).

**§2A3.2. Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts**

- (a) Base Offense Level: **18**
- (b) Specific Offense Characteristics
  - (1) If the minor was in the custody, care, or supervisory control of the defendant, increase by **4** levels.
  - (2) If (A) subsection (b)(1) does not apply; and (B)(i) the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct; or (ii) a participant otherwise unduly influenced the minor to engage in prohibited sexual conduct, increase by **4** levels.
  - (3) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct, increase by **2** levels.
- (c) Cross Reference
  - (1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse). If the victim had not attained the age of 12 years, §2A3.1 shall apply, regardless of the "consent" of the victim.

Commentary

Statutory Provision: 18 U.S.C. § 2243(a). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).*

*"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).*

*"Minor" means (A) an individual who had not attained the age of 16 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 16 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 16 years.*

*"Participant" has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).*

*"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).*

2. Custody, Care, or Supervisory Control Enhancement.—

(A) In General.—*Subsection (b)(1) is intended to have broad application and is to be applied whenever the minor is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.*

(B) Inapplicability of Chapter Three Adjustment.—*If the enhancement in subsection (b)(1) applies, do not apply subsection (b)(2) or §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

3. Application of Subsection (b)(2).—

(A) Misrepresentation of Identity.—*The enhancement in subsection (b)(2)(B)(i) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. Subsection (b)(2)(B)(i) is intended to apply only to misrepresentations made directly to the minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(2)(B)(i) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.*

*The misrepresentation to which the enhancement in subsection (b)(2)(B)(i) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.*

(B) Undue Influence.—*In determining whether subsection (b)(2)(B)(ii) applies, the court should closely consider the facts of the case to determine whether a participant's influence over the minor compromised the voluntariness of the minor's behavior.*

*In a case in which a participant is at least 10 years older than the minor, there shall be a rebuttable presumption, for purposes of subsection (b)(2)(B)(ii), that such participant unduly influenced the minor to engage in prohibited sexual conduct. In such a case, some degree of undue influence can be presumed because of the substantial difference in age between the participant and the minor.*

4. *Application of Subsection (b)(3).*—Subsection (b)(3) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce the minor to engage in prohibited sexual conduct. Subsection (b)(3) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with the minor or with a person who exercises custody, care, or supervisory control of the minor.
5. *Cross Reference.*— Subsection (c)(1) provides a cross reference to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, as defined in 18 U.S.C. § 2241 or § 2242. For example, the cross reference to §2A3.1 shall apply if (A) the victim had not attained the age of 12 years (see 18 U.S.C. § 2241(c)); (B) the victim had attained the age of 12 years but not attained the age of 16 years, and was placed in fear of death, serious bodily injury, or kidnaping (see 18 U.S.C. § 2241(a),(c)); or (C) the victim was threatened or placed in fear other than fear of death, serious bodily injury, or kidnaping (see 18 U.S.C. § 2242(1)).
6. *Upward Departure Consideration.*—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.

*Background:* This section applies to offenses involving the criminal sexual abuse of an individual who had not attained the age of 16 years. While this section applies to consensual sexual acts prosecuted under 18 U.S.C. § 2243(a) that would be lawful but for the age of the minor, it also applies to cases, prosecuted under 18 U.S.C. § 2243(a), in which a participant took active measure(s) to unduly influence the minor to engage in prohibited sexual conduct and, thus, the voluntariness of the minor's behavior was compromised. A two-level enhancement is provided in subsection (b)(2) for such cases. It is assumed that at least a four-year age difference exists between the minor and the defendant, as specified in 18 U.S.C. § 2243(a). A two-level enhancement is provided in subsection (b)(1) for a defendant who victimizes a minor under his supervision or care. However, if the minor had not attained the age of 12 years, §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) will apply, regardless of the "consent" of the minor.

*Historical Note:* Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 93); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511); November 1, 2000 (see Appendix C, amendment 592); November 1, 2001 (see Appendix C, amendment 615); November 1, 2004 (see Appendix C, amendment 664).

### §2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

- (a) Base Offense Level: **14**
- (b) Specific Offense Characteristics
  - (1) If the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.

- (2) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by 2 levels.

Commentary

Statutory Provision: 18 U.S.C. § 2243(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).*

*"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).*

*"Minor" means (A) an individual who had not attained the age of 18; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.*

*"Participant" has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).*

*"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).*

*"Ward" means a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.*

2. Application of Subsection (b)(1).—The enhancement in subsection (b)(1) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(1) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor.

*The misrepresentation to which the enhancement in subsection (b)(1) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.*

3. Application of Subsection (b)(2).—Subsection (b)(2) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(2) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with

*a person who exercises custody, care, or supervisory control of the minor.*

4. *Inapplicability of §3B1.3.*—Do not apply §3B1.3 (*Abuse of Position of Trust or Use of Special Skill*).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 94); November 1, 1995 (see Appendix C, amendment 511); November 1, 2000 (see Appendix C, amendment 592); November 1, 2001 (see Appendix C, amendment 615); November 1, 2004 (see Appendix C, amendment 664); November 1, 2007 (see Appendix C, amendment 701).

#### §2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

- (a) Base Offense Level:
- (1) **20**, if the offense involved conduct described in 18 U.S.C. § 2241(a) or (b);
  - (2) **16**, if the offense involved conduct described in 18 U.S.C. § 2242; or
  - (3) **12**, otherwise.
- (b) Specific Offense Characteristics
- (1) If the victim had not attained the age of twelve years, increase by **4** levels; but if the resulting offense level is less than **22**, increase to level **22**.
  - (2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels.
  - (3) If the victim was in the custody, care, or supervisory control of the defendant, increase by **2** levels.
  - (4) If the offense involved the knowing misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.
  - (5) If a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct, increase by **2** levels.
- (c) Cross References
- (1) If the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse (as defined in 18 U.S.C. § 2241 or § 2242), apply §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

- (2) If the offense involved criminal sexual abuse of a minor or attempt to commit criminal sexual abuse of a minor (as defined in 18 U.S.C. § 2243(a)), apply §2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 18 U.S.C. § 2244. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"Participant" has the meaning given that term in Application Note 1 of the Commentary to §3B1.1 (Aggravating Role).

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

2. Application of Subsection (a)(1).—For purposes of subsection (a)(1), "conduct described in 18 U.S.C. § 2241(a) or (b)" is engaging in, or causing sexual contact with, or by another person by: (A) using force against the victim; (B) threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; (C) rendering the victim unconscious; or (D) administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.
3. Application of Subsection (a)(2).—For purposes of subsection (a)(2), "conduct described in 18 U.S.C. § 2242" is: (A) engaging in, or causing sexual contact with, or by another person by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or (B) engaging in, or causing sexual contact with, or by another person who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

4. Application of Subsection (b)(3).—
- (A) Custody, Care, or Supervisory Control.—*Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.*
- (B) Inapplicability of Chapter Three Adjustment.—*If the enhancement in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*
5. Misrepresentation of a Participant's Identity.—*The enhancement in subsection (b)(4) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(4) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(4) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.*
- The misrepresentation to which the enhancement in subsection (b)(4) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.*
6. Application of Subsection (b)(5).—*Subsection (b)(5) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(5) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.*

Background: *This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 95); November 1, 1991 (see Appendix C, amendment 392); November 1, 1992 (see Appendix C, amendment 444); November 1, 1995 (see Appendix C, amendment 511); November 1, 2000 (see Appendix C, amendment 592); November 1, 2001 (see Appendix C, amendment 615); November 1, 2004 (see Appendix C, amendment 664); November 1, 2007 (see Appendix C, amendments 701 and 711).

### §2A3.5. Failure to Register as a Sex Offender

- (a) Base Offense Level (Apply the greatest):
- (1) **16**, if the defendant was required to register as a Tier III offender;
  - (2) **14**, if the defendant was required to register as a Tier II offender; or

- (3) **12**, if the defendant was required to register as a Tier I offender.
- (b) Specific Offense Characteristics
  - (1) (Apply the greatest):

If, while in a failure to register status, the defendant committed—

    - (A) a sex offense against someone other than a minor, increase by **6** levels;
    - (B) a felony offense against a minor not otherwise covered by subdivision (C), increase by **6** levels; or
    - (C) a sex offense against a minor, increase by **8** levels.
  - (2) If the defendant voluntarily (A) corrected the failure to register; or (B) attempted to register but was prevented from registering by uncontrollable circumstances and the defendant did not contribute to the creation of those circumstances, decrease by **3** levels.

Commentary

Statutory Provision: 18 U.S.C. § 2250(a).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"Sex offense" has the meaning given that term in 42 U.S.C. § 16911(5).

"Tier I offender", "Tier II offender", and "Tier III offender" have the meaning given those terms in 42 U.S.C. § 16911(2), (3) and (4), respectively.

2. Application of Subsection (b)(2).—

(A) In General.—In order for subsection (b)(2) to apply, the defendant's voluntary attempt to register or to correct the failure to register must have occurred prior to the time the defendant knew or reasonably should have known a jurisdiction had detected the failure to register.

- (B) Interaction with Subsection (b)(1).—Do not apply subsection (b)(2) if subsection (b)(1) also applies.

Historical Note: Effective November 1, 2007 (see Appendix C, amendments 701 and 711).

**§2A3.6. Aggravated Offenses Relating to Registration as a Sex Offender**

If the defendant was convicted under—

- (a) 18 U.S.C. § 2250(c), the guideline sentence is the minimum term of imprisonment required by statute; or
- (b) 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute.

Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to any count of conviction covered by this guideline.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2250(c), 2260A.

Application Notes:

1. In General.—Section 2250(c) of title 18, United States Code, provides a mandatory minimum term of five years' imprisonment and a statutory maximum term of 30 years' imprisonment. The statute also requires a sentence to be imposed consecutively to any sentence imposed for a conviction under 18 U.S.C. § 2250(a). Section 2260A of title 18, United States Code, provides a term of imprisonment of 10 years that is required to be imposed consecutively to any sentence imposed for an offense enumerated under that section.
2. Inapplicability of Chapters Three and Four.—Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).
3. Inapplicability of Chapter Two Enhancement.—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic that is based on the same conduct as the conduct comprising the conviction under 18 U.S.C. § 2250(c) or § 2260A.
4. Upward Departure.—In a case in which the guideline sentence is determined under subsection (a), a sentence above the minimum term required by 18 U.S.C. § 2250(c) is an upward departure from the guideline sentence. A departure may be warranted, for example, in a case

*involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.*

Historical Note: Effective November 1, 2007 (see Appendix C, amendment 701).

\* \* \* \* \*

#### 4. KIDNAPPING, ABDUCTION, OR UNLAWFUL RESTRAINT

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

- (a) Base Offense Level: **32**
- (b) Specific Offense Characteristics
  - (1) If a ransom demand or a demand upon government was made, increase by **6** levels.
  - (2) (A) If the victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) if the victim sustained serious bodily injury, increase by **2** levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by **3** levels.
  - (3) If a dangerous weapon was used, increase by **2** levels.
  - (4) (A) If the victim was not released before thirty days had elapsed, increase by **2** levels.  
(B) If the victim was not released before seven days had elapsed, increase by **1** level.
  - (5) If the victim was sexually exploited, increase by **6** levels.
  - (6) If the victim is a minor and, in exchange for money or other consideration, was placed in the care or custody of another person who had no legal right to such care or custody of the victim, increase by **3** levels.
  - (7) If the victim was kidnapped, abducted, or unlawfully restrained during the commission of, or in connection with, another offense or escape therefrom; or if another offense was committed during the kidnapping, abduction, or unlawful restraint, increase to --
    - (A) the offense level from the Chapter Two offense guideline applicable to that other offense if such offense guideline includes an adjustment for kidnapping, abduction, or unlawful restraint, or otherwise takes such conduct into account; or

- (B) 4 plus the offense level from the offense guideline applicable to that other offense, but in no event greater than level 43, in any other case,

if the resulting offense level is greater than that determined above.

(c) Cross Reference

- (1) If the victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

Commentary

Statutory Provisions: 18 U.S.C. §§ 115(b)(2), 351(b), (d), 1201, 1203, 1751(b), 2340A. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline—

*Definitions of "serious bodily injury" and "permanent or life-threatening bodily injury" are found in the Commentary to §1B1.1 (Application Instructions). However, for purposes of this guideline, "serious bodily injury" means conduct other than criminal sexual abuse, which is taken into account in the specific offense characteristic under subsection (b)(5).*

2. *"A dangerous weapon was used" means that a firearm was discharged, or a "firearm" or "dangerous weapon" was "otherwise used" (as defined in the Commentary to §1B1.1 (Application Instructions)).*
3. *"Sexually exploited" includes offenses set forth in 18 U.S.C. §§ 2241-2244, 2251, and 2421-2423.*
4. *In the case of a conspiracy, attempt, or solicitation to kidnap, §2X1.1 (Attempt, Solicitation, or Conspiracy) requires that the court apply any adjustment that can be determined with reasonable certainty. Therefore, for example, if an offense involved conspiracy to kidnap for the purpose of committing murder, subsection (b)(7) would reference first degree murder (resulting in an offense level of 43, subject to a possible 3-level reduction under §2X1.1(b)). Similarly, for example, if an offense involved a kidnapping during which a participant attempted to murder the victim under circumstances that would have constituted first degree murder had death occurred, the offense referenced under subsection (b)(7) would be the offense of first degree murder.*

Background: Federal kidnapping cases generally encompass three categories of conduct: limited duration kidnapping where the victim is released unharmed; kidnapping that occurs as part of or to facilitate the commission of another offense (often, sexual assault); and kidnapping for ransom or political demand.

*The guideline contains an adjustment for the length of time that the victim was detained. The adjustment recognizes the increased suffering involved in lengthy kidnappings and provides an incentive to release the victim.*

*An enhancement is provided when the offense is committed for ransom (subsection (b)(1)) or involves another federal, state, or local offense that results in a greater offense level (subsections (b)(7) and (c)(1)).*

*Section 401 of Public Law 101-647 amended 18 U.S.C. § 1201 to require that courts take into account certain specific offense characteristics in cases involving a victim under eighteen years of age and directed the Commission to include those specific offense characteristics within the guidelines. Where the guidelines did not already take into account the conduct identified by the Act, additional specific offense characteristics have been provided.*

*Subsections (a) and (b)(5), and the deletion of subsection (b)(4)(C), effective May 30, 2003, implement the directive to the Commission in section 104 of Public Law 108–21.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 96); November 1, 1991 (see Appendix C, amendment 363); November 1, 1992 (see Appendix C, amendment 445); November 1, 1993 (see Appendix C, amendment 478); November 1, 1997 (see Appendix C, amendment 545); November 1, 2002 (see Appendix C, amendment 637); May 30, 2003 (see Appendix C, amendment 650); October 27, 2003 (see Appendix C, amendment 651).

