

Subsection (b)(9)(D) implements the the directive in section 3 of the College Scholarship Fraud Prevention Act of 1999, Pub. L. 106–420. The directive requires the Commission to amend the guidelines:

*...in order to provide for enhanced penalties for any offense involving fraud or misrepresentation in connection with the obtaining or providing of, or the furnishing of information to a consumer on, any scholarship, grant, loan, tuition, discount, award, or other financial assistance for purposes of financing an education at an institution of higher education, such that those penalties are comparable to the base offense level for misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency.*

*The amendment adds an additional alternative enhancement that applies if the offense involves a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education. This proposed enhancement is targeted at the provider of the financial assistance or scholarship services, not the individual applicant for such assistance or scholarship, consistent with the intent of the legislation.*

**Risk of Bodily Injury Enhancement:** *The proposal provides for two substantive changes with respect to the enhancement involving conscious or reckless risk of serious bodily injury. First, it increases the "floor" offense level from level 13 to level 14. Second, it inserts "death" before the term "or serious bodily injury" because, as a practical matter, a risk of serious bodily injury is likely also to entail a risk of death. Including "of death" also will provide consistency throughout the Guidelines Manual. Currently, "risk of death or serious bodily injury" appears in a number of other guidelines as either an alternative base offense level, specific offense characteristic, or invited upward departure (see e.g., §2A2.2 comment (n.3); §2K1.4(a)(1)(2); §2Q1.4(b)(1)). The fraud guideline is the only guideline in which risk of serious bodily injury appears as a sentencing factor without a reference to "risk of death".*

*This enhancement stems from a 1988 congressional directive in which the Commission was instructed to amend the fraud guideline to provide an appropriate enhancement for a fraud offense that creates a conscious or reckless risk of serious bodily injury. The Commission was further instructed to consider the appropriateness of a minimum enhancement of two offense levels for this conduct. The legislation did not require a "floor" offense level.*

*The proposal increases the "floor" from level 13 to level 14 to promote proportionality between this and other guidelines covering similar conduct. Within the current theft and fraud guidelines, there are three specific offense characteristics that have a higher floor offense level than the current risk of bodily injury enhancement: (1) "chop shops": level 14; (2) jeopardizing the solvency of a financial institution: level 24; and (3) personally receiving more than \$1 million from a financial institution: level 24 (congressionally directed minimum).*

*Other conceptually similar offense conduct under various guidelines is graded as follows:*

- (1) Reckless voluntary manslaughter (§2A1.4): level 14

- (2) *Operating a common carrier under influence of drugs or alcohol, no death or serious bodily injury resulting (§2D2.3): level 13*
- (3) *Arson creating a substantial risk of death or serious bodily injury (§2K1.4): level 20*
- (4) *Immigration smuggling offense creating a substantial risk of death or serious bodily injury (§2L1.1): 2-level enhancement, "floor" of level 18*
- (5) *Environmental offenses resulting in risk of death or serious bodily injury (§§2Q1.1, 2Q1.2, 2Q1.3, 2Q1.4): Offense level varies from level 17 to level 24.*

**Gross Receipts Enhancement:** *The proposed amendment presents two options for modifying this enhancement, which currently provides a 4-level increase and a floor offense level of level 24 for a defendant who personally derives more than \$1 million in gross receipts from an offense that affected a financial institution.*

*The gross receipts enhancement derives from a 1990 congressional directive requiring a minimum offense level of level 24 if the defendant derived more than \$1 million in gross receipts from certain offenses that affected financial institutions. The Commission had received and implemented a related directive the previous year requiring that the guidelines provide a "substantial period of incarceration" for certain specific offenses that "substantially jeopardize the safety and soundness of a federally insured financial institution." In each case, the Commission constructed an enhancement that was considerably broader and more severe than the directive required. In part, this was the Commission's way of responding to the increases in statutory maximum penalties for financial institution offenses that Congress enacted in 1989 and 1990. The Commission had modestly increased the penalties for all fraud offenses with substantial monetary losses in 1989. Rather than increase the loss table again, or adopt a generally applicable enhancement for fraud against financial institutions, the Commission elected to use the two congressionally directed enhancements as mechanisms for ensuring more stringent penalties for the more severe forms of those offenses.*

