

Amendment Options: Referring Guidelines for Theft and Fraud

Synopsis of Amendment: The following proposed amendments indicate the changes that might be called for in several guidelines that refer to the loss tables in either §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or §2F1.1 (Fraud and Deceit) if the Commission were to adopt one of the proposed new loss tables as well as an alternative monetary table that did not incorporate “more than minimal planning”.

The amendments are presented in six categories:

- (1) Those guidelines that arguably incorporate the concept of “more than minimal planning” (MMP) into the base offense level or a specific offense characteristic.
- (2) Certain pornography and obscenity guidelines, for which the use of a monetary table at all is a policy choice for the Commission.
- (3) Certain copyright infringement and structuring guidelines, for which use of the proposed loss tables for fraud is also presented as an option.
- (4) Trespass, for which use of the proposed theft and fraud loss tables starting at \$2,000 is also presented as an option, as well as an issue for comment.
- (5) Property destruction, which is proposed to be consolidated with the theft guideline (thereby mitigating the necessity for reference to the alternative monetary table).
- (6) Bank gratuity, which is proposed to be consolidated with the principal gratuity guideline.

Three issues for comment are included following the proposed amendments, including an issue for comment regarding whether, if the Commission adopts a new loss table for fraud offenses, it should nevertheless continue to refer some of these guidelines to the current fraud loss table.

(1) Guidelines with MMP Built into the Base Offense Level or a Specific Offense Characteristic

With respect to these guidelines, there are two issues:

- (1) The loss table to be referenced.
- (2) Whether the initial offense level increase from the referenced table should

occur at \$2,000 (the current status) or at \$5,000.¹

To avoid concerns about a MMP overlap, the Reference Monetary Table is used for all of these guidelines. Option 1 shows how the guideline might be amended if the Commission were to reference a monetary table for which the starting point is \$5,000. Alternatively, Option 1A shows how, even with a reference table starting at \$5,000, the individual guideline might be amended to provide a 1-level increase for cases in which the loss is more than \$2,000 but not more than \$5,000.

Option 2 shows how the guideline might be amended if the Commission were to adopt a reference monetary table for which the starting point is \$2,000. To cover the possibility that the Commission might elect, for one or more of these guidelines, to reference the new fraud loss table in spite of an arguable MMP overlap, an issue for comment is added at the end of the amendments.

§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 exceeded \$2,000, increase by the corresponding number of levels from the table at §2F1.1 (Fraud and Deceit).~~
 - (1) **If the face value of the counterfeit items exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).**

- Option 1A:
- (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 corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).**

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§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**

¹To be precise, the “cutting points” in the monetary tables occur when the monetary amount is “more than \$2,000” or “more than \$5,000”, etc. For simplicity, this discussion generally will omit the “more than” modifier.

(b) Specific Offense Characteristics

(1) — If the retail value of the motor vehicles or parts involved exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit):

(1) If the retail value of the motor vehicles or parts involved exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

Option 1A: (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 corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

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§2F1.2. Insider Trading

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

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

(1) If the gain resulting from the offense exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

Option 1A: (1) If the gain resulting from the offense (A) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

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§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 exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1.

(1) If the greater of the value of the bribe or the improper benefit to be

conferred exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

- Option 1A: (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 corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

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§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 exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1.

(1) If the greater of the amount obtained or demanded exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

- Option 1A: (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 corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

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

- (a) Base Offense Level: 6
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- (3) (If more than one applies, use the greater):

(A) — If the market value of the fish, wildlife, or plants exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or

(A) If the market value of the fish, wildlife, or plants exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table), [but in no event more than 18 levels]; or

Option 1A:

- (A) If the market value of the fish, wildlife, or plants (i) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (ii) exceeded \$5,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table), [but in no event more than **18** levels]; or
- (B) If the offense involved (i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as set forth in 50 C.F.R. § 216.15); (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 C.F.R. Part 17); or (iii) fish, wildlife, or plants that are listed in Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 C.F.R. Part 23), increase by **4** levels.

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

- (a) Base Offense Level: **10**
- (b) Specific Offense Characteristics

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

- (A) ~~If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit):~~
- (A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

Option 1A:

- (A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest (i) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (ii) exceeded \$5,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

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

- (a) Base Offense Level: **7**
- (b) Specific Offense Characteristics

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

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

(A) If the value of the gratuity exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

Option 1A:

(A) If the value of the gratuity (i) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (ii) exceeded \$5,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

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

- (a) Base Offense Level: **10**
- (b) Specific Offense Characteristic

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

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

(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

Option 1A:

(A) If the loss to the government, or the value of anything obtained or

to be obtained by a public official or others acting with a public official, whichever is greater, (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

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

- (a) Base Offense Level:
 - (1) 10, if a bribe; or
 - (2) 6, if a gratuity.
- (b) Specific Offense Characteristics

* * *

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

(2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater, exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

Option 1A: (2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

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(2) Pornography and Obscenity

Option 1 for the following pornography and obscenity guidelines references the guidelines to the alternative monetary reference table. Option 2 references the new fraud loss table. Option 3 deletes the reference to a monetary table altogether and adds invited upward departure language for large-scale commercial endeavors.