#### **§2A4.2. Demanding or Receiving Ransom Money**

- (a) Base Offense Level: **23**
- (b) Cross Reference
  - (1) If the defendant was a participant in the kidnapping offense, apply §2A4.1 (Kidnapping, Abduction, Unlawful Restraint).

#### Commentary

Statutory Provisions: 18 U.S.C. §§ 876, 877, 1202. For additional statutory provision(s), see Appendix A (Statutory Index).

#### Application Note:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted.

Background: This section specifically includes conduct prohibited by 18 U.S.C. § 1202, requiring that ransom money be received, possessed, or disposed of with knowledge of its criminal origins. The actual demand for ransom under these circumstances is reflected in §2A4.1. This section additionally includes extortionate demands through the use of the United States Postal Service, behavior proscribed by 18 U.S.C. §§ 876-877.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1993 (see Appendix C, amendment 479).

\* \* \* \* \*

## 5. AIR PIRACY AND OFFENSES AGAINST MASS TRANSPORTATION SYSTEMS

Historical Note: Effective November 1, 1987. Amended effective November 1, 2002 (see Appendix C, amendment 637).

### §2A5.1. Aircraft Piracy or Attempted Aircraft Piracy

- (a) Base Offense Level: **38**
- (b) Specific Offense Characteristic
  - (1) If death resulted, increase by **5** levels.

#### Commentary

Statutory Provisions: 49 U.S.C. § 46502(a), (b) (formerly 49 U.S.C. § 1472 (i), (n)). For additional statutory provision(s), see Appendix A (Statutory Index).

Background: This section covers aircraft piracy both within the special aircraft jurisdiction of the United States, 49 U.S.C. § 46502(a), and aircraft piracy outside that jurisdiction when the defendant is later found in the United States, 49 U.S.C. § 46502(b). Seizure of control of an aircraft may be by force or violence, or threat of force or violence, or by any other form of intimidation. The presence of a weapon is assumed in the base offense level.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1995 (see Appendix C, amendment 534).

### §2A5.2. Interference with Flight Crew Member or Flight Attendant; Interference with Dispatch, Navigation, Operation, or Maintenance of Mass Transportation Vehicle

- (a) Base Offense Level (Apply the greatest):
  - (1) **30**, if the offense involved intentionally endangering the safety of: (A) an airport or an aircraft; or (B) a mass transportation facility or a mass transportation vehicle;
  - (2) **18**, if the offense involved recklessly endangering the safety of: (A) an airport or an aircraft; or (B) a mass transportation facility or a mass transportation vehicle;
  - (3) if an assault occurred, the offense level from the most analogous assault guideline, §§2A2.1-2A2.4; or
  - (4) **9**.

- (b) Specific Offense Characteristic
- (1) If (A) subsection (a)(1) or (a)(2) applies; and (B)(i) a firearm was discharged, increase by **5** levels; (ii) a dangerous weapon was otherwise used, increase by **4** levels; or (iii) a dangerous weapon was brandished or its use was threatened, increase by **3** levels. If the resulting offense level is less than level **24**, increase to level **24**.
- (c) Cross References
- (1) If death resulted, apply the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.
  - (2) If the offense involved possession of, or a threat to use (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 1992(a)(1), (a)(4), (a)(5), (a)(6); 49 U.S.C. §§ 46308, 46503, 46504 (formerly 49 U.S.C. § 1472(c), (j)). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. Definitions.—For purposes of this guideline:

*"Biological agent", "chemical weapon", "nuclear byproduct material", "nuclear material", "toxin", and "weapon of mass destruction" have the meaning given those terms in Application Note 1 of the Commentary to §2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction).*

*"Brandished", "dangerous weapon", "firearm", and "otherwise used" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).*

*"Mass transportation" has the meaning given that term in 18 U.S.C. § 1992(d)(7).*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 97 and 303); November 1, 1993 (see Appendix C, amendment 480); November 1, 1995 (see Appendix C, amendment 534); November 1, 2002 (see Appendix C, amendment 637); November 1, 2007 (see Appendix C, amendment 699).

**§2A5.3. Committing Certain Crimes Aboard Aircraft**

- (a) Base Offense Level: The offense level applicable to the underlying offense.

Commentary

Statutory Provision: 49 U.S.C. § 46506 (formerly 49 U.S.C. § 1472(k)(1)).

Application Notes:

1. "Underlying offense" refers to the offense listed in 49 U.S.C. § 46506 of which the defendant is convicted.
2. If the conduct intentionally or recklessly endangered the safety of the aircraft or passengers, an upward departure may be warranted.

Historical Note: Effective October 15, 1988 (see Appendix C, amendment 65). Amended effective November 1, 1989 (see Appendix C, amendment 98); November 1, 1995 (see Appendix C, amendment 534).

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**6. THREATENING OR HARASSING COMMUNICATIONS, HOAXES, STALKING, AND DOMESTIC VIOLENCE**

Historical Note: Effective November 1, 1987. Amended effective November 1, 1997 (see Appendix C, amendment 549); November 1, 2006 (see Appendix C, amendment 686).

**§2A6.1. Threatening or Harassing Communications; Hoaxes**

- (a) Base Offense Level:
- (1) **12**; or
  - (2) **6**, if the defendant is convicted of an offense under 47 U.S.C. § 223(a)(1)(C), (D), or (E) that did not involve a threat to injure a person or property.
- (b) Specific Offense Characteristics
- (1) If the offense involved any conduct evidencing an intent to carry out such threat, increase by **6** levels.
  - (2) If the offense involved more than two threats, increase by **2** levels.
  - (3) If the offense involved the violation of a court protection order, increase by **2** levels.

- (4) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by **4** levels.
  - (5) If (A) subsection (a)(2) and subdivisions (1), (2), (3), and (4) do not apply, and (B) the offense involved a single instance evidencing little or no deliberation, decrease by **4** levels.
- (c) Cross Reference
- (1) If the offense involved any conduct evidencing an intent to carry out a threat to use a weapon of mass destruction, as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D), apply §2M6.1 (Weapons of Mass Destruction), if the resulting offense level is greater than that determined under this guideline.

#### Commentary

*Statutory Provisions:* 18 U.S.C. §§ 32(c), 35(b), 871, 876, 877, 878(a), 879, 1038, 1992(a)(9), (a)(10), 2291(a)(8), 2291(e), 2292, 2332b(a)(2); 47 U.S.C. § 223(a)(1)(C)-(E); 49 U.S.C. § 46507. For additional statutory provision(s), see Appendix A (Statutory Index).

#### Application Notes:

1. Scope of Conduct to Be Considered.— In determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider both conduct that occurred prior to the offense and conduct that occurred during the offense; however, conduct that occurred prior to the offense must be substantially and directly connected to the offense, under the facts of the case taken as a whole. For example, if the defendant engaged in several acts of mailing threatening letters to the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider only those prior acts of threatening the victim that have a substantial and direct connection to the offense.
2. Grouping.—For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving making a threatening or harassing communication to the same victim are grouped together under §3D1.2 (Groups of Closely Related Counts). Multiple counts involving different victims are not to be grouped under §3D1.2.
3. Departure Provisions.—
  - (A) In General.—The Commission recognizes that offenses covered by this guideline may include a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted. See Chapter Five, Part K (Departures).

- (B) *Multiple Threats or Victims.*—If the offense involved substantially more than two threatening communications to the same victim or a prolonged period of making harassing communications to the same victim, or if the offense involved multiple victims, an upward departure may be warranted.

*Background:* These statutes cover a wide range of conduct, the seriousness of which depends upon the defendant's intent and the likelihood that the defendant would carry out the threat. The specific offense characteristics are intended to distinguish such cases.

*Historical Note:* Effective November 1, 1987. Amended effective November 1, 1993 (see Appendix C, amendment 480); November 1, 1997 (see Appendix C, amendment 549); November 1, 2002 (see Appendix C, amendment 637); November 1, 2006 (see Appendix C, amendment 686); November 1, 2007 (see Appendix C, amendment 699).

## §2A6.2. Stalking or Domestic Violence

- (a) Base Offense Level: **18**
- (b) Specific Offense Characteristic
- (1) If the offense involved one of the following aggravating factors: (A) the violation of a court protection order; (B) bodily injury; (C) possession, or threatened use, of a dangerous weapon; or (D) a pattern of activity involving stalking, threatening, harassing, or assaulting the same victim, increase by **2** levels. If the offense involved more than one of these aggravating factors, increase by **4** levels.
- (c) Cross Reference
- (1) If the offense involved the commission of another criminal offense, apply the offense guideline from Chapter Two, Part A (Offenses Against the Person) most applicable to that other criminal offense, if the resulting offense level is greater than that determined above.

### Commentary

*Statutory Provisions:* 18 U.S.C. §§ 2261-2262.

### Application Notes:

1. For purposes of this guideline:

*"Bodily injury" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions).*

*"Pattern of activity involving stalking, threatening, harassing, or assaulting the same victim" means any combination of two or more separate instances of stalking, threatening, harassing, or assaulting the same victim, whether or not such conduct resulted in a conviction. For example, a single instance of stalking accompanied by a separate instance of threatening,*

harassing, or assaulting the same victim constitutes a pattern of activity for purposes of this guideline.

"Stalking" means (A) traveling with the intent to kill, injure, harass, or intimidate another person and, in the course of, or as a result of, such travel, placing the person in reasonable fear of death or serious bodily injury to that person or an immediate family member of that person; or (B) using the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, that person or an immediate family member of that person. *See* 18 U.S.C. § 2261A. "Immediate family member" (A) has the meaning given that term in 18 U.S.C. § 115(c)(2); and (B) includes a spouse or intimate partner. "Course of conduct" and "spouse or intimate partner" have the meaning given those terms in 18 U.S.C. § 2266(2) and (7), respectively.

2. Subsection (b)(1) provides for a two-level or four-level enhancement based on the degree to which the offense involved aggravating factors listed in that subsection. If the offense involved aggravating factors more serious than the factors listed in subsection (b)(1), the cross reference in subsection (c) most likely will apply, if the resulting offense level is greater, because the more serious conduct will be covered by another offense guideline from Chapter Two, Part A. For example, §2A2.2 (Aggravated Assault) most likely would apply pursuant to subsection (c) if the offense involved assaultive conduct in which injury more serious than bodily injury occurred or if a dangerous weapon was used rather than merely possessed.
3. In determining whether subsection (b)(1)(D) applies, the court shall consider, under the totality of the circumstances, any conduct that occurred prior to or during the offense; however, conduct that occurred prior to the offense must be substantially and directly connected to the offense. For example, if a defendant engaged in several acts of stalking the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of determining whether subsection (b)(1)(D) applies, the court shall look to the totality of the circumstances, considering only those prior acts of stalking the victim that have a substantial and direct connection to the offense.

Prior convictions taken into account under subsection (b)(1)(D) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving stalking, threatening, or harassing the same victim are grouped together (and with counts of other offenses involving the same victim that are covered by this guideline) under §3D1.2 (Groups of Closely Related Counts). For example, if the defendant is convicted of two counts of stalking the defendant's ex-spouse under 18 U.S.C. § 2261A and one count of interstate domestic violence involving an assault of the ex-spouse under 18 U.S.C. § 2261, the stalking counts would be grouped together with the interstate domestic violence count. This grouping procedure avoids unwarranted "double counting" with the enhancement in subsection (b)(1)(D) (for multiple acts of stalking, threatening, harassing, or assaulting the same victim) and recognizes that the stalking and interstate domestic violence counts are sufficiently related to warrant grouping.

Multiple counts that are cross referenced to another offense guideline pursuant to subsection (c) are to be grouped together if §3D1.2 (Groups of Closely Related Counts) would require grouping of those counts under that offense guideline. Similarly, multiple counts cross referenced pursuant to subsection (c) are not to be grouped together if §3D1.2 would preclude

*grouping of the counts under that offense guideline. For example, if the defendant is convicted of multiple counts of threatening an ex-spouse in violation of a court protection order under 18 U.S.C. § 2262 and the counts are cross referenced to §2A6.1 (Threatening or Harassing Communications), the counts would group together because Application Note 2 of §2A6.1 specifically requires grouping. In contrast, if the defendant is convicted of multiple counts of assaulting the ex-spouse in violation of a court protection order under 18 U.S.C. § 2262 and the counts are cross referenced to §2A2.2 (Aggravated Assault), the counts probably would not group together inasmuch as §3D1.2(d) specifically precludes grouping of counts covered by §2A2.2 and no other provision of §3D1.2 would likely apply to require grouping.*

*Multiple counts involving different victims are not to be grouped under §3D1.2 (Groups of Closely Related Counts).*

5. *If the defendant received an enhancement under subsection (b)(1) but that enhancement does not adequately reflect the extent or seriousness of the conduct involved, an upward departure may be warranted. For example, an upward departure may be warranted if the defendant stalked the victim on many occasions over a prolonged period of time.*

Historical Note: Effective November 1, 1997 (see Appendix C, amendment 549). Amended effective November 1, 2001 (see Appendix C, amendment 616).

**PART B - BASIC ECONOMIC OFFENSES**

**1. THEFT, EMBEZZLEMENT, RECEIPT OF STOLEN PROPERTY, PROPERTY DESTRUCTION, AND OFFENSES INVOLVING FRAUD OR DECEIT**

*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 Chapter Two, 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.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 303); November 1, 2001 (see Appendix C, amendment 617).

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

(a) Base Offense Level:

- (1) **7**, if (A) the defendant was convicted of an offense referenced to this guideline; and (B) that offense of conviction has a statutory maximum term of imprisonment of 20 years or more; or
- (2) **6**, otherwise.