*Option 1 deletes the 4-level increase for deriving more than \$1 million in gross receipts from the offense but retains the "floor" offense level of level 24 for such conduct (in order to retain compliance with the congressional directive). The 4-level increase is deleted under the assumption that a loss table will be adopted that builds in increases for relatively high dollar losses; the deletion would prevent double-counting for the fact of a high dollar loss. Option 2 retains the current floor offense level but reduces the 4-level enhancement to 2 levels.*

**Sentencing Data:** *Due to the structure of this enhancement and the Commission's data collection methods it is impossible to determine which offenders received increases for jeopardizing a financial institution and which offenders received increases for gross receipts in excess of \$1,000,000. Nevertheless, 33 fraud offenders (0.5 %) received an increase under this enhancement.*

**Additional Cross References:**

- (A) *This proposal adds a more generally applicable cross reference that would apply whenever a broadly applicable fraud statute is used to reach conduct that is more specifically addressed in another Chapter Two guideline [if the resulting offense level is greater].*

*Currently, Application Note 14 in the fraud guideline instructs the user to move to another, more appropriate Chapter Two guideline under circumstances in which: (1) the defendant is convicted of a broadly applicable fraud statute (e.g., 18 U.S.C. § 1001), and (2) the convicted conduct is more appropriately covered by another Chapter Two guideline specifically tailored to that conduct. In essence, this note is not a cross reference, but rather a reminder of the principles enunciated in §1B1.2 regarding application of the guideline most appropriate for the convicted conduct. Moreover, unlike the more typical cross reference, under this instruction the user locates and applies the more appropriate guideline, even if it yields an offense level lower than would have been obtained under the fraud guideline.*

*Experience over the years demonstrates that this application note is not well known or understood, and hence, not applied consistently. One way of possibly addressing these problems would be to convert the application note into a cross reference. The more highly visible approach of incorporating the instruction directly into the guideline should ensure more consistent application, without changing the basic policy of using the cross reference to move to the guideline most appropriate for the conduct of which the defendant was convicted.*

**Proposed Amendment (Part A):**

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

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

~~—————~~ Introductory Commentary

~~—————~~ *These sections address the most basic forms of property offenses: theft, embezzlement, transactions in stolen goods, and simple property damage or destruction. (Arson is dealt with separately in Part K, Offenses Involving Public Safety.) These guidelines apply to offenses prosecuted under a wide variety of federal statutes, as well as offenses that arise under the Assimilative Crimes Act.*

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

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

~~(b) Specific Offense Characteristics~~

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

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

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

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

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

~~(B) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen~~

~~property, increase by 4 levels.~~

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

~~(6) If the offense~~

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

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

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

~~(7) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit any foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.~~

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

~~(e) Cross Reference~~

~~(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of such item was an object of the offense, or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate, if the resulting offense level is greater than that determined above.~~

Commentary

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

~~*Application Notes:*~~

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

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

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

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

~~2. "Loss" means the value of the property taken, damaged, or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim. Loss does not include the interest that could have been earned had the funds not been stolen. When property is damaged, the loss is the cost of repairs, not to exceed the loss had the property been destroyed. *Examples:* (1) In the case of a theft of a check or money order, the loss is the loss that would have occurred if the check or money order had been cashed. (2) In the case of a defendant apprehended taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately.~~

~~If the offense involved making a fraudulent loan or credit card application, or other unlawful conduct involving a loan, a counterfeit access device, or an unauthorized access device, the loss is to be determined in accordance with the Commentary to §2F1.1 (Fraud and Deceit). For example, in accordance with Application Note 17 of the Commentary to §2F1.1, in a case involving an unauthorized access device (such as a stolen credit card), loss includes any unauthorized charge(s) made with the access device. In such a case, the loss shall be not less than \$500 per unauthorized access device. For purposes of this application note, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in 18 U.S.C. § 1029(e)(2) and (e)(3), respectively.~~

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

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

~~In an offense involving unlawfully accessing, or exceeding authorized access to, a "protected~~

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

- ~~— In the case of a partially completed offense (e.g., an offense involving a completed theft that is part of a larger, attempted theft), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.~~
- ~~3. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based upon the approximate number of victims and the average loss to each victim, or on more general factors such as the scope and duration of the offense.~~
  - ~~4. Controlled substances should be valued at their estimated street value.~~
  - ~~5. "Undelivered United States mail" means mail that has not actually been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mail box).~~
  - ~~6. "From the person of another" refers to property, taken without the use of force, that was being held by another person or was within arms' reach. Examples include pick-pocketing or non-forceful purse-snatching, such as the theft of a purse from a shopping cart.~~
  - ~~7. Subsection (b)(5), referring to an "organized scheme to steal vehicles or vehicle parts," provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or "chop shop." "Vehicles" refers to all forms of vehicles, including aircraft and watercraft.~~
  - ~~8. "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.~~
  - ~~9. An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully~~