Note that, with respect to §§2G2.2 and 2G3.1, the floor (i.e., an increase of not less than [5] levels) for the amount of the material has been maintained. However, two effects of maintaining the floor should be mentioned:

- (1) The issue of the starting point for any of the proposed tables is no longer relevant (because the starting point simply doesn't come into play at such levels).
- (2) Under the current fraud loss table, the 5-level floor presupposes a retail value of at least \$40,000; however, those values change depending on the particular table proposed to be used. For that reason, the 5-level enhancement is bracketed in the following options.

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

- (a) Base Offense Level: **17**
- (b) Specific Offense Characteristics

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

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

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Option 2 (keeps current language): (2) If the offense involved distribution, increase by the number of levels from the table in §2F1.1 (**Fraud and Deceit**) corresponding to the retail value of the material, but in no event by less than [5] levels.

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Option 3: (2) ~~If the offense involved distribution, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material, but in no event by less than [5] levels.~~

Application Notes:

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

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

(a) Base Offense Level: **10**

(b) Specific Offense Characteristics

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

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

* * *

Option 2 (keeps current language):

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

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Option 3:

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

Application Notes:

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

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

- (a) Base Offense Level: **12**
- (b) Specific Offense Characteristics
 - (1) If a person who received the telephonic communication was less than eighteen years of age, or if a broadcast was made between six o'clock in the morning and eleven o'clock at night, increase by **4** levels.
 - (2) ~~If 6 plus the offense level from the table at 2F1.1(b)(1) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.~~

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

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

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Option 3: * * *

Application Notes:

1. *Subsection (b)(1) provides an enhancement where an obscene telephonic communication was received by a minor less than 18 years of age or where a broadcast was made during a time when such minors were likely to receive it.*
2. *If the offense involved communications or broadcasting operations by a large-scale commercial enterprise [(i.e., a commercial enterprise engaging in a volume of commerce having a value that is more than [\$40,000])], an upward departure may be warranted.*

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

which the obscene material was distributed is approximated by the volume of commerce attributable to the defendant.

(3) Copyright Infringement and Structuring Transactions

With respect to these guidelines, four options are presented. Option 1 shows how the guideline might be amended if the Commission were to reference an alternative monetary table for which the starting point is \$5,000. Alternatively, Option 1A shows how, even with a reference table starting at \$5,000, the individual guideline might be amended to provide a 1-level increase for cases in which the monetary amount is more than \$2,000 but not more than \$5,000. Option 2 shows how the guideline might be amended if the Commission were to adopt an alternative reference monetary table for which the starting point is \$2,000.

Option 3 shows how the guideline might be amended if the Commission were to reference a fraud loss table for which the starting point is \$5,000. Alternatively, Option 3A shows how, even with a reference table starting at \$5,000, the individual guideline might be amended to provide a 1-level increase for cases in which the monetary amount is more than \$2,000 but not more than \$5,000. Option 4 shows how the guideline might be amended if the Commission were to adopt a fraud loss table for which the starting point is \$2,000.

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

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

(b) Specific Offense Characteristic

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

(1) **If the retail value of the infringing items exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).**

Option 1A: (1) **If the retail value of the infringing items (A) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).**

(1) **If the retail value of the infringing items exceeded [Option 3: \$5,000][Option 4: \$2,000], increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).**

Option 3A: (1) **If the retail value of the infringing items (A) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000, increase by**

the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

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

- (a) Base Offense Level: **6** plus the number of offense levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the funds.
- (a) Base Offense Level: **6** plus the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table), if the value of the funds exceeded [Option 1: \$5,000][Option 2: \$2,000].

Option 1A: (a) Base Offense Level: **6** plus (1) **1** level, if the value of the funds exceeded \$2,000 but did not exceed \$5,000; or (2) the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table), if the value of the funds exceeded \$5,000.

- (a) Base Offense Level: **6** plus the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit), if the value of the funds exceeded [Option 3: \$5,000][Option 4: \$2,000].

Option 3A: (a) Base Offense Level: **6** plus (1) **1** level, if the value of the funds exceeded \$2,000 but did not exceed \$5,000; or (2) the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit), if the value of the funds exceeded \$5,000.

(4) Trespass

By virtue of an amendment effective November 1, 1997, the trespass guideline contains a reference to the fraud loss table to cover losses resulting from the invasion of a protected government computer. The fraud table, rather than the theft table, was chosen because it better fits with a guideline structure that provides an initial increase in offense level at \$2,000. Under the proposed loss tables and accompanying reference monetary tables, a range of as many as six options are potentially viable. Those considered more likely are set forth below.

Among the issues specific to this guideline to be decided are:

- (1) Does the Commission wish to maintain the \$2,000 threshold for an initial increase in offense level?
- (2) Does the Commission wish to treat these offenses comparably to computer offenses sentenced under the theft or fraud guidelines (which, under the proposed

amendments, will be subject to a phased-in MMP enhancement)?