(b) Specific Offense Characteristics

- (1) If the loss exceeded \$5,000, increase the offense level as follows:

<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A) \$5,000 or less	no increase
(B) More than \$5,000	add <b>2</b>
(C) More than \$10,000	add <b>4</b>
(D) More than \$30,000	add <b>6</b>
(E) More than \$70,000	add <b>8</b>
(F) More than \$120,000	add <b>10</b>
(G) More than \$200,000	add <b>12</b>
(H) More than \$400,000	add <b>14</b>
(I) More than \$1,000,000	add <b>16</b>
(J) More than \$2,500,000	add <b>18</b>

- |     |                         |                 |
|-----|-------------------------|-----------------|
| (K) | More than \$7,000,000   | 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>   |
| (O) | More than \$200,000,000 | add <b>28</b>   |
| (P) | More than \$400,000,000 | add <b>30</b> . |
- (2) (Apply the greatest) If the offense—
- (A) (i) involved 10 or more victims; or (ii) was committed through mass-marketing, increase by **2** levels;
- (B) involved 50 or more victims, increase by **4** levels; or
- (C) involved 250 or more victims, increase by **6** levels.
- (3) If the offense involved a theft from the person of another, increase by **2** levels.
- (4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.
- (5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit a foreign government, foreign instrumentality, or foreign agent, increase by **2** levels.
- (6) If the offense involved theft of, damage to, or destruction of, property from a national cemetery or veterans' memorial, increase by **2** levels.
- (7) If (A) the defendant was convicted of an offense under 18 U.S.C. § 1037; and (B) the offense involved obtaining electronic mail addresses through improper means, increase by **2** levels.
- (8) 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; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.
- (9) 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**.

- (10) If the offense involved (A) the possession or use of any (i) device-making equipment, or (ii) authentication feature; (B) the production or trafficking of any (i) unauthorized access device or counterfeit access device, or (ii) authentication feature; or (C)(i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification, or (ii) the possession of 5 or more means of identification that unlawfully were produced from, or obtained by the use of, another means of identification, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (11) If the offense involved an organized scheme to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment, increase by **2** levels. If the offense level is less than level **14**, increase to level **14**.
- (12) 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**.
- (13) (Apply the greater) 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; or
- (B) the offense (i) substantially jeopardized the safety and soundness of a financial institution; (ii) substantially endangered the solvency or financial security of an organization that, at any time during the offense, (I) was a publicly traded company; or (II) had 1,000 or more employees; or (iii) substantially endangered the solvency or financial security of 100 or more victims, increase by **4** levels.
- (C) The cumulative adjustments from application of both subsections (b)(2) and (b)(13)(B) shall not exceed **8** levels, except as provided in subdivision (D).
- (D) If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.
- (14) (A) (Apply the greatest) If the defendant was convicted of an offense under:
- (i) 18 U.S.C. § 1030, and the offense involved (I) a

- computer system used to maintain or operate a critical infrastructure, or used by or for a government entity in furtherance of the administration of justice, national defense, or national security; or (II) an intent to obtain personal information, increase by **2** levels.
- (ii) 18 U.S.C. § 1030(a)(5)(A)(i), increase by **4** levels.
  - (iii) 18 U.S.C. § 1030, and the offense caused a substantial disruption of a critical infrastructure, increase by **6** levels.
- (B) If subdivision (A)(iii) applies, and the offense level is less than level **24**, increase to level **24**.
- (15) If the offense involved—
- (A) a violation of securities law and, at the time of the offense, the defendant was (i) an officer or a director of a publicly traded company; (ii) a registered broker or dealer, or a person associated with a broker or dealer; or (iii) an investment adviser, or a person associated with an investment adviser; or
  - (B) a violation of commodities law and, at the time of the offense, the defendant was (i) an officer or a director of a futures commission merchant or an introducing broker; (ii) a commodities trading advisor; or (iii) a commodity pool operator,
- increase by **4** levels.
- (c) Cross References
- (1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of any 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 (Including Possession with Intent to Commit These Offenses); 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.
  - (2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

- (3) If (A) neither subdivision (1) nor (2) of this subsection applies; (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 establishes an offense specifically covered by another guideline in Chapter Two (Offense Conduct), apply that other guideline.
- (4) If the offense involved a cultural heritage resource, apply §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources), if the resulting offense level is greater than that determined above.

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, 6821; 18 U.S.C. §§ 38, 225, 285-289, 471-473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4)-(5), 1031, 1037, 1341-1344, 1348, 1350, 1361, 1363, 1369, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail, is involved), 1708, 1831, 1832, 1992(a)(1), (a)(5), 2113(b), 2282A, 2282B, 2291, 2312-2317, 2332b(a)(1), 2701; 19 U.S.C. § 2401f; 29 U.S.C. § 501(c); 42 U.S.C. § 1011; 49 U.S.C. §§ 14915, 30170, 46317(a), 60123(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Cultural heritage resource" has the meaning given that term in Application Note 1 of the Commentary to §2B1.5 (Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources).*

*"Equity securities" has the meaning given that term in section 3(a)(11) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(11)).*

*"Financial institution" includes any institution described in 18 U.S.C. § 20, § 656, § 657, § 1005, § 1006, § 1007, or § 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," primarily include large pension funds that serve many persons (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" have the meaning given those terms in the Commentary to §1B1.1 (Application Instructions).*

*"Foreign instrumentality" and "foreign agent" have the meaning given those terms 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.*

*"Publicly traded company" means an issuer (A) with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l); or (B) that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). "Issuer" has the meaning given that term in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. § 78c).*

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

*"Trade secret" has the meaning given that term in 18 U.S.C. § 1839(3).*

*"Veterans' memorial" means any structure, plaque, statue, or other monument described in 18 U.S.C. § 1369(a).*

*"Victim" means (A) any person who sustained any part of the actual loss determined under subsection (b)(1); or (B) any individual who sustained bodily injury as a result of the offense. "Person" includes individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies.*

2. Application of Subsection (a)(1).—

(A) "Referenced to this Guideline".—For purposes of subsection (a)(1), an offense is "referenced to this guideline" if (i) this guideline is the applicable Chapter Two guideline determined under the provisions of §1B1.2 (Applicable Guidelines) for the offense of conviction; or (ii) in the case of a conviction for conspiracy, solicitation, or attempt to which §2X1.1 (Attempt, Solicitation, or Conspiracy) applies, this guideline is the appropriate guideline for the offense the defendant was convicted of conspiring, soliciting, or attempting to commit.

(B) Definition of "Statutory Maximum Term of Imprisonment".—For purposes of this guideline, "statutory maximum term of imprisonment" means the maximum term of imprisonment authorized for the offense of conviction, including any increase in that maximum term under a statutory enhancement provision.

- (C) Base Offense Level Determination for Cases Involving Multiple Counts.—*In a case involving multiple counts sentenced under this guideline, the applicable base offense level is determined by the count of conviction that provides the highest statutory maximum term of imprisonment.*
3. Loss Under Subsection (b)(1).—*This application note applies to the determination of loss under subsection (b)(1).*
- (A) General Rule.—*Subject to the exclusions in subdivision (D), loss is the greater of actual loss or intended loss.*
- (i) Actual Loss.—*"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.*
- (ii) Intended Loss.—*"Intended loss" (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).*
- (iii) Pecuniary Harm.—*"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.*
- (iv) Reasonably Foreseeable Pecuniary Harm.—*For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.*
- (v) Rules of Construction in Certain Cases.—*In the cases described in subdivisions (I) through (III), reasonably foreseeable pecuniary harm shall be considered to include the pecuniary harm specified for those cases as follows:*
- (I) Product Substitution Cases.—*In the case of a product substitution offense, the reasonably foreseeable pecuniary harm includes the reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or of retrofitting the product so that it can be used for its intended purpose, and the reasonably foreseeable costs of rectifying the actual or potential disruption to the victim's business operations caused by the product substitution.*
- (II) Procurement Fraud Cases.—*In the case of a procurement fraud, such as a fraud affecting a defense contract award, reasonably foreseeable pecuniary harm includes the reasonably foreseeable administrative costs to the government and other participants of repeating or correcting the procurement action affected, plus any increased costs to procure the product or service involved that was reasonably foreseeable.*

- (III) Offenses Under 18 U.S.C. § 1030.—*In the case of an offense under 18 U.S.C. § 1030, actual loss includes the following pecuniary harm, regardless of whether such pecuniary harm was reasonably foreseeable: any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other damages incurred because of interruption of service.*
- (B) Gain.—*The court shall use the gain that resulted from the offense as an alternative measure of loss only if there is a loss but it reasonably cannot be determined.*
- (C) Estimation of Loss.—*The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court’s loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).*

*The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:*

- (i) *The fair market value of the property unlawfully taken or destroyed; or, if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property.*
- (ii) *The cost of repairs to damaged property.*
- (iii) *The approximate number of victims multiplied by the average loss to each victim.*
- (iv) *The reduction that resulted from the offense in the value of equity securities or other corporate assets.*
- (v) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*
- (D) Exclusions from Loss.—*Loss shall not include the following:*
- (i) *Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs.*
- (ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense.*
- (E) Credits Against Loss.—*Loss shall be reduced by the following:*
- (i) *The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have known that the offense was detected or about to be detected by a victim or*

government agency.

- (ii) *In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.*
- (F) Special Rules.—Notwithstanding subdivision (A), the following special rules shall be used to assist in determining loss in the cases indicated:
- (i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—*In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device and shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this subdivision, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 7(A).*
  - (ii) Government Benefits.—*In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, loss is \$50.*
  - (iii) Davis-Bacon Act Violations.—*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 value of the benefits shall be considered to be not less than the difference between the legally required wages and actual wages paid.*
  - (iv) Ponzi and Other Fraudulent Investment Schemes.—*In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the money or the value of the property transferred to any individual investor in the scheme in excess of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).*
  - (v) Certain Other Unlawful Misrepresentation Schemes.—*In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals; (II) goods were falsely represented as approved by a governmental regulatory agency; or (III) goods for which regulatory approval by a government agency was required but not obtained, or was obtained by fraud, loss shall include the amount paid for the property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services.*

- (vi) Value of Controlled Substances.—*In a case involving controlled substances, loss is the estimated street value of the controlled substances.*
  - (vii) Value of Cultural Heritage Resources.—*In a case involving a cultural heritage resource, loss attributable to that cultural heritage resource shall be determined in accordance with the rules for determining the "value of the cultural heritage resource" set forth in Application Note 2 of the Commentary to §2B1.5.*
4. Application of Subsection (b)(2).—
- (A) Definition.—*For purposes of subsection (b)(2), "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 (i) purchase goods or services; (ii) participate in a contest or sweepstakes; or (iii) invest for financial profit. "Mass-marketing" includes, for example, a telemarketing campaign that solicits a large number of individuals to purchase fraudulent life insurance policies.*
  - (B) Applicability to Transmission of Multiple Commercial Electronic Mail Messages.—*For purposes of subsection (b)(2), an offense under 18 U.S.C. § 1037, or any other offense involving conduct described in 18 U.S.C. § 1037, shall be considered to have been committed through mass-marketing. Accordingly, the defendant shall receive at least a two-level enhancement under subsection (b)(2) and may, depending on the facts of the case, receive a greater enhancement under such subsection, if the defendant was convicted under, or the offense involved conduct described in, 18 U.S.C. § 1037.*
  - (C) Undelivered United States Mail.—
    - (i) In General.—*In a case in which undelivered United States mail was taken, or the taking of such item was an object of the offense, or in a case in which the stolen property received, transported, transferred, transmitted, or possessed was undelivered United States mail, "victim" means (I) any victim as defined in Application Note 1; or (II) any person who was the intended recipient, or addressee, of the undelivered United States mail.*
    - (ii) Special Rule.—*A case described in subdivision (C)(i) of this note that involved—*
      - (I) *a United States Postal Service relay box, collection box, delivery vehicle, satchel, or cart, shall be considered to have involved at least 50 victims.*
      - (II) *a housing unit cluster box or any similar receptacle that contains multiple mailboxes, whether such receptacle is owned by the United States Postal Service or otherwise owned, shall, unless proven otherwise, be presumed to have involved the number of victims corresponding to the number of mailboxes in each cluster box or similar receptacle.*
    - (iii) Definition.—*"Undelivered United States mail" means mail that has not actually been received by the addressee or his agent (e.g., mail taken from the addressee's mail box).*

- (D) Vulnerable Victims.—If subsection (b)(2)(B) or (C) applies, an enhancement under §3A1.1(b)(2) shall not apply.
5. Enhancement for Business of Receiving and Selling Stolen Property under Subsection (b)(4).—For purposes of subsection (b)(4), the court shall consider the following non-exhaustive list of factors in determining whether the defendant was in the business of receiving and selling stolen property:
- (A) The regularity and sophistication of the defendant’s activities.
- (B) The value and size of the inventory of stolen property maintained by the defendant.
- (C) The extent to which the defendant’s activities encouraged or facilitated other crimes.
- (D) The defendant’s past activities involving stolen property.
6. Application of Subsection (b)(7).—For purposes of subsection (b)(7), “improper means” includes the unauthorized harvesting of electronic mail addresses of users of a website, proprietary service, or other online public forum.
7. Application of Subsection (b)(8).—
- (A) In General.—The adjustments in subsection (b)(8) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.
- (B) Misrepresentations Regarding Charitable and Other Institutions.—Subsection (b)(8)(A) applies in any case in which the defendant represented that the defendant was acting to obtain a benefit on behalf of a charitable, educational, religious, or political organization, or a government agency (regardless of whether the defendant actually was associated with the organization or government agency) when, in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant’s personal gain). Subsection (b)(8)(A) applies, for example, to the following:
- (i) A defendant who solicited contributions for a non-existent famine relief organization.
- (ii) A defendant who solicited donations from church members by falsely claiming to be a fundraiser for a religiously affiliated school.
- (iii) A defendant, chief of a local fire department, who conducted a public fundraiser representing that the purpose of the fundraiser was to procure sufficient funds for a new fire engine when, in fact, the defendant intended to divert some of the funds for the defendant’s personal benefit.
- (C) Fraud in Contravention of Prior Judicial Order.—Subsection (b)(8)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated

*criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §3C1.3 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).*

(D) College Scholarship Fraud.—For purposes of subsection (b)(8)(D):

*"Financial assistance" means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purpose of financing an education.*

*"Institution of higher education" has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. § 1001).*

(E) Non-Applicability of Enhancements.—

(i) Subsection (b)(8)(A).—*If the conduct that forms the basis for an enhancement under subsection (b)(8)(A) is the only conduct that forms the basis for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill), do not apply that adjustment under §3B1.3.*

(ii) Subsection (b)(8)(B) and (C).—*If the conduct that forms the basis for an enhancement under subsection (b)(8)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstructing or Impeding the Administration of Justice), do not apply that adjustment under §3C1.1.*

8. Sophisticated Means Enhancement under Subsection (b)(9).—

(A) Definition of United States.—*For purposes of subsection (b)(9)(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.*

(B) Sophisticated Means Enhancement.—*For purposes of subsection (b)(9)(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 ordinarily indicates sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means.*