~~any deposit, payment, or investment, was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.~~

~~10. "The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(6)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).~~

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

~~12. If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."~~

~~13. If the offense involved theft or embezzlement from an employee pension or welfare benefit plan (a violation of 18 U.S.C. § 664) and the defendant was a fiduciary of the benefit plan, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply. "Fiduciary of the benefit plan" is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.~~

~~If the offense involved theft or embezzlement from a labor union (a violation of 29 U.S.C. § 501(c)) and the defendant was a union officer or occupied a position of trust in the union as set forth in 29 U.S.C. § 501(a), an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply.~~

~~14. In cases where the loss determined under subsection (b)(1) does not fully capture the harmfulness of the conduct, an upward departure may be warranted. For example, the theft~~

~~of personal information or writings (e.g., medical records, educational records, a diary) may involve a substantial invasion of a privacy interest that would not be addressed by the monetary loss provisions of subsection (b)(1).~~

~~15. In cases involving theft of information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), an upward departure may be warranted where the defendant sought the stolen information to further a broader criminal purpose.~~

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



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

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

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

~~Theft from the person of another, such as pickpocketing or non-forceful purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies.~~

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

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

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

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

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

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

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~~(b) Specific Offense Characteristics~~

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

~~(2) If undelivered United States mail was destroyed, and the offense level as~~

determined above is less than level 6, increase to level 6.

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

~~(4) If property of a national cemetery was damaged or destroyed, increase by 2 levels.~~

~~(e) Cross Reference~~

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

~~(d) Special Instruction~~

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

Commentary

~~*Statutory Provisions:* 18 U.S.C. §§ 1030(a)(5), 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail is involved). For additional statutory provision(s), see Appendix A (Statutory Index).~~

~~*Application Notes:*~~

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

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

~~2. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).~~

~~3. "Undelivered United States mail" means mail that has not been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mailbox).~~

~~4. In some cases, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused. For example, the destruction of a \$500 telephone line or interference with a telecommunications network may cause an interruption in service to thousands of people for several hours, with attendant life-threatening delay in the delivery of emergency medical treatment or disruption of other important governmental or private~~

~~services. In such cases, an upward departure may be warranted. See §§5K2.2 (Physical Injury), 5K2.7 (Disruption of Governmental Function), and 5K2.14 (Public Welfare).~~

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

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

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

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

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

~~(b) Specific Offense Characteristics~~

~~(1) If the loss exceeded \$2,000, increase the offense level as follows:~~

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

~~(2) If the offense involved (A) more than minimal planning, or (B) a scheme to~~

~~defraud more than one victim, increase by 2 levels.~~

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

~~(4) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; or (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.~~

~~(5) If the offense involved~~

~~(A) the possession or use of any device-making equipment;~~

~~(B) the production or trafficking of any unauthorized access device or counterfeit access device; 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 another means of identification 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.~~

~~(6) 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.~~

~~(7) 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.~~

~~(8) If the offense~~

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

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

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

~~(c) Special Instruction~~

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

~~Commentary~~

~~Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644; 18 U.S.C. §§ 225, 285-289, 471-473, 500, 510, 659, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4), 1031, 1341-1344, 2314, 2315. For additional statutory provision(s), see Appendix A (Statutory Index).~~

~~Application Notes:~~

- ~~1. The adjustments in §2F1.1(b)(4) are alternative rather than cumulative. If in a particular case, however, both of the enumerated factors applied, an upward departure might be warranted.~~
- ~~2. "More than minimal planning" (subsection (b)(2)(A)) is defined in the Commentary to §1B1.1 (Application Instructions).~~
- ~~3. "Mass-marketing," as used in subsection (b)(3), means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services, (B) participate in a contest or sweepstakes, or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.~~
- ~~4. "Scheme to defraud more than one victim," as used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one person. In this context, "victim" refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.~~
- ~~5. Subsection (b)(4)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group~~