Options 1 and 1A assume that the Commission may elect to use the Reference Monetary Table because these computer trespass offenses may be simpler in nature than computer offenses referenced to the theft and fraud guidelines (and, thus, the additional MMP enhancement built into the theft and fraud loss tables would not be warranted). Option 1 shows how the guideline might be amended if the Commission were to refer to a Reference Monetary Table that provides an initial increase in offense level at \$2,000. Alternatively, Option 1A shows how, even with a reference table starting at \$5,000, the trespass guideline might be amended to provide a 1-level increase for cases in which the loss is more than \$2,000 but not more than \$5,000.

Options 2 and 3 assume that the Commission will (1) maintain the current \$2,000 starting point for the referenced loss table, and (2) elect to use a loss table that incorporates the phased-in MMP enhancement. Option 2 references the proposed fraud loss table and assumes a Commission decision to use a loss table structure illustrated by the Option 2 loss tables. (Under this assumed choice, the fraud loss table, rather than theft, is referenced because the former starts at \$2,000.) Option 3 references the proposed theft loss table and assumes a Commission decision to use a theft table that provides an initial increase at \$2,000, as in the Option 1 theft loss table.

An issue for comment has been designed to cover the possibility that the Commission might wish to use a loss table starting point that is lower or higher than \$2,000.

§2B2.3. Trespass

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

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(3) — If the offense involved invasion of a protected computer resulting in a loss exceeding \$2000, increase the offense level by the number of levels from the table in §2F1.1 corresponding to the loss.

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

Option 1A: (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 corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

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

Option 3: (3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion exceeded \$2,000, increase by the corresponding number of levels from the table in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).

Issue for Comment: The Commission invites comment on the appropriate starting point for a loss table applicable to offenses sentenced under §2B2.3 (Trespass) that involve the invasion of a protected computer described in 18 U.S.C. § 1030(e)(2)(A) or (B). Specifically, should the Commission adopt a table for these offenses that starts at an amount that is lower or higher than \$2,000? Since the current fraud loss table at §2F1.1 (Fraud and Deceit) applicable to these offenses starts at \$2,000, should the Commission account for any difference in offense levels that might occur between a lower or higher starting amount under a new loss table and the \$2,000 starting amount under the current fraud loss table?

(5) Property Destruction - Consolidation with Theft Guideline

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

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

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

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- (c) Cross References

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 225, 553(a)(1), 641, 656, 657, 659, 662, 664, **1361, 1363**, 1702, **1703**, 1708, 2113(b), 2312-2317, **2321**; 29 U.S.C. § 501(c). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

Background: *This guideline covers offenses involving theft, stolen property, and property damage or destruction.*

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

* * *

Guideline Deleted:

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

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

~~(b) Specific Offense Characteristics~~

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

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

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

~~(c) Cross Reference~~

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail is involved). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

(6) Bank Gratuity -Consolidation with Principal Gratuity Guideline

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

(a) Base Offense Level: **7**

(b) Specific Offense Characteristic

(1) If the offense involved more than one gratuity, increase by **2** levels.

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

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

(A) If the value of the unlawful payment exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

Option 1A:

(A) If the value of the unlawful payment (i) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (ii) exceeded \$5,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

(B) If the ~~gratuity~~ **unlawful payment** was given, or to be given, to an elected official or any official holding a high-level decision-making or sensitive position, increase by **8** levels.

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

* * *

Application Notes:

* * *

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

* * *

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

Guideline Deleted:

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

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

~~(b) Specific Offense Characteristic~~

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

Commentary

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

Application Note:

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

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

Issue for Comment:

(1) The Commission invites comment on whether any of the above guidelines proposed to be referenced to the Reference Monetary Table (§2X6.1) instead should be referenced to the loss table in §2F1.1, as such table is proposed to be amended under Option 1 or Option 2. Such an approach might be justified by an assessment that the higher penalties of this approach are warranted for a particular guideline/type of offense and/or by a determination that there is no substantial overlap in the incorporation of more-than-minimal planning into the structure of the guideline and the revised loss table.

(2) The Commission invites comment on whether, for any of the above guidelines, the increase in offense level resulting from reference to a particular monetary table should be capped at a certain number of levels. For example, in §2Q2.1 (Offenses Involving Fish, Wildlife, and Plants), should the maximum increase in offense level resulting from use of the table in §2X6.1 (Reference Monetary Table) to measure the market value of the fish, wildlife, or plants be limited to [18] levels? Capping the increase in offense level for any particular guideline might be justified in order to maintain proportionality in sentencing among various offenses and/or be required in order to maintain consistency with prevailing statutory maximum sentences for offenses covered by the guideline.

(3) The Commission invites comment on whether, for any of the above guidelines that are currently referenced to the fraud loss table in §2F1.1, the Commission should continue to refer the guideline to the current fraud table if the Commission adopts one of the proposed loss tables for fraud offenses under §2F1.1. Similarly to the issue of capping increases in offense levels for certain guidelines (see issue for comment #2, above), such an approach might be justified in order to maintain proportionality in sentencing among various offenses and/or be required in order to maintain consistency with prevailing statutory maximum sentences for offenses covered by the guideline.