- (C) Non-Applicability of Enhancement.—*If the conduct that forms the basis for an enhancement under subsection (b)(9) is the only conduct that forms the basis for an adjustment under §3C1.1, do not apply that adjustment under §3C1.1.*

9. Application of Subsection (b)(10).—

- (A) Definitions.—*For purposes of subsection (b)(10):*

*"Authentication feature" has the meaning given that term in 18 U.S.C. § 1028(d)(1).*

*"Counterfeit access device" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (ii) includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service.*

*"Telecommunications service" has the meaning given that term in 18 U.S.C. § 1029(e)(9).*

*"Device-making equipment" (i) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (ii) includes (I) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (II) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). "Scanning receiver" has the meaning given that term in 18 U.S.C. § 1029(e)(8).*

*"Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7), except that such means of identification shall be of an actual (i.e., not fictitious) individual, other than the defendant or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct).*

*"Produce" includes manufacture, design, alter, authenticate, duplicate, or assemble. "Production" includes manufacture, design, alteration, authentication, duplication, or assembly.*

*"Unauthorized access device" has the meaning given that term in 18 U.S.C. § 1029(e)(3).*

- (B) Authentication Features and Identification Documents.—*Offenses involving authentication features, identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense, under 18 U.S.C. § 1028, was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than this guideline.*

- (C) Application of Subsection (b)(10)(C)(i).—
- (i) In General.—Subsection (b)(10)(C)(i) applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.
  - (ii) Examples.—Examples of conduct to which subsection (b)(10)(C)(i) applies are as follows:
    - (I) A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.
    - (II) A defendant obtains an individual's name and address from a source (e.g., from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.
  - (iii) Nonapplicability of Subsection (b)(10)(C)(i).—Examples of conduct to which subsection (b)(10)(C)(i) does not apply are as follows:
    - (I) A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.
    - (II) A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.
- (D) Application of Subsection (b)(10)(C)(ii).—Subsection (b)(10)(C)(ii) applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.
10. Application of Subsection (b)(11).—Subsection (b)(11) provides a minimum offense level in the case of an ongoing, sophisticated operation (e.g., an auto theft ring or "chop shop") to steal or to receive stolen (A) vehicles or vehicle parts; or (B) goods or chattels that are part of a cargo shipment. For purposes of this subsection, "vehicle" means motor vehicle, vessel, or aircraft. A "cargo shipment" includes cargo transported on a railroad car, bus, steamboat, vessel, or airplane.

11. Gross Receipts Enhancement under Subsection (b)(13)(A).—

- (A) In General.—For purposes of subsection (b)(13)(A), 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.
- (B) Definition.—"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. Application of Subsection (b)(13)(B).—

- (A) Application of Subsection (b)(13)(B)(i).—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the safety and soundness of a financial institution was substantially jeopardized:
- (i) The financial institution became insolvent.
  - (ii) The financial institution substantially reduced benefits to pensioners or insureds.
  - (iii) The financial institution was unable on demand to refund fully any deposit, payment, or investment.
  - (iv) The financial institution was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.
- (B) Application of Subsection (b)(13)(B)(ii).—
- (i) Definition.—For purposes of this subsection, "organization" has the meaning given that term in Application Note 1 of §8A1.1 (Applicability of Chapter Eight).
  - (ii) In General.—The following is a non-exhaustive list of factors that the court shall consider in determining whether, as a result of the offense, the solvency or financial security of an organization that was a publicly traded company or that had more than 1,000 employees was substantially endangered:
    - (I) The organization became insolvent or suffered a substantial reduction in the value of its assets.
    - (II) The organization filed for bankruptcy under Chapters 7, 11, or 13 of the Bankruptcy Code (title 11, United States Code).
    - (III) The organization suffered a substantial reduction in the value of its equity securities or the value of its employee retirement accounts.
    - (IV) The organization substantially reduced its workforce.
    - (V) The organization substantially reduced its employee pension benefits.

- (VI) *The liquidity of the equity securities of a publicly traded company was substantially endangered. For example, the company was delisted from its primary listing exchange, or trading of the company's securities was halted for more than one full trading day.*

13. Application of Subsection (b)(14).—

- (A) Definitions.—For purposes of subsection (b)(14):

*"Critical infrastructure" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.*

*"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).*

*"Personal information" means sensitive or private information (including such information in the possession of a third party), including (i) medical records; (ii) wills; (iii) diaries; (iv) private correspondence, including e-mail; (v) financial records; (vi) photographs of a sensitive or private nature; or (vii) similar information.*

- (B) Subsection (b)(14)(iii).—*If the same conduct that forms the basis for an enhancement under subsection (b)(14)(iii) is the only conduct that forms the basis for an enhancement under subsection (b)(13)(B), do not apply the enhancement under subsection (b)(13)(B).*

14. Application of Subsection (b)(15).—

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

*"Commodities law" means (i) the Commodities Exchange Act (7 U.S.C. § 1 et seq.); and (ii) includes the rules, regulations, and orders issued by the Commodities Futures Trading Commission.*

*"Commodity pool operator" has the meaning given that term in section 1a(4) of the Commodities Exchange Act (7 U.S.C. § 1a(4)).*

*"Commodity trading advisor" has the meaning given that term in section 1a(5) of the Commodities Exchange Act (7 U.S.C. § 1a(5)).*

*"Futures commission merchant" has the meaning given that term in section 1a(20) of the Commodities Exchange Act (7 U.S.C. § 1a(20)).*

*"Introducing broker" has the meaning given that term in section 1a(23) of the Commodities Exchange Act (7 U.S.C. § 1a(23)).*

"Investment adviser" has the meaning given that term in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(11)).

"Person associated with a broker or dealer" has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(18)).

"Person associated with an investment adviser" has the meaning given that term in section 202 of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-2(a)(17)).

"Registered broker or dealer" has the meaning given that term in section 3(a)(48) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(48)).

"Securities law" (i) means 18 U.S.C. §§ 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.

- (B) In General.—A conviction under a securities law or commodities law is not required in order for subsection (b)(15) to apply. This subsection would apply in the case of a defendant convicted under a general fraud statute if the defendant's conduct violated a securities law or commodities law. For example, this subsection would apply if an officer of a publicly traded company violated regulations issued by the Securities and Exchange Commission by fraudulently influencing an independent audit of the company's financial statements for the purposes of rendering such financial statements materially misleading, even if the officer is convicted only of wire fraud.
- (C) Nonapplicability of §3B1.3 (Abuse of Position of Trust or Use of Special Skill).—If subsection (b)(15) applies, do not apply §3B1.3.
15. Cross Reference in Subsection (c)(3).—Subsection (c)(3) provides a cross reference to another guideline in Chapter Two (Offense Conduct) in cases in which the defendant is convicted of a general fraud statute, and the count of conviction establishes an offense involving fraudulent conduct that is more aptly covered by another guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense involves fraudulent conduct that 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) likely 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. For example, a state employee who improperly influenced the award of a contract and used the mails to commit the offense may be prosecuted under 18 U.S.C. § 1341 for fraud involving the deprivation of the intangible right of honest services. Such a case would be more aptly sentenced pursuant to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).

16. Continuing Financial Crimes Enterprise.—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".
17. Partially Completed Offenses.—In the case of a partially completed offense (e.g., an offense involving a completed theft or fraud that is part of a larger, attempted theft or 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 of the Commentary to §2X1.1.
18. Multiple-Count Indictments.—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).
19. Departure Considerations.—
- (A) Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. 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 (through, for example, the theft of personal information such as medical, educational, or financial records). An upward departure would be warranted, for example, in an 18 U.S.C. § 1030 offense involving damage to a protected computer, if, as a result of that offense, death resulted. An upward departure also would be warranted, for example, in a case involving animal enterprise terrorism under 18 U.S.C. § 43, if, in the course of the offense, serious bodily injury or death resulted, or substantial scientific research or information were destroyed.
  - (iii) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other similar costs, not included in the determination of loss for purposes of subsection (b)(1).
  - (iv) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).
  - (v) In a case involving stolen information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2), the defendant sought the stolen information to further a broader criminal purpose.

- (vi) *In a case involving access devices or unlawfully produced or unlawfully obtained means of identification:*
- (I) *The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.*
  - (II) *An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in that individual's name.*
  - (III) *The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.*
- (B) *Upward Departure for Debilitating Impact on a Critical Infrastructure.—An upward departure would be warranted in a case in which subsection (b)(14)(iii) applies and the disruption to the critical infrastructure(s) is so substantial as to have a debilitating impact on national security, national economic security, national public health or safety, or any combination of those matters.*
- (C) *Downward Departure Consideration.—There may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted.*

*Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States).*

*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 loss caused or intended 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.*

*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 level 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of "organized scheme" is used as an alternative to "loss" in setting a minimum offense level.*

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

*Offenses that involve the use of financial transactions or financial 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 offense level of level 12 is provided for these offenses.*

*Subsection (b)(6) implements the instruction to the Commission in section 2 of Public Law 105–101.*

*Subsection (b)(8)(D) implements, in a broader form, the directive in section 3 of the College Scholarship Fraud Prevention Act of 2000, Public Law 106–420.*

*Subsection (b)(9) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.*

*Subsections (b)(10)(A)(i) and (B)(i) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.*

*Subsection (b)(10)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as "affirmative identity theft" or "breeding", in which a defendant uses another individual's name, social security number, or some other form of identification (the "means of identification") to "breed" (*i.e.*, produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines "means of identification", the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were "bred" (*i.e.*, produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been "stolen." Generally, the victim does not become aware of the offense until certain*

*harms have already occurred (e.g., a damaged credit rating or an inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (e.g., harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.*

*Subsection (b)(12)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.*

*Subsection (b)(13)(A) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101–647.*

*Subsection (b)(13)(B)(i) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.*

*Subsection (b)(14) implements the directive in section 225(b) of Public Law 107–296. The minimum offense level of level 24 provided in subsection (b)(14)(B) for an offense that resulted in a substantial disruption of a critical infrastructure reflects the serious impact such an offense could have on national security, national economic security, national public health or safety, or a combination of any of these matters.*

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 7); November 1, 1989 (see Appendix C, amendments 99-101 and 303); November 1, 1990 (see Appendix C, amendments 312, 317, and 361); November 1, 1991 (see Appendix C, amendments 364 and 393); November 1, 1993 (see Appendix C, amendments 481 and 482); November 1, 1995 (see Appendix C, amendment 512); November 1, 1997 (see Appendix C, amendment 551); November 1, 1998 (see Appendix C, amendment 576); November 1, 2000 (see Appendix C, amendment 596); November 1, 2001 (see Appendix C, amendment 617); November 1, 2002 (see Appendix C, amendments 637, 638, and 646); January 25, 2003 (see Appendix C, amendment 647); November 1, 2003 (see Appendix C, amendments 653, 654, 655, and 661); November 1, 2004 (see Appendix C, amendments 665, 666, and 674); November 1, 2005 (see Appendix C, amendment 679); November 1, 2006 (see Appendix C, amendments 685 and 696); November 1, 2007 (see Appendix C, amendments 699, 700, and 702).

## **§2B1.2. [Deleted]**

Historical Note: Section 2B1.2 (Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property), effective November 1, 1987, amended effective January 15, 1988 (see Appendix C, amendment 8), June 15, 1988 (see Appendix C, amendment 9), November 1, 1989 (see Appendix C, amendments 102-104), and November 1, 1990 (see Appendix C, amendments 312 and 361), was deleted by consolidation with §2B1.1 effective November 1, 1993 (see Appendix C, amendment 481).

## **§2B1.3. [Deleted]**

Historical Note: Section 2B1.3 (Property Damage or Destruction), effective November 1, 1987, amended effective June 15, 1988 (see Appendix C, amendment 10), November 1, 1990 (see Appendix C, amendments 312 and 313), November 1, 1997 (see Appendix C, amendment 551), November 1, 1998 (see Appendix C, amendment 576), was deleted by consolidation with §2B1.1 effective November 1, 2001 (see Appendix C, amendment 617).

## **§2B1.4. Insider Trading**

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

- (b) Specific Offense Characteristic
  - (1) If the gain resulting from the offense exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

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. Application of Subsection of §3B1.3.—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 the defendant or to whom the defendant 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 appropriately may be covered by this guideline.

Historical Note: Effective November 1, 2001 (see Appendix C, amendment 617).

**§2B1.5. Theft of, Damage to, or Destruction of, Cultural Heritage Resources; Unlawful Sale, Purchase, Exchange, Transportation, or Receipt of Cultural Heritage Resources**

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
  - (1) If the value of the cultural heritage resource (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
  - (2) If the offense involved a cultural heritage resource from, or that, prior to the offense, was on, in, or in the custody of (A) the national park system; (B) a National Historic Landmark; (C) a national monument or national memorial; (D) a national marine sanctuary; (E) a national cemetery or

- veterans' memorial; (F) a museum; or (G) the World Heritage List, increase by **2** levels.
- (3) If the offense involved a cultural heritage resource constituting (A) human remains; (B) a funerary object; (C) cultural patrimony; (D) a sacred object; (E) cultural property; (F) designated archaeological or ethnological material; or (G) a pre-Columbian monumental or architectural sculpture or mural, increase by **2** levels.
  - (4) If the offense was committed for pecuniary gain or otherwise involved a commercial purpose, increase by **2** levels.
  - (5) If the defendant engaged in a pattern of misconduct involving cultural heritage resources, increase by **2** levels.
  - (6) If a dangerous weapon was brandished or its use was threatened, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.
- (c) Cross Reference
- (1) If the offense involved arson, or property damage by the use of any explosive, explosive material, or destructive device, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 16 U.S.C. §§ 470ee, 668(a), 707(b); 18 U.S.C. §§ 541-546, 554, 641, 661-662, 666, 668, 1152-1153, 1163, 1168, 1170, 1361, 1369, 2232, 2314-2315.

Application Notes:

1. "Cultural Heritage Resource" Defined.—For purposes of this guideline, "cultural heritage resource" means any of the following:
  - (A) A historic property, as defined in 16 U.S.C. § 470w(5) (see also section 16(l) of 36 C.F.R. pt. 800).
  - (B) A historic resource, as defined in 16 U.S.C. § 470w(5).
  - (C) An archaeological resource, as defined in 16 U.S.C. § 470bb(1) (see also section 3(a) of 43 C.F.R. pt. 7; 36 C.F.R. pt. 296; 32 C.F.R. pt. 299; 18 C.F.R. pt. 1312).
  - (D) A cultural item, as defined in section 2(3) of the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(3) (see also 43 C.F.R. § 10.2(d)).