~~of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.~~

~~6. Subsection (b)(4)(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 §2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).~~

~~— If the conduct that forms the basis for an enhancement under (b)(4)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.~~

~~7. Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).~~

~~8. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred. Consistent with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell \$40,000 in worthless securities, or representing that a forged check for \$40,000 was genuine, the loss would be \$40,000.~~

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

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

~~— A fraud may involve the misrepresentation of the value of an item that does have some~~

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

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

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

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

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

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

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

~~foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.~~

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

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

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

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

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

~~10. In the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.~~

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

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

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

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

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

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

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



~~In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. In such cases, a downward departure may be warranted.~~

~~12. Offenses involving access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. In such a case, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.~~

~~Offenses involving 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 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 §2F1.1.~~

~~13. If the fraud exploited vulnerable victims, an enhancement will apply. See §3A1.1 (Hate Crime Motivation or Vulnerable Victim).~~

~~14. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 would be more apt, and false statements to a customs officer, for which §2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than §2F1.1. Otherwise, in such cases, §2F1.1 is to be applied, but a departure from the guidelines may be considered.~~

~~15. For purposes of subsection (b)(5) —~~

~~"Counterfeit access device" (A) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (B) also 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" (A) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (B) also 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)(3), 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).~~

~~16. Subsection (b)(5)(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.~~

~~Examples of conduct to which this subsection should apply are as follows:~~

~~(A) 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.~~

~~(B) 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.~~

~~Examples of conduct to which subsection (b)(5)(C)(i) should not apply are as follows:~~

~~(A) 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.~~

~~(B) A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.~~

~~Subsection (b)(5)(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.~~

~~In a case involving unlawfully produced or unlawfully obtained means of identification, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense. Examples may include the following:~~

~~(A) 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.~~

- ~~(B) 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 the individual's name.~~
- ~~(C) The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.~~
- ~~17. 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. In any such case, loss 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 application note, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 15.~~
- ~~18. For purposes of subsection (b)(6)(B), "United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.~~
- ~~For purposes of subsection (b)(6)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.~~
- ~~The enhancement for sophisticated means under subsection (b)(6)(C) requires conduct that is significantly more complex or intricate than the conduct that may form the basis for an enhancement for more than minimal planning under subsection (b)(2)(A).~~
- ~~If the conduct that forms the basis for an enhancement under subsection (b)(6) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.~~
- ~~19. "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.~~

~~20. An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.~~

~~21. "The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(8)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).~~

~~22. 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."~~

~~23. If subsection (b)(5), subsection (b)(8)(A), or subsection (b)(8)(B) applies, there shall be a rebuttable presumption that the offense also involved more than minimal planning for purposes of subsection (b)(2).~~

~~— If the conduct that forms the basis for an enhancement under subsection (b)(5) is the only conduct that forms the basis of an enhancement under subsection (b)(6), do not apply an enhancement under subsection (b)(6).~~

~~Background: This guideline is designed to apply to a wide variety of fraud cases. The statutory maximum term of imprisonment for most such offenses is five years. The guideline does not link offense characteristics to specific code sections. Because federal fraud statutes are so broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity.~~

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

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

~~small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.~~

~~Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm. The commission of a fraud in the course of a bankruptcy proceeding subjects the defendant to an enhanced sentence because that fraudulent conduct undermines the bankruptcy process as well as harms others with an interest in the bankruptcy estate.~~

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

~~Subsections (b)(5)(A) and (B) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105-172.~~

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

~~Subsection (b)(7)(B) implements, in a broader form, the instruction to the Commission in section H10512 of Public Law 103-322.~~

~~Subsection (b)(8)(A) implements, in a broader form, the instruction to the Commission in section~~

~~961(m) of Public Law 101-73.~~

~~Subsection (b)(8)(B) implements the instruction to the Commission in section 2507 of Public Law 101-647.~~

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

~~§2F1.2. **Insider Trading**~~

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

~~(b) Specific Offense Characteristic~~

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

~~Commentary~~

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

~~Application Note:~~

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

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

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

**PART B - BASIC ECONOMIC OFFENSES**

**1. Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, Fraud and Insider Trading**

Introductory Commentary

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

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

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristics
  - (1) If the loss exceeded [\$2,000][\$5,000], increase the offense level as follows:  
[Loss Table Options -See Part B of this amendment ]
  - (2) If the offense involved—
    - (A) (i) involved more than 4, but less than 50, victims; or (ii) was committed through mass-marketing, increase by 2 levels; or
    - (B) involved 50 or more victims, increase by 4 levels.
  - (3) If the theft was 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 any foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.
  - (6) If the offense involved theft to, damage of or destruction of property from a national cemetery, increase by 2 levels.
  - [(7) If the loss was \$2,000 or less, decrease 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 device-making equipment;

(B) the production or trafficking of any unauthorized access device or counterfeit access device; 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 another means of identification 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 vehicles or vehicle parts, and 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) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.



[Option 1: (14) If (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense; and (B) the offense level is less than level 24, increase to level 24.]

[Option 2: (14) If the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels. If the resulting offense level is less than level 24, increase to level 24.]

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply §2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy), §2D2.1 (Unlawful Possession; Attempt or Conspiracy), §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate, if the resulting offense level is greater than that determined above.

(2) If the offense involved arson, or property 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) none of subdivisions (1) or (2) of this subsection apply; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two, apply that other guideline [if the resulting offense level is greater].

(d) Special Instruction

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

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644; 18 U.S.C. §§ 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), 1030(a)(5), 1031, 1341-1344, 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail is involved), 1702, 1708, 1831, 1832, 2113(b), 2312-2317; 29 U.S.C. § 501(c). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline.—

"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.

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

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

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

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

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

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

2. *[Definition of Loss - See Part C of this amendment]*
3. *Controlled substances should be valued at their estimated street value.*
4. *Enhancement for Business of Receiving and Selling Stolen Property.—*
  - (A) *In General.*—*The court shall consider the totality of the circumstances to determine whether a defendant was in the business of receiving and selling stolen property for purposes of subsection (b)(4).*
  - (B) *Factors to Consider.*—*The following is a non-inclusive list of factors that the court may consider in determining whether the defendant was in the business of receiving and selling stolen property for purposes of subsection (b)(4):*
    - (i) *the regularity or sophistication of the defendant’s activities;*
    - (ii) *the value and size of the inventory of stolen property maintained by the defendant;*
    - (iii) *the extent to which the defendant’s activities encouraged or facilitated other crimes; or*
    - (iv) *the defendant’s past activities involving stolen property.]*
5. *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) *Misrepresentation Defendant Was Acting On Behalf of Charitable Institution.*—*Subsection (b)(8)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.*
  - (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 §2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).

(D) College Scholarship Fraud.—

For the purposes of subsection (b)(8)(D)—

"Financial assistance" means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purposes 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 Enhancement.—If the conduct that forms the basis for an enhancement under (b)(8)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.

6. Application of Subsection (b)(9).—

(A) Definition of United States.—"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 would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.

(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 (Obstruction of Justice), do not apply an adjustment under §3C1.1.

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

(A) Definitions.—

"Counterfeit access device" (A) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (B) also 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" (A) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (B) also 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)(3), 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) Subsection (b)(10)(C)(i).—This subsection 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.

(C) Examples of Conduct Under (b)(10)(C)(i). —Examples of conduct to which this subsection should apply 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.

of

(D) Nonapplicability of Subsection (b)(10)(C)(i):—Examples of conduct to which this subsection should 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.

(E) Subsection (b)(10)(C)(ii).—This subsection 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.

(F) Upward Departure.—In a case involving unlawfully produced or unlawfully obtained means of identification, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense. Examples may include the following:

- (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 the 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.

(G) Counterfeit Access Devices.—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. In any such case, loss 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.

8. Chop Shop Enhancement.—For purposes of (b)(11), a minimum offense level is provided in the case of an ongoing, sophisticated operation (such as an auto theft ring or "chop shop") to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts. "Vehicles" refers

to all forms of vehicles, including aircraft and watercraft.

9. Substantially Jeopardized the Safety and Soundness of a Financial Institution.— For the purposes of subsection (b)(13), 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 became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

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

In General.—For the purposes of (b)(14), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.

Gross Receipts From the Offense.—"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).

11. Cross References.—

(A) General Fraud Statutes.—Subsection (c)(3) provides a cross reference to another Chapter Two guideline in cases in which the defendant is convicted of a general fraud statute, and the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline [and the resulting offense level is greater]. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 would be more apt, and false statements to a customs officer, for which §2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses.

(B) Identification Documents.—Offenses involving 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 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 §2F1.1.