- (E) *A commemorative work. "Commemorative work" (A) has the meaning given that term in section 2(c) of Public Law 99–652 (40 U.S.C. § 1002(c)); and (B) includes any national monument or national memorial.*
  - (F) *An object of cultural heritage, as defined in 18 U.S.C. § 668(a)(2).*
  - (G) *Designated ethnological material, as described in 19 U.S.C. §§ 2601(2)(ii), 2601(7), and 2604.*
2. Value of the Cultural Heritage Resource Under Subsection (b)(1).—*This application note applies to the determination of the value of the cultural heritage resource under subsection (b)(1).*
- (A) General Rule.—*For purposes of subsection (b)(1), the value of the cultural heritage resource shall include, as applicable to the particular resource involved, the following:*
    - (i) *The archaeological value. (Archaeological value shall be included in the case of any cultural heritage resource that is an archaeological resource.)*
    - (ii) *The commercial value.*
    - (iii) *The cost of restoration and repair.*
  - (B) Estimation of Value.—*For purposes of subsection (b)(1), the court need only make a reasonable estimate of the value of the cultural heritage resource based on available information.*
  - (C) Definitions.—*For purposes of this application note:*
    - (i) *"Archaeological value" of a cultural heritage resource means the cost of the retrieval of the scientific information which would have been obtainable prior to the offense, including the cost of preparing a research design, conducting field work, conducting laboratory analysis, and preparing reports, as would be necessary to realize the information potential. (See 43 C.F.R. § 7.14(a); 36 C.F.R. § 296.14(a); 32 C.F.R. § 229.14(a); 18 C.F.R. § 1312.14(a).)*
    - (ii) *"Commercial value" of a cultural heritage resource means the fair market value of the cultural heritage resource at the time of the offense. (See 43 C.F.R. § 7.14(b); 36 C.F.R. § 296.14(b); 32 C.F.R. § 229.14(b); 18 C.F.R. § 1312.14(b).)*
    - (iii) *"Cost of restoration and repair" includes all actual and projected costs of curation, disposition, and appropriate reburial of, and consultation with respect to, the cultural heritage resource; and any other actual and projected costs to complete restoration and repair of the cultural heritage resource, including (I) its reconstruction and stabilization; (II) reconstruction and stabilization of ground contour and surface; (III) research necessary to conduct reconstruction and stabilization; (IV) the construction of physical barriers and other protective devices; (V) examination and analysis of the cultural heritage resource as part of efforts to salvage remaining information about the resource; and (VI)*

preparation of reports. (*See* 43 C.F.R. § 7.14(c); 36 C.F.R. § 296.14(c); 32 C.F.R. § 229.14(c); 18 C.F.R. § 1312.14(c).)

(D) *Determination of Value in Cases Involving a Variety of Cultural Heritage Resources.*—*In a case involving a variety of cultural heritage resources, the value of the cultural heritage resources is the sum of all calculations made for those resources under this application note.*

3. *Enhancement in Subsection (b)(2).*—*For purposes of subsection (b)(2):*

(A) *"Museum" has the meaning given that term in 18 U.S.C. § 668(a)(1) except that the museum may be situated outside the United States.*

(B) *"National cemetery" and "veterans' memorial" have the meaning given those terms in Application Note 1 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).*

(C) *"National Historic Landmark" means a property designated as such pursuant to 16 U.S.C. § 470a(a)(1)(B).*

(D) *"National marine sanctuary" means a national marine sanctuary designated as such by the Secretary of Commerce pursuant to 16 U.S.C. § 1433.*

(E) *"National monument or national memorial" means any national monument or national memorial established as such by Act of Congress or by proclamation pursuant to the Antiquities Act of 1906 (16 U.S.C. § 431).*

(F) *"National park system" has the meaning given that term in 16 U.S.C. § 1c(a).*

(G) *"World Heritage List" means the World Heritage List maintained by the World Heritage Committee of the United Nations Educational, Scientific, and Cultural Organization in accordance with the Convention Concerning the Protection of the World Cultural and Natural Heritage.*

4. *Enhancement in Subsection (b)(3).*—*For purposes of subsection (b)(3):*

(A) *"Cultural patrimony" has the meaning given that term in 25 U.S.C. § 3001(3)(D) (see also 43 C.F.R. 10.2(d)(4)).*

(B) *"Cultural property" has the meaning given that term in 19 U.S.C. § 2601(6).*

(C) *"Designated archaeological or ethnological material" means archaeological or ethnological material described in 19 U.S.C. § 2601(7) (see also 19 U.S.C. §§ 2601(2) and 2604).*

(D) *"Funerary object" means an object that, as a part of the death rite or ceremony of a culture, was placed intentionally, at the time of death or later, with or near human remains.*

- (E) *"Human remains" (i) means the physical remains of the body of a human; and (ii) does not include remains that reasonably may be determined to have been freely disposed of or naturally shed by the human from whose body the remains were obtained, such as hair made into ropes or nets.*
- (F) *"Pre-Columbian monumental or architectural sculpture or mural" has the meaning given that term in 19 U.S.C. § 2095(3).*
- (G) *"Sacred object" has the meaning given that term in 25 U.S.C. § 3001(3)(C) (see also 43 C.F.R. § 10.2(d)(3)).*
5. *Pecuniary Gain and Commercial Purpose Enhancement Under Subsection (b)(4).*—
- (A) *"For Pecuniary Gain."*—*For purposes of subsection (b)(4), "for pecuniary gain" means for receipt of, or in anticipation of receipt of, anything of value, whether monetary or in goods or services. Therefore, offenses committed for pecuniary gain include both monetary and barter transactions, as well as activities designed to increase gross revenue.*
- (B) *Commercial Purpose.*—*The acquisition of cultural heritage resources for display to the public, whether for a fee or donation and whether by an individual or an organization, including a governmental entity, a private non-profit organization, or a private for-profit organization, shall be considered to involve a "commercial purpose" for purposes of subsection (b)(4).*
6. *Pattern of Misconduct Enhancement Under Subsection (b)(5).*—
- (A) *Definition.*—*For purposes of subsection (b)(5), "pattern of misconduct involving cultural heritage resources" means two or more separate instances of offense conduct involving a cultural heritage resource that did not occur during the course of the offense (i.e., that did not occur during the course of the instant offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct)). Offense conduct involving a cultural heritage resource may be considered for purposes of subsection (b)(5) regardless of whether the defendant was convicted of that conduct.*
- (B) *Computation of Criminal History Points.*—*A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*
7. *Dangerous Weapons Enhancement Under Subsection (b)(6).*—*For purposes of subsection (b)(6), "brandished" and "dangerous weapon" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).*
8. *Multiple Counts.*—*For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving cultural heritage offenses covered by this guideline are grouped together under subsection (d) of §3D1.2 (Groups of Closely Related Counts). Multiple counts involving cultural heritage offenses covered by this guideline and offenses covered by other guidelines are not to be grouped under §3D1.2(d).*

9. *Upward Departure Provision.*—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. For example, an upward departure may be warranted if (A) in addition to cultural heritage resources, the offense involved theft of, damage to, or destruction of, items that are not cultural heritage resources (such as an offense involving the theft from a national cemetery of lawnmowers and other administrative property in addition to historic gravemarkers or other cultural heritage resources); or (B) the offense involved a cultural heritage resource that has profound significance to cultural identity (e.g., the Statue of Liberty or the Liberty Bell).

*Historical Note:* Effective November 1, 2002 (see Appendix C, amendment 638). Amended effective November 1, 2006 (see Appendix C, amendment 685); November 1, 2007 (see Appendix C, amendment 700).

### §2B1.6. Aggravated Identity Theft

- (a) If the defendant was convicted of violating 18 U.S.C. § 1028A, the guideline sentence is the term of imprisonment required by statute. Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to that count of conviction.

#### Commentary

*Statutory Provision:* 18 U.S.C. § 1028A. For additional statutory provision(s), see Appendix A (Statutory Index).

#### Application Notes:

1. Imposition of Sentence.—

- (A) *In General.*—Section 1028A of title 18, United State Code, provides a mandatory term of imprisonment. Accordingly, the guideline sentence for a defendant convicted under 18 U.S.C. § 1028A is the term required by that statute. Except as provided in subdivision (B), 18 U.S.C. § 1028A also requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.
- (B) *Multiple Convictions Under Section 1028A.*—Section 1028A(b)(4) of title 18, United State Code, provides that in the case of multiple convictions under 18 U.S.C. § 1028A, the terms of imprisonment imposed on such counts may, in the discretion of the court, run concurrently, in whole or in part, with each other. See the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance regarding imposition of sentence on multiple counts of 18 U.S.C. § 1028A.

2. *Inapplicability of Chapter Two Enhancement.*—If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for the transfer, possession, or use of a means of identification when determining the sentence for the underlying offense. A sentence under this guideline accounts for this factor for the underlying offense of conviction, including any such enhancement that would apply

*based on conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). "Means of identification" has the meaning given that term in 18 U.S.C. § 1028(d)(7).*

3. *Inapplicability of Chapters Three and Four.—Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2.*

Historical Note: Effective November 1, 2005 (see Appendix C, amendment 677).

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**2. BURGLARY AND TRESPASS**

**§2B2.1. Burglary of a Residence or a Structure Other than a Residence**

- (a) Base Offense Level:
  - (1) **17**, if a residence; or
  - (2) **12**, if a structure other than a residence.
- (b) Specific Offense Characteristics
  - (1) If the offense involved more than minimal planning, increase by **2** levels.
  - (2) If the loss exceeded \$2,500, increase the offense level as follows:

<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A) \$2,500 or less	no increase
(B) More than \$2,500	add <b>1</b>
(C) More than \$10,000	add <b>2</b>
(D) More than \$50,000	add <b>3</b>
(E) More than \$250,000	add <b>4</b>
(F) More than \$800,000	add <b>5</b>
(G) More than \$1,500,000	add <b>6</b>
(H) More than \$2,500,000	add <b>7</b>
(I) More than \$5,000,000	add <b>8</b> .

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

- (4) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

Commentary

*Statutory Provisions:* 18 U.S.C. §§ 1153, 2113(a), 2115, 2117, 2118(b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. "Firearm," "destructive device," and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions).
2. "Loss" means the value of the property taken, damaged, or destroyed.
3. Subsection (b)(4) does not apply to possession of a dangerous weapon (including a firearm) that was stolen during the course of the offense.
4. **More than Minimal Planning.**—*"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" shall be considered to be present in any case involving repeated acts over a period of time, unless it is clear that each instance was purely opportune. For example, checking the area to make sure no witnesses were present would not alone constitute more than minimal planning. By contrast, obtaining building plans to plot a particular course of entry, or disabling an alarm system, would constitute more than minimal planning.*

**Background:** *The base offense level for residential burglary is higher than for other forms of burglary because of the increased risk of physical and psychological injury. Weapon possession, but not use, is a specific offense characteristic because use of a weapon (including to threaten) ordinarily would make the offense robbery. Weapon use would be a ground for upward departure.*

**Historical Note:** Effective November 1, 1987. Amended effective January 15, 1988 (*see* Appendix C, amendment 11); June 15, 1988 (*see* Appendix C, amendment 12); November 1, 1989 (*see* Appendix C, amendments 105 and 106); November 1, 1990 (*see* Appendix C, amendments 315 and 361); November 1, 1993 (*see* Appendix C, amendment 481); November 1, 2001 (*see* Appendix C, amendment 617).

## §2B2.2. [Deleted]

**Historical Note:** Section 2B2.2 (Burglary of Other Structures), effective November 1, 1987, amended effective June 15, 1988 (*see* Appendix C, amendment 13), November 1, 1989 (*see* Appendix C, amendment 107), and November 1, 1990 (*see* Appendix C, amendments 315 and 361), was deleted by consolidation with §2B2.1 effective November 1, 1993 (*see* Appendix C, amendment 481).

## §2B2.3. Trespass

- (a) Base Offense Level: 4

- (b) Specific Offense Characteristics
- (1) If the trespass occurred (A) at a secure government facility; (B) at a nuclear energy facility; (C) on a vessel or aircraft of the United States; (D) in a secure area of an airport or a seaport; (E) at a residence; (F) at Arlington National Cemetery or a cemetery under the control of the National Cemetery Administration; or (G) on a computer system used (i) to maintain or operate a critical infrastructure; or (ii) by or for a government entity in furtherance of the administration of justice, national defense, or national security, increase by **2** levels.
  - (2) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.
  - (3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (i) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
- (c) Cross Reference
- (1) If the offense was committed with the intent to commit a felony offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that felony offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1030(a)(3), 1036, 2199; 38 U.S.C. § 2413; 42 U.S.C. § 7270b. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Airport" has the meaning given that term in section 47102 of title 49, United States Code.*

*"Critical infrastructure" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.*

"Felony offense" means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought or a conviction was obtained.

"Firearm" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions).

"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).

"Protected computer" means a computer described in 18 U.S.C. § 1030(e)(2)(A) or (B).

"Seaport" has the meaning given that term in 18 U.S.C. § 26.

2. Valuation of loss is discussed in the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).

**Background:** Most trespasses punishable under federal law involve federal lands or property. The trespass section provides an enhancement for offenses involving trespass on secure government installations (such as nuclear facilities) and other locations (such as airports and seaports) to protect a significant federal interest. Additionally, an enhancement is provided for trespass at a residence.

**Historical Note:** Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 108 and 109); November 1, 1997 (see Appendix C, amendment 551); November 1, 2001 (see Appendix C, amendment 617); November 1, 2002 (see Appendix C, amendment 637); November 1, 2003 (see Appendix C, amendment 654); November 1, 2007 (see Appendix C, amendments 699 and 703).

\* \* \* \* \*

### 3. ROBBERY, EXTORTION, AND BLACKMAIL

#### §2B3.1. Robbery

- (a) Base Offense Level: **20**
- (b) Specific Offense Characteristics
  - (1) If the property of a financial institution or post office was taken, or if the taking of such property was an object of the offense, increase by **2** levels.
  - (2) (A) If a firearm was discharged, increase by **7** levels; (B) if a firearm was otherwise used, increase by **6** levels; (C) if a firearm was brandished or possessed, increase by **5** levels; (D) if a dangerous weapon was otherwise used, increase by **4** levels; (E) if a dangerous weapon was brandished or possessed, increase by **3** levels; or (F) if a threat of death was made, increase by **2** levels.