12. 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."

13. Upward Departure in Cases Involving Theft of Information from a Protected Computer.—In cases involving theft of information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), an upward departure may be warranted where the defendant sought the stolen information to further a broader criminal purpose.
14. 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).
15. Upward Departure in Cases Involving Access Devices.—Offenses involving access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. In such a case, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.
16. Vulnerable Victims.—
  - (A) In General.—Except as provided in subdivision (b)(2)(B), if the fraud exploited vulnerable victims, an enhancement shall apply. See §3A1.1 (Hate Crime Motivation or Vulnerable Victim).
  - (B) Nonapplicability of §3A1.1(b)(2) in Certain Cases.—If subsection (b)(2)[(B)] applies, an enhancement under §3A1.1(b)(2) shall not apply.

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

Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics [and cross references] contained in this guideline are designed with these considerations in mind.

[Loss Background Commentary - See Part C]

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

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

*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) and (B) 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 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) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.

Subsection (b)(14) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101-647.

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

\* \* \*

**§2B1.4. Insider Trading**

- (a) Base Offense Level: 8
- (b) Specific Offense Characteristic
  - (1) Increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the gain resulting from the offense.

Commentary

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

Application Note:

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

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

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

\* \* \*

Conforming amendment to §1B1.1 deleting more than minimal planning.

**§1B1.1. Application Instructions**

\* \* \*

Commentary

Application Notes:

1.

\* \* \*

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

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

~~In an assault, for example, waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. By contrast, luring the victim to a specific location, or wearing a ski mask to prevent identification, would constitute more than minimal planning.~~

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

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

~~In an embezzlement, a single taking accomplished by a false book entry would constitute only minimal planning. On the other hand, creating purchase orders to, and invoices from, a~~

~~dummy corporation for merchandise that was never delivered would constitute more than minimal planning, as would several instances of taking money, each accompanied by false entries.~~

\* \* \*

[Redesignate subdivisions (g) through (l) of Application Note 1 of §1B1.1 as subdivisions (f) through (k), respectively.]

4.

\* \* \*

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

Conforming amendment to §2A2.2 to move illustrations relating to more than minimal planning from §1B1.1 (Application Instructions) to aggravated assault guideline:

**§2A2.2. Aggravated Assault**

\* \* \*

Commentary

Application Notes:

\* \* \*

2. *Definitions of "~~more than minimal planning~~," "firearm," "dangerous weapon," "brandished," "otherwise used," "bodily injury," "serious bodily injury," and "permanent or life-threatening bodily injury," are found in the Commentary to §1B1.1 (Application Instructions).*

\* \* \*

4. *"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.*

Conforming amendment to §2B2.1 to move illustratons relating to more than minimal planning from application instructions guideline to commercial burglary guideline:

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

\* \* \*

Commentary

Application Notes:

1. ~~"More than minimal planning," "firearm,"~~ "Firearm", "destructive device," and "dangerous weapon" are 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)~~ §2B1.1 (Theft, Property Destruction, and Fraud).

\* \* \*

4. "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, 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.

**Issues for Comment:**

1. The Commission invites comment on whether and how the rules on inchoate and partially completed offenses, as currently expressed in §2X1.1, §1B1.2 Application Note 7, §2B1.1 Application Note 2 (last paragraph), and §2F1.1 Application Note 10, should apply under the proposed revised and consolidated economic crime guideline (§2B1.1) and the proposed revised definition of "loss." If the current rules are retained, how might they be revised to make their application clearer, simpler, and more consistent? Alternatively, should the current rules be replaced with permissive, encouraged downward departure commentary? If the current rules are modified in regard to offenses sentenced under the revised, consolidated guideline, what conforming changes should be made in §2X1.1 to ensure similar treatment for similar offense conduct not subject to the revised consolidated guideline?
2. The Commission also requests comment on whether, and if so, to what extent it should provide an enhancement for the destruction of, or damage to, unique or irreplaceable items of cultural heritage, archeological, or historical significance. As one means of providing an enhancement, should the Commission provide an alternative loss calculation based on the cultural heritage, archeological, or historical significance of the item or based on the cost of the item's restoration and repair? See, e.g., *United States v. Shumway*, 47 F.3d 1413, 1424 (10<sup>th</sup> Cir. 1997). Alternatively, should the Commission provide an upward