- (3) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	<u>Degree of Bodily Injury</u>	<u>Increase in Level</u>
(A)	Bodily Injury	add <b>2</b>
(B)	Serious Bodily Injury	add <b>4</b>
(C)	Permanent or Life-Threatening Bodily Injury	add <b>6</b>
(D)	If the degree of injury is between that specified in subdivisions (A) and (B), add <b>3</b> levels; or	
(E)	If the degree of injury is between that specified in subdivisions (B) and (C), add <b>5</b> levels.	

*Provided*, however, that the cumulative adjustments from (2) and (3) shall not exceed **11** levels.

- (4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by **2** levels.
- (5) If the offense involved carjacking, increase by **2** levels.
- (6) If a firearm, destructive device, or controlled substance was taken, or if the taking of such item was an object of the offense, increase by **1** level.
- (7) If the loss exceeded \$10,000, increase the offense level as follows:

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$10,000 or less	no increase
(B)	More than \$10,000	add <b>1</b>
(C)	More than \$50,000	add <b>2</b>
(D)	More than \$250,000	add <b>3</b>
(E)	More than \$800,000	add <b>4</b>
(F)	More than \$1,500,000	add <b>5</b>
(G)	More than \$2,500,000	add <b>6</b>
(H)	More than \$5,000,000	add <b>7</b> .

(c) Cross Reference

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).

Commentary

Statutory Provisions: 18 U.S.C. §§ 1951, 2113, 2114, 2118(a), 2119. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. "Firearm," "destructive device," "dangerous weapon," "otherwise used," "brandished," "bodily injury," "serious bodily injury," "permanent or life-threatening bodily injury," "abducted," and "physically restrained" are defined in the Commentary to §1B1.1 (Application Instructions).

"Carjacking" means the taking or attempted taking of a motor vehicle from the person or presence of another by force and violence or by intimidation.

2. Consistent with Application Note 1(d)(ii) of §1B1.1 (Application Instructions), an object shall be considered to be a dangerous weapon for purposes of subsection (b)(2)(E) if (A) the object closely resembles an instrument capable of inflicting death or serious bodily injury; or (B) the defendant used the object in a manner that created the impression that the object was an instrument capable of inflicting death or serious bodily injury (e.g., a defendant wrapped a hand in a towel during a bank robbery to create the appearance of a gun).
3. "Loss" means the value of the property taken, damaged, or destroyed.
4. The combined adjustments for weapon involvement and injury are limited to a maximum enhancement of 11 levels.
5. If the defendant intended to murder the victim, an upward departure may be warranted; see §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder).
6. "A threat of death," as used in subsection (b)(2)(F), may be in the form of an oral or written statement, act, gesture, or combination thereof. Accordingly, the defendant does not have to state expressly his intent to kill the victim in order for the enhancement to apply. For example, an oral or written demand using words such as "Give me the money or I will kill you", "Give me the money or I will pull the pin on the grenade I have in my pocket", "Give me the money or I will shoot you", "Give me your money or else (where the defendant draws his hand across his throat in a slashing motion)", or "Give me the money or you are dead" would constitute a threat of death. The court should consider that the intent of this provision is to provide an increased offense level for cases in which the offender(s) engaged in conduct that would instill in a reasonable person, who is a victim of the offense, a fear of death.

Background: Possession or use of a weapon, physical injury, and unlawful restraint sometimes occur during a robbery. The guideline provides for a range of enhancements where these factors are present.

Although in pre-guidelines practice the amount of money taken in robbery cases affected sentence length, its importance was small compared to that of the other harm involved. Moreover, because of the relatively high base offense level for robbery, an increase of 1 or 2 levels brings

*about a considerable increase in sentence length in absolute terms. Accordingly, the gradations for property loss increase more slowly than for simple property offenses.*

*The guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location, or was physically restrained by being tied, bound, or locked up.*

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendments 14 and 15); November 1, 1989 (see Appendix C, amendments 110 and 111); November 1, 1990 (see Appendix C, amendments 314, 315, and 361); November 1, 1991 (see Appendix C, amendment 365); November 1, 1993 (see Appendix C, amendment 483); November 1, 1997 (see Appendix C, amendments 545 and 552); November 1, 2000 (see Appendix C, amendment 601); November 1, 2001 (see Appendix C, amendment 617).

**§2B3.2. Extortion by Force or Threat of Injury or Serious Damage**

- (a) Base Offense Level: **18**
- (b) Specific Offense Characteristics
  - (1) If the offense involved an express or implied threat of death, bodily injury, or kidnapping, increase by **2** levels.
  - (2) If the greater of the amount demanded or the loss to the victim exceeded \$10,000, increase by the corresponding number of levels from the table in §2B3.1(b)(7).
  - (3) (A)(i) If a firearm was discharged, increase by **7** levels; (ii) if a firearm was otherwise used, increase by **6** levels; (iii) if a firearm was brandished or possessed, increase by **5** levels; (iv) if a dangerous weapon was otherwise used, increase by **4** levels; or (v) if a dangerous weapon was brandished or possessed, increase by **3** levels; or  
  
 (B) If (i) the offense involved preparation to carry out a threat of (I) death; (II) serious bodily injury; (III) kidnapping; (IV) product tampering; or (V) damage to a computer system used to maintain or operate a critical infrastructure, or by or for a government entity in furtherance of the administration of justice, national defense, or national security; or (ii) the participant(s) otherwise demonstrated the ability to carry out a threat described in any of subdivisions (i)(I) through (i)(V), increase by **3** levels.
  - (4) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	<u>Degree of Bodily Injury</u>	<u>Increase in Level</u>
(A)	Bodily Injury	add <b>2</b>
(B)	Serious Bodily Injury	add <b>4</b>
(C)	Permanent or Life-Threatening Bodily Injury	add <b>6</b>

- (D) If the degree of injury is between that specified in subdivisions (A) and (B), add **3** levels; or
- (E) If the degree of injury is between that specified in subdivisions (B) and (C), add **5** levels.

*Provided*, however, that the cumulative adjustments from (3) and (4) shall not exceed **11** levels.

- (5) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by **4** levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by **2** levels.

(c) Cross References

- (1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder).
- (2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 875(b), 876, 877, 1030(a)(7), 1951. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Abducted," "bodily injury," "brandished," "dangerous weapon," "firearm," "otherwise used," "permanent or life-threatening bodily injury," "physically restrained," and "serious bodily injury" have the meaning given those terms in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).*

*"Critical infrastructure" means systems and assets vital to national defense, national security, economic security, public health or safety, or any combination of those matters. A critical infrastructure may be publicly or privately owned. Examples of critical infrastructures include gas and oil production, storage, and delivery systems, water supply systems, telecommunications networks, electrical power delivery systems, financing and banking systems, emergency services (including medical, police, fire, and rescue services), transportation systems and services (including highways, mass transit, airlines, and airports), and government operations that provide essential services to the public.*

*"Government entity" has the meaning given that term in 18 U.S.C. § 1030(e)(9).*

2. *This guideline applies if there was any threat, express or implied, that reasonably could be interpreted as one to injure a person or physically damage property, or any comparably serious threat, such as to drive an enterprise out of business. Even if the threat does not in itself imply violence, the possibility of violence or serious adverse consequences may be inferred from the circumstances of the threat or the reputation of the person making it. An ambiguous threat, such as "pay up or else," or a threat to cause labor problems, ordinarily should be treated under this section.*
3. *Guidelines for bribery involving public officials are found in Part C, Offenses Involving Public Officials. "Extortion under color of official right," which usually is solicitation of a bribe by a public official, is covered under §2C1.1 unless there is use of force or a threat that qualifies for treatment under this section. Certain other extortion offenses are covered under the provisions of Part E, Offenses Involving Criminal Enterprises and Racketeering.*
4. *The combined adjustments for weapon involvement and injury are limited to a maximum enhancement of 11 levels.*
5. *"Loss to the victim," as used in subsection (b)(2), means any demand paid plus any additional consequential loss from the offense (e.g., the cost of defensive measures taken in direct response to the offense).*
6. *In certain cases, an extortionate demand may be accompanied by conduct that does not qualify as a display of a dangerous weapon under subsection (b)(3)(A)(v) but is nonetheless similar in seriousness, demonstrating the defendant's preparation or ability to carry out the threatened harm (e.g., an extortionate demand containing a threat to tamper with a consumer product accompanied by a workable plan showing how the product's tamper-resistant seals could be defeated, or a threat to kidnap a person accompanied by information showing study of that person's daily routine). Subsection (b)(3)(B) addresses such cases.*
7. *If the offense involved the threat of death or serious bodily injury to numerous victims (e.g., in the case of a plan to derail a passenger train or poison consumer products), an upward departure may be warranted.*
8. *If the offense involved organized criminal activity, or a threat to a family member of the victim, an upward departure may be warranted.*

**Background:** *The Hobbs Act, 18 U.S.C. § 1951, prohibits extortion, attempted extortion, and conspiracy to extort. It provides for a maximum term of imprisonment of twenty years. 18 U.S.C. §§ 875-877 prohibit communication of extortionate demands through various means. The maximum penalty under these statutes varies from two to twenty years. Violations of 18 U.S.C. § 875 involve threats or demands transmitted by interstate commerce. Violations of 18 U.S.C. § 876 involve the use of the United States mails to communicate threats, while violations of 18 U.S.C. § 877 involve mailing threatening communications from foreign countries. This guideline also applies to offenses under 18 U.S.C. § 1030(a)(7) involving a threat to impair the operation of a "protected computer."*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 112, 113, and 303); November 1, 1990 (see Appendix C, amendment 316); November 1, 1991 (see Appendix C, amendment 366); November 1, 1993 (see Appendix C, amendment 479); November 1, 1997 (see Appendix C, amendment 551); November 1, 1998 (see Appendix C, amendment 586); November 1, 2000 (see Appendix C, amendment 601); November 1, 2003 (see Appendix C, amendment 654).

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

- (a) Base Offense Level: **9**
- (b) Specific Offense Characteristic
  - (1) If the greater of the amount obtained or demanded (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
- (c) Cross References
  - (1) If the offense involved extortion under color of official right, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).
  - (2) If the offense involved extortion by force or threat of injury or serious damage, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

#### Commentary

Statutory Provisions: 18 U.S.C. §§ 873, 875-877, 1951. For additional statutory provision(s), see Appendix A (Statutory Index).

#### Application Note:

1. This section applies only to blackmail and similar forms of extortion where there clearly is no threat of violence to person or property. "Blackmail" (18 U.S.C. § 873) is defined as a threat to disclose a violation of United States law unless money or some other item of value is given.

Background: Under 18 U.S.C. § 873, the maximum term of imprisonment authorized for blackmail is one year. Extortionate threats to injure a reputation, or other threats that are less serious than those covered by §2B3.2, may also be prosecuted under 18 U.S.C. §§ 875-877, which carry higher maximum sentences.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 114); November 1, 1993 (see Appendix C, amendment 479); November 1, 2001 (see Appendix C, amendment 617); November 1, 2005 (see Appendix C, amendment 679).

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#### 4. COMMERCIAL BRIBERY AND KICKBACKS

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

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
  - (1) If the greater of the value of the bribe or the improper benefit to be conferred (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
  - (2) (Apply the greater) 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; or
    - (B) the offense substantially jeopardized the safety and soundness of a financial institution, increase by **4** levels.

If the resulting offense level determined under subdivision (A) or (B) is less than level **24**, increase to level **24**.
- (c) Special Instruction for Fines - Organizations
  - (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment.

##### Commentary

Statutory Provisions: 18 U.S.C. §§ 215, 224, 225; 26 U.S.C. §§ 9012(e), 9042(d); 41 U.S.C. §§ 53, 54; 42 U.S.C. §§ 1395nn(b)(1), (2), 1396h(b)(1),(2); 49 U.S.C. § 11902. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *This guideline covers commercial bribery offenses and kickbacks that do not involve officials of federal, state, or local government, foreign governments, or public international organizations. See Part C, Offenses Involving Public Officials, if any such officials are involved.*
2. *The "value of the improper benefit to be conferred" refers to the value of the action to be taken or effected in return for the bribe. See Commentary to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions).*
3. *"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.*
4. Gross Receipts Enhancement under Subsection (b)(2)(A).—
  - (A) In General.—*For purposes of subsection (b)(2)(A), 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.*
  - (B) Definition.—*"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).*
5. Enhancement for Substantially Jeopardizing the Safety and Soundness of a Financial Institution under Subsection (b)(2)(B).—*For purposes of subsection (b)(2)(B), 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 any of subdivisions (A) through (D) of this note.*
6. *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 applies to violations of various federal bribery statutes that do not involve governmental officials. The base offense level is to be enhanced based upon the value of the unlawful payment or the value of the action to be taken or effected in return for the unlawful payment, whichever is greater.

One of the more commonly prosecuted offenses to which this guideline applies is offering or accepting a fee in connection with procurement of a loan from a financial institution in violation of 18 U.S.C. § 215.

As with non-commercial bribery, this guideline considers not only the amount of the bribe but also the value of the action received in return. Thus, for example, if a bank officer agreed to the offer of a \$25,000 bribe to approve a \$250,000 loan under terms for which the applicant would not otherwise qualify, the court, in increasing the offense level, would use the greater of the \$25,000 bribe, and the savings in interest over the life of the loan compared with alternative loan terms. If a gambler paid a player \$5,000 to shave points in a nationally televised basketball game, the value of the action to the gambler would be the amount that he and his confederates won or stood to gain. If that amount could not be estimated, the amount of the bribe would be used to determine the appropriate increase in offense level.

This guideline also applies to making prohibited payments to induce the award of subcontracts on federal projects for which the maximum term of imprisonment authorized was recently increased from two to ten years. 41 U.S.C. §§ 51, 53-54. Violations of 42 U.S.C. §§ 1395nn(b)(1) and (b)(2), involve the offer or acceptance of a payment to refer an individual for services or items paid for under the Medicare program. Similar provisions in 42 U.S.C. §§ 1396h(b)(1) and (b)(2) cover the offer or acceptance of a payment for referral to the Medicaid program.

This guideline also applies to violations of law involving bribes and kickbacks in expenses incurred for a presidential nominating convention or presidential election campaign. These offenses are prohibited under 26 U.S.C. §§ 9012(e) and 9042(d), which apply to candidates for President and Vice President whose campaigns are eligible for federal matching funds.

This guideline also applies to violations of 18 U.S.C. § 224, sports bribery, as well as certain violations of the Interstate Commerce Act.

Subsection (b)(2)(A) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.

Subsection (b)(2)(B) implements the instruction to the Commission in section 2507 of Public Law 101-647.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 317); November 1, 1991 (see Appendix C, amendments 364 and 422); November 1, 1992 (see Appendix C, amendment 468); November 1, 1997 (see Appendix C, amendment 553); November 1, 2001 (see Appendix C, amendment 617); November 1, 2002 (see Appendix C, amendments 639 and 646); November 1, 2004 (see Appendix C, amendment 666).

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## 5. COUNTERFEITING AND INFRINGEMENT OF COPYRIGHT OR TRADEMARK

Historical Note: Effective November 1, 1987. Amended effective November 1, 1993 (see Appendix C, amendment 481).

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

- (a) Base Offense Level: **9**
- (b) Specific Offense Characteristics
  - (1) If the face value of the counterfeit items (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
  - (2) If the defendant (A) manufactured or produced any counterfeit obligation or security of the United States, or possessed or had custody of or control over a counterfeiting device or materials used for counterfeiting; or (B) controlled or possessed (i) counterfeiting paper similar to a distinctive paper; or (ii) a feature or device essentially identical to a distinctive counterfeit deterrent, increase by **2** levels.
  - (3) If subsection (b)(2)(A) applies, and the offense level determined under that subsection is less than level **15**, increase to level **15**.
  - (4) If a dangerous weapon (including a firearm) was possessed in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **13**, increase to level **13**.
  - (5) If any part of the offense was committed outside the United States, increase by **2** levels.

#### Commentary

Statutory Provisions: 18 U.S.C. §§ 470-474A, 476, 477, 500, 501, 1003. For additional statutory provision(s), see Appendix A (Statutory Index).

#### Application Notes:

1. Definitions.—For purposes of this guideline:

"Distinctive counterfeit deterrent" and "distinctive paper" have the meaning given those terms in 18 U.S.C. § 474A(c)(2) and (1), respectively.

"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.

2. *Applicability to Counterfeit Bearer Obligations of the United States.*— This guideline applies to counterfeiting of United States currency and coins, food stamps, postage stamps, treasury bills, bearer bonds and other items that generally could be described as bearer obligations of the United States, *i.e.*, that are not made out to a specific payee.
3. *Inapplicability to Genuine but Fraudulently Altered Instruments.*— "Counterfeit," as used in this section, means an instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety. Offenses involving genuine instruments that have been altered are covered under §2B1.1 (Theft, Property Destruction, and Fraud).
4. *Inapplicability to Certain Obviously Counterfeit Items.*— Subsection (b)(2)(A) does not apply to persons who produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny.

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

Subsection (b)(4) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 16); November 1, 1989 (see Appendix C, amendment 115); November 1, 1995 (see Appendix C, amendment 513); November 1, 1997 (see Appendix C, amendment 554); November 1, 1998 (see Appendix C, amendment 587); November 1, 2000 (see Appendix C, amendments 595 and 605); November 1, 2001 (see Appendix C, amendments 617 and 618).

## §2B5.2. [Deleted]

Historical Note: Section 2B5.2 (Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States), effective November 1, 1987, amended effective January 15, 1988 (see Appendix C, amendment 17) and November 1, 1989 (see Appendix C, amendment 116), was deleted by consolidation with §2F1.1 effective November 1, 1993 (see Appendix C, amendment 481).

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

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
  - (1) If the infringement amount (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
  - (2) If the offense involved the display, performance, publication,

reproduction, or distribution of a work being prepared for commercial distribution, increase by **2** levels.

- (3) If the (A) offense involved the manufacture, importation, or uploading of infringing items; or (B) defendant was convicted under 17 U.S.C. §§ 1201 and 1204 for trafficking in circumvention devices, increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.
- (4) If the offense was not committed for commercial advantage or private financial gain, decrease by **2** levels, but the resulting offense level shall be not less than level **8**.
- (5) 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**.

Commentary

*Statutory Provisions:* 17 U.S.C. §§ 506(a), 1201, 1204; 18 U.S.C. §§ 2318-2320, 2511. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Circumvention devices" are devices used to perform the activity described in 17 U.S.C. §§ 1201(a)(3)(A) and 1201(b)(2)(A).

"Commercial advantage or private financial gain" means the receipt, or expectation of receipt, of anything of value, including other protected works.

"Infringed item" means the copyrighted or trademarked item with respect to which the crime against intellectual property was committed.

"Infringing item" means the item that violates the copyright or trademark laws.

"Uploading" means making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item; or (B) have access to the infringing item, including by storing the infringing item as an openly shared file. "Uploading" does not include merely downloading or installing an infringing item on a hard drive on a defendant's personal computer unless the infringing item is an openly shared file.

"Work being prepared for commercial distribution" has the meaning given that term in 17 U.S.C. § 506(a)(3).

2. Determination of Infringement Amount.—This note applies to the determination of the infringement amount for purposes of subsection (b)(1).
- (A) Use of Retail Value of Infringed Item.—The infringement amount is the retail value of the infringed item, multiplied by the number of infringing items, in a case involving any of the following:
- (i) The infringing item (I) is, or appears to a reasonably informed purchaser to be, identical or substantially equivalent to the infringed item; or (II) is a digital or electronic reproduction of the infringed item.
  - (ii) The retail price of the infringing item is not less than 75% of the retail price of the infringed item.
  - (iii) The retail value of the infringing item is difficult or impossible to determine without unduly complicating or prolonging the sentencing proceeding.
  - (iv) The offense involves the illegal interception of a satellite cable transmission in violation of 18 U.S.C. § 2511. (In a case involving such an offense, the "retail value of the infringed item" is the price the user of the transmission would have paid to lawfully receive that transmission, and the "infringed item" is the satellite transmission rather than the intercepting device.)
  - (v) The retail value of the infringed item provides a more accurate assessment of the pecuniary harm to the copyright or trademark owner than does the retail value of the infringing item.
  - (vi) The offense involves the display, performance, publication, reproduction, or distribution of a work being prepared for commercial distribution. In a case involving such an offense, the "retail value of the infringed item" is the value of that item upon its initial commercial distribution.
  - (vii) A case under 18 U.S.C. § 2318 or § 2320 that involves a counterfeit label, patch, sticker, wrapper, badge, emblem, medallion, charm, box, container, can, case, hangtag, documentation, or packaging of any type or nature (I) that has not been affixed to, or does not enclose or accompany a good or service; and (II) which, had it been so used, would appear to a reasonably informed purchaser to be affixed to, enclosing or accompanying an identifiable, genuine good or service. In such a case, the "infringed item" is the identifiable, genuine good or service.
  - (viii) A case under 17 U.S.C. §§ 1201 and 1204 in which the defendant used a circumvention device. In such an offense, the "retail value of the infringed item" is the price the user would have paid to access lawfully the copyrighted work, and the "infringed item" is the accessed work.
- (B) Use of Retail Value of Infringing Item.—The infringement amount is the retail value of the infringing item, multiplied by the number of infringing items, in any case not covered by subdivision (A) of this Application Note, including a case involving the unlawful recording of a musical performance in violation of 18 U.S.C. § 2319A.

- (C) Retail Value Defined.—For purposes of this Application Note, the "retail value" of an infringed item or an infringing item is the retail price of that item in the market in which it is sold.
- (D) Determination of Infringement Amount in Cases Involving a Variety of Infringing Items.—In a case involving a variety of infringing items, the infringement amount is the sum of all calculations made for those items under subdivisions (A) and (B) of this Application Note. For example, if the defendant sold both counterfeit videotapes that are identical in quality to the infringed videotapes and obviously inferior counterfeit handbags, the infringement amount, for purposes of subsection (b)(1), is the sum of the infringement amount calculated with respect to the counterfeit videotapes under subdivision (A)(i) (i.e., the quantity of the infringing videotapes multiplied by the retail value of the infringed videotapes) and the infringement amount calculated with respect to the counterfeit handbags under subdivision (B) (i.e., the quantity of the infringing handbags multiplied by the retail value of the infringing handbags).
- (E) Indeterminate Number of Infringing Items.—In a case in which the court cannot determine the number of infringing items, the court need only make a reasonable estimate of the infringement amount using any relevant information, including financial records.
3. Application of §3B1.3.—If the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial access to an infringed item, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.
4. Departure Considerations.—If the offense level determined under this guideline substantially understates or overstates the seriousness of the offense, a departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a departure may be warranted:
- (A) The offense involved substantial harm to the reputation of the copyright or trademark owner.
- (B) The offense was committed in connection with, or in furtherance of, the criminal activities of a national, or international, organized criminal enterprise.
- (C) The method used to calculate the infringement amount is based upon a formula or extrapolation that results in an estimated amount that may substantially exceed the actual pecuniary harm to the copyright or trademark owner.

Background: This guideline treats copyright and trademark violations much like theft and fraud. Similar to the sentences for theft and fraud offenses, the sentences for defendants convicted of intellectual property offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, similar to the loss enhancement in the theft and fraud guideline, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.

Subsection (b)(1) implements section 2(g) of the No Electronic Theft (NET) Act of 1997, Pub. L. 105–147, by using the retail value of the infringed item, multiplied by the number of infringing items, to determine the pecuniary harm for cases in which use of the retail value of the infringed item is a

*reasonable estimate of that harm. For cases referred to in Application Note 2(B), the Commission determined that use of the retail value of the infringed item would overstate the pecuniary harm or otherwise be inappropriate. In these types of cases, use of the retail value of the infringing item, multiplied by the number of those items, is a more reasonable estimate of the resulting pecuniary harm.*

*Section 2511 of title 18, United States Code, as amended by the Electronic Communications Act of 1986, prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1993 (see Appendix C, amendments 481 and 482); May 1, 2000 (see Appendix C, amendment 590); November 1, 2000 (see Appendix C, amendment 593); November 1, 2001 (see Appendix C, amendment 617); October 24, 2005 (see Appendix C, amendment 675); September 12, 2006 (see Appendix C, amendment 682); November 1, 2006 (see Appendix C, amendment 687); November 1, 2007 (see Appendix C, amendment 704).

#### §2B5.4. [Deleted]

Historical Note: Section 2B5.4 (Criminal Infringement of Trademark), effective November 1, 1987, was deleted by consolidation with §2B5.3 effective November 1, 1993 (see Appendix C, amendment 481).

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## 6. MOTOR VEHICLE IDENTIFICATION NUMBERS

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

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
  - (1) If the retail value of the motor vehicles or parts (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
  - (2) If the defendant was in the business of receiving and selling stolen property, increase by **2** levels.
  - (3) If the offense involved an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts, and the offense level as determined above is less than level **14**, increase to level **14**.

Commentary

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

Application Notes:

1. Subsection (b)(3), referring to an "organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts," provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or "chop shop." "Vehicles" refers to all forms of vehicles, including aircraft and watercraft. See Commentary to §2B1.1 (Theft, Property Destruction, and Fraud).
2. The term "increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount," as used in subsection (b)(1), refers to the number of levels corresponding to the retail value of the motor vehicles or parts involved.

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 117-119); November 1, 1993 (see Appendix C, amendment 482); November 1, 2001 (see Appendix C, amendment 617).

**PART C - OFFENSES INVOLVING PUBLIC OFFICIALS AND VIOLATIONS OF  
FEDERAL ELECTION CAMPAIGN LAWS**

Historical Note: Effective November 1, 1987. Amended effective January 25, 2003 (see Appendix C, amendment 648). Introductory Commentary to Part C, effective November 1, 1987, was deleted effective January 25, 2003 (see Appendix C, amendment 648), and November 1, 2003 (see Appendix C, amendment 656).

**§2C1.1. Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions**

- (a) Base Offense Level:
- (1) **14**, if the defendant was a public official; or
  - (2) **12**, otherwise.
- (b) Specific Offense Characteristics
- (1) If the offense involved more than one bribe or extortion, increase by **2** levels.
  - (2) If the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government from the offense, whichever is greatest, exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
  - (3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by **4** levels. If the resulting offense level is less than level **18**, increase to level **18**.
  - (4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by **2** levels.
- (c) Cross References
- (1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense, if the resulting offense level is greater than that determined above.

- (2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense, if the resulting offense level is greater than that determined above.
  - (3) If the offense involved a threat of physical injury or property destruction, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), if the resulting offense level is greater than that determined above.
- (d) Special Instruction for Fines - Organizations
- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the unlawful payment; or (C) the consequential damages resulting from the unlawful payment.

Commentary

*Statutory Provisions:* 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3; 18 U.S.C. §§ 201(b)(1), (2), 226, 371 (if conspiracy to defraud by interference with governmental functions), 872, 1341 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1342 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1343 (if the scheme or artifice to defraud was to deprive another of the intangible right of honest services of a public official), 1951. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Government identification document" means a document made or issued by or under the authority of the United States Government, a State, or a political subdivision of a State, which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.*

*"Payment" means anything of value. A payment need not be monetary.*

*"Public official" shall be construed broadly and includes the following:*

- (A) *"Public official" as defined in 18 U.S.C. § 201(a)(1).*
- (B) *A member of a state or local legislature. "State" means a State of the United States, and any commonwealth, territory, or possession of the United States.*
- (C) *An officer or employee or person acting for or on behalf of a state or local government, or any department, agency, or branch of government thereof, in any*

*official function, under or by authority of such department, agency, or branch of government, or a juror in a state or local trial.*

- (D) *Any person who has been selected to be a person described in subdivisions (A), (B), or (C), either before or after such person has qualified.*
- (E) *An individual who, although not otherwise covered by subdivisions (A) through (D): (i) is in a position of public trust with official responsibility for carrying out a government program or policy; (ii) acts under color of law or official right; or (iii) participates so substantially in government operations as to possess de facto authority to make governmental decisions (e.g., which may include a leader of a state or local political party who acts in the manner described in this subdivision).*

2. *More than One Bribe or Extortion.—Subsection (b)(1) provides an adjustment for offenses involving more than one incident of either bribery or extortion. Related payments that, in essence, constitute a single incident of bribery or extortion (e.g., a number of installment payments for a single action) are to be treated as a single bribe or extortion, even if charged in separate counts.*

*In a case involving more than one incident of bribery or extortion, the applicable amounts under subsection (b)(2) (i.e., the greatest of the value of the payment, the benefit received or to be received, the value of anything obtained or to be obtained by a public official or others acting with a public official, or the loss to the government) are determined separately for each incident and then added together.*

3. *Application of Subsection (b)(2).—"Loss", for purposes of subsection (b)(2)(A), shall be determined in accordance with Application Note 3 of the Commentary to §2B1.1 (Theft, Property Destruction, and Fraud). The value of "the benefit received or to be received" means the net value of such benefit. Examples: (A) 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. (B) 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 preceding examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.*

4. *Application of Subsection (b)(3).—*

- (A) *Definition.—"High-level decision-making or sensitive position" means a position characterized by a direct authority to make decisions for, or on behalf of, a government department, agency, or other government entity, or by a substantial influence over the decision-making process.*
- (B) *Examples.—Examples of a public official in a high-level decision-making position include a prosecuting attorney, a judge, an agency administrator, and any other public official with a similar level of authority. Examples of a public official who holds a sensitive position include a juror, a law enforcement officer, an election official, and any other similarly situated individual.*

5. Application of Subsection (c).—For the purposes of determining whether to apply the cross references in this section, the "resulting offense level" means the final offense level (*i.e.*, the offense level determined by taking into account both the Chapter Two offense level and any applicable adjustments from Chapter Three, Parts A-D). *See* §1B1.5(d); Application Note 2 of the Commentary to §1B1.5 (*Interpretation of References to Other Offense Guidelines*).
6. Inapplicability of §3B1.3.—Do not apply §3B1.3 (*Abuse of Position of Trust or Use of Special Skill*).
7. Upward Departure Provisions.—In some cases the monetary value of the unlawful payment may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes or the destruction of evidence in a major narcotics case. In part, this issue is addressed by the enhancements in §2C1.1(b)(2) and (c)(1), (2), and (3). However, in cases in which the seriousness of the offense is still not adequately reflected, an upward departure is warranted. *See* Chapter Five, Part K (*Departures*).