*departure provision for such cases, or some combination of an alternative measure of loss and an upward departure provision? Should the Commission also consider amending the current enhancement for damage to, or destruction of, property of a national cemetery in §§2B1.1 and 2B1.3 to include, for example, offenses involving human remains and funerary objects located on federal or Indian land?*

**Part B. Loss Tables for Consolidated Guideline and §2T4.1 (Tax Table)**

**Synopsis of Proposed Amendment:** *This amendment proposes three options for a loss table for the consolidated guideline, §2B1.1, and two options for a loss table for §2T4.1 (Tax Table). If a decision is made to use the same table, the effect would be to sentence the offenses under both guidelines in a similar manner. This would represent a change from the current relationship in which tax offenses generally face slightly higher offense levels for a given loss amount than fraud and theft offenses.*

*Regarding the tables for both guidelines, each option attempts to compress the loss table by (generally) moving from one-level to two-level increments, thus increasing the range of losses that correspond to an individual increment. This is designed to minimize fact-finding and the appearance of false precision.*

**(1) Proposed Amendment (Part B):**

Section 2B1.1(b)(1), as amended by Part A of this amendment, is further amended to read as follows:

Option One

(1) If the loss exceeded \$2,000, increase the offense level as follows:

	Loss (Apply the Greatest)	Increase in Level
(A)	\$2,000 or less	no increase
(B)	More than \$2,000	add 1
(C)	More than \$5,000	add 2
(D)	More than \$10,000	add 4
(E)	More than \$20,000	add 6
(F)	More than \$40,000	add 8
(G)	More than \$80,000	add 10
(H)	More than \$200,000	add 12
(I)	More than \$500,000	add 14
(J)	More than \$1,200,000	add 16
(K)	More than \$2,500,000	add 18
(L)	More than \$7,500,000	add 20
(M)	More than \$20,000,000	add 22

- (N) More than \$50,000,000 add 24
- (O) More than \$100,000,000 add 26.

Option Two

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

Loss (Apply the Greatest)	Increase in Level
(A) \$5,000 or less	no increase
(B) More than \$5,000	add 2
(C) More than \$10,000	add 4
(D) More than \$30,000	add 6
(E) More than \$70,000	add 8
(F) More than \$120,000	add 10
(G) More than \$200,000	add 12
(H) More than \$400,000	add 14
(I) More than \$1,000,000	add 16
(J) More than \$2,500,000	add 18
(K) More than \$7,000,000	add 20
(L) More than \$20,000,000	add 22
(M) More than \$50,000,000	add 24
(N) More than \$100,000,000	add 26.

Option Three

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

Loss (Apply the Greatest)	Increase in Level
(A) \$5,000 or less	no increase
(B) More than \$5,000	add 2
(C) More than \$10,000	add 4
(D) More than \$20,000	add 6
(E) More than \$40,000	add 8
(F) More than \$80,000	add 10
(G) More than \$160,000	add 12
(H) More than \$400,000	add 14
(I) More than \$1,000,000	add 16
(J) More than \$2,500,000	add 18
(K) More than \$7,500,000	add 20
(L) More than \$20,000,000	add 22
(M) More than \$50,000,000	add 24
(N) More than \$125,000,000	add 26.

Section 2T4.1 is amended by striking the table in its entirety and inserting the following:

Option One

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

Option Two

	Tax Loss (Apply the Greatest)	Offense Level
(A)	\$5,000 or less	6
(B)	More than \$5,000	8
(C)	More than \$10,000	10
(D)	More than \$30,000	12
(E)	More than \$70,000	14
(F)	More than \$120,000	16
(G)	More than \$200,000	18
(H)	More than \$400,000	20
(I)	More than \$1,000,000	22
(J)	More than \$2,500,000	24
(K)	More than \$7,000,000	26
(L)	More than \$20,000,000	28
(M)	More than \$50,000,000	30
(N)	More than \$100,000,000	32.

**Part C. Revised Definition of Loss for Offenses Sentenced Pursuant to §2B1.1, the**



## Consolidated Guideline

**Synopsis of Proposed Amendment:** *The proposed amendment provides two major options to create one definition of loss for offenses sentenced pursuant to §2B1.1 (Larceny, Embezzlement and Other Forms of Theft) and §2F1.1 (Fraud and Deceit). Each option is designed to resolve circuit conflicts, address case law and application issues, and to promote consistency in application. To the extent practicable