In a case in which the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. *See* §5K2.7 (*Disruption of Governmental Function*).

Background: This section applies to a person who offers or gives a bribe for a corrupt purpose, such as inducing a public official to participate in a fraud or to influence such individual's official actions, or to a public official who solicits or accepts such a bribe.

The object and nature of a bribe may vary widely from case to case. In some cases, the object may be commercial advantage (*e.g.*, preferential treatment in the award of a government contract). In others, the object may be issuance of a license to which the recipient is not entitled. In still others, the object may be the obstruction of justice. Consequently, a guideline for the offense must be designed to cover diverse situations.

In determining the net value of the benefit received or to be received, the value of the bribe is not deducted from the gross value of such benefit; the harm is the same regardless of value of the bribe paid to receive the benefit. In a case in which the value of the bribe exceeds the value of the benefit, or in which the value of the benefit cannot be determined, the value of the bribe is used because it is likely that the payer of such a bribe expected something in return that would be worth more than the value of the bribe. Moreover, for deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is greater.

Under §2C1.1(b)(3), if the payment was for the purpose of influencing an official act by certain officials, the offense level is increased by 4 levels.

Under §2C1.1(c)(1), if the payment was to facilitate the commission of another criminal offense, the guideline applicable to a conspiracy to commit that other offense will apply if the result is greater than that determined above. For example, if a bribe was given to a law enforcement officer to allow the smuggling of a quantity of cocaine, the guideline for conspiracy to import cocaine would be applied if it resulted in a greater offense level.

*Under §2C1.1(c)(2), if the payment was to conceal another criminal offense or obstruct justice in respect to another criminal offense, the guideline from §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, will apply if the result is greater than that determined above. For example, if a bribe was given for the purpose of concealing the offense of espionage, the guideline for accessory after the fact to espionage would be applied.*

*Under §2C1.1(c)(3), if the offense involved forcible extortion, the guideline from §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) will apply if the result is greater than that determined above.*

*Section 2C1.1 also applies to offenses under 15 U.S.C. §§ 78dd-1, 78dd-2, and 78dd-3. Such offenses generally involve a payment to a foreign public official, candidate for public office, or agent or intermediary, with the intent to influence an official act or decision of a foreign government or political party. Typically, a case prosecuted under these provisions will involve an intent to influence governmental action.*

*Section 2C1.1 also applies to fraud involving the deprivation of the intangible right to honest services of government officials under 18 U.S.C. §§ 1341-1343 and conspiracy to defraud by interference with governmental functions under 18 U.S.C. § 371. Such fraud offenses typically involve an improper use of government influence that harms the operation of government in a manner similar to bribery offenses.*

*Offenses involving attempted bribery are frequently not completed because the offense is reported to authorities or an individual involved in the offense is acting in an undercover capacity. Failure to complete the offense does not lessen the defendant's culpability in attempting to use public position for personal gain. Therefore, solicitations and attempts are treated as equivalent to the underlying offense.*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 18); November 1, 1989 (see Appendix C, amendments 120-122); November 1, 1991 (see Appendix C, amendments 367 and 422); November 1, 1997 (see Appendix C, amendment 547); November 1, 2001 (see Appendix C, amendment 617); November 1, 2002 (see Appendix C, amendment 639); November 1, 2003 (see Appendix C, amendment 653); November 1, 2004 (see Appendix C, amendment 666); November 1, 2007 (see Appendix C, amendment 699).

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

- (a) Base Offense Level:
  - (1) **11**, if the defendant was a public official; or
  - (2) **9**, otherwise.
- (b) Specific Offense Characteristics
  - (1) If the offense involved more than one gratuity, increase by **2** levels.
  - (2) If the value of the gratuity exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

- (3) If the offense involved an elected public official or any public official in a high-level decision-making or sensitive position, increase by **4** levels. If the resulting offense level is less than level **15**, increase to level **15**.
  - (4) If the defendant was a public official who facilitated (A) entry into the United States for a person, a vehicle, or cargo; (B) the obtaining of a passport or a document relating to naturalization, citizenship, legal entry, or legal resident status; or (C) the obtaining of a government identification document, increase by **2** levels.
- (c) Special Instruction for Fines - Organizations
- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the value of the unlawful payment.

Commentary

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

Application Notes:

1. Definitions.—For purposes of this guideline:

*"Government identification document" means a document made or issued by or under the authority of the United States Government, a State, or a political subdivision of a State, which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.*

*"Public official" shall be construed broadly and includes the following:*

- (A) *"Public official" as defined in 18 U.S.C. § 201(a)(1).*
- (B) *A member of a state or local legislature. "State" means a State of the United States, and any commonwealth, territory, or possession of the United States.*
- (C) *An officer or employee or person acting for or on behalf of a state or local government, or any department, agency, or branch of government thereof, in any official function, under or by authority of such department, agency, or branch of government, or a juror.*
- (D) *Any person who has been selected to be a person described in subdivisions (A), (B), or (C), either before or after such person has qualified.*
- (E) *An individual who, although not otherwise covered by subdivisions (A) through (D): (i) is in a position of public trust with official responsibility for carrying out a government program or policy; (ii) acts under color of law or official right; or (iii) participates so substantially in government operations as to possess de facto*

*authority to make governmental decisions (e.g., which may include a leader of a state or local political party who acts in the manner described in this subdivision).*

2. *Application of Subsection (b)(1).—Related payments that, in essence, constitute a single gratuity (e.g., separate payments for airfare and hotel for a single vacation trip) are to be treated as a single gratuity, even if charged in separate counts.*
3. *Application of Subsection (b)(3).—*
  - (A) *Definition.*—*"High-level decision-making or sensitive position" means a position characterized by a direct authority to make decisions for, or on behalf of, a government department, agency, or other government entity, or by a substantial influence over the decision-making process.*
  - (B) *Examples.*—*Examples of a public official in a high-level decision-making position include a prosecuting attorney, a judge, an agency administrator, a law enforcement officer, and any other public official with a similar level of authority. Examples of a public official who holds a sensitive position include a juror, a law enforcement officer, an election official, and any other similarly situated individual.*
4. *Inapplicability of §3B1.3.—Do not apply the adjustment in §3B1.3 (Abuse of Position or Trust or Use of Special Skill).*

*Background:* This section applies to the offering, giving, soliciting, or receiving of a gratuity to a public official in respect to an official act. It also applies in cases involving (1) the offer to, or acceptance by, a bank examiner of a loan or gratuity; (2) the offer or receipt of anything of value for procuring a loan or discount of commercial bank paper from a Federal Reserve Bank; and (3) the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt.

*Historical Note:* Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 121); November 1, 1991 (see Appendix C, amendment 422); November 1, 1995 (see Appendix C, amendment 534); November 1, 2001 (see Appendix C, amendment 617); November 1, 2004 (see Appendix C, amendment 666).

### **§2C1.3. Conflict of Interest; Payment or Receipt of Unauthorized Compensation**

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristic
  - (1) If the offense involved actual or planned harm to the government, increase by **4** levels.
- (c) Cross Reference
  - (1) If the offense involved a bribe or gratuity, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right; Fraud Involving the Deprivation of the Intangible Right

to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions) or §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than the offense level determined above.

*Commentary*

*Statutory Provisions:* 18 U.S.C. §§ 203, 205, 207, 208, 209, 1909; 40 U.S.C. § 14309(a), (b). For additional statutory provision(s), *see* Appendix A (Statutory Index).

*Application Note:*

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

*Historical Note:* Effective November 1, 1987. Amended effective November 1, 1995 (*see* Appendix C, amendment 534); November 1, 2001 (*see* Appendix C, amendment 619); November 1, 2003 (*see* Appendix C, amendment 661); November 1, 2005 (*see* Appendix C, amendment 679).

**§2C1.4. [Deleted]**

*Historical Note:* Section 2C1.4 (Payment or Receipt of Unauthorized Compensation), effective November 1, 1987, amended effective November 1, 1998 (*see* Appendix C, amendment 588), was deleted by consolidation with §2C1.3 effective November 1, 2001 (*see* Appendix C, amendment 619).

**§2C1.5. Payments to Obtain Public Office**

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

*Commentary*

*Statutory Provisions:* 18 U.S.C. §§ 210, 211.

*Application Note:*

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

*Background:* Under 18 U.S.C. § 210, it is unlawful to pay, offer, or promise anything of value to a person, firm, or corporation in consideration of procuring appointive office. Under 18 U.S.C. § 211, it is unlawful to solicit or accept anything of value in consideration of a promise of the use of influence in obtaining appointive federal office. Both offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year.

*Historical Note:* Effective November 1, 1987.

**§2C1.6. [Deleted]**

Historical Note: Effective November 1, 1987. Amended effective November 1, 2001 (see Appendix C, amendment 617); was deleted by consolidation with §2C1.2 effective November 1, 2004 (see Appendix C, amendment 666).

**§2C1.7. [Deleted]**

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 368). Amended effective November 1, 1992 (see Appendix C, amendment 468); November 1, 1997 (see Appendix C, amendment 547); November 1, 2001 (see Appendix C, amendment 617); November 1, 2003 (see Appendix C, amendment 653); was deleted by consolidation with §2C1.1 effective November 1, 2004 (see Appendix C, amendment 666).

**§2C1.8. Making, Receiving, or Failing to Report a Contribution, Donation, or Expenditure in Violation of the Federal Election Campaign Act; Fraudulently Misrepresenting Campaign Authority; Soliciting or Receiving a Donation in Connection with an Election While on Certain Federal Property**

- (a) Base Offense Level: **8**
- (b) Specific Offense Characteristics
  - (1) If the value of the illegal transactions exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.
  - (2) (Apply the greater) If the offense involved, directly or indirectly, an illegal transaction made by or received from—
    - (A) a foreign national, increase by **2** levels; or
    - (B) a government of a foreign country, increase by **4** levels.
  - (3) If (A) the offense involved the contribution, donation, solicitation, expenditure, disbursement, or receipt of governmental funds; or (B) the defendant committed the offense for the purpose of obtaining a specific, identifiable non-monetary Federal benefit, increase by **2** levels.
  - (4) If the defendant engaged in 30 or more illegal transactions, increase by **2** levels.
  - (5) If the offense involved a contribution, donation, solicitation, or expenditure made or obtained through intimidation, threat of pecuniary or other harm, or coercion, increase by **4** levels.
- (c) Cross Reference
  - (1) If the offense involved a bribe or gratuity, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of

Official Right; Fraud Involving the Deprivation of the Intangible Right to Honest Services of Public Officials; Conspiracy to Defraud by Interference with Governmental Functions) or §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than the offense level determined above.

Commentary

Statutory Provisions: 2 U.S.C. §§ 437g(d)(1), 439a, 441a, 441a-1, 441b, 441c, 441d, 441e, 441f, 441g, 441h(a), 441i, 441k; 18 U.S.C. § 607. For additional provision(s), see Statutory Index (Appendix A).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Foreign national" has the meaning given that term in section 319(b) of the Federal Election Campaign Act of 1971, 2 U.S.C. § 441e(b).

"Government of a foreign country" has the meaning given that term in section 1(e) of the Foreign Agents Registration Act of 1938 (22 U.S.C. § 611(e)).

"Governmental funds" means money, assets, or property, of the United States government, of a State government, or of a local government, including any branch, subdivision, department, agency, or other component of any such government. "State" means any of the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, or American Samoa. "Local government" means the government of a political subdivision of a State.

"Illegal transaction" means (A) any contribution, donation, solicitation, or expenditure of money or anything of value, or any other conduct, prohibited by the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 et seq; (B) any contribution, donation, solicitation, or expenditure of money or anything of value made in excess of the amount of such contribution, donation, solicitation, or expenditure that may be made under such Act; and (C) in the case of a violation of 18 U.S.C. § 607, any solicitation or receipt of money or anything of value under that section. The terms "contribution" and "expenditure" have the meaning given those terms in section 301(8) and (9) of the Federal Election Campaign Act of 1971 (2 U.S.C. § 431(8) and (9)), respectively.

2. Application of Subsection (b)(3)(B).—Subsection (b)(3)(B) provides an enhancement for a defendant who commits the offense for the purpose of achieving a specific, identifiable non-monetary Federal benefit that does not rise to the level of a bribe or a gratuity. Subsection (b)(3)(B) is not intended to apply to offenses under this guideline in which the defendant's only motivation for commission of the offense is generally to achieve increased visibility with, or heightened access to, public officials. Rather, subsection (b)(3)(B) is intended to apply to defendants who commit the offense to obtain a specific, identifiable non-monetary Federal benefit, such as a Presidential pardon or information proprietary to the government.

3. *Application of Subsection (b)(4).*—Subsection (b)(4) shall apply if the defendant engaged in any combination of 30 or more illegal transactions during the course of the offense, whether or not the illegal transactions resulted in a conviction for such conduct.
4. *Departure Provision.*—In a case in which the defendant’s conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted.

Historical Note: Effective January 25, 2003 (see Appendix C, amendment 648). Amended effective November 1, 2003 (see Appendix C, amendment 656); November 1, 2005 (see Appendix C, amendment 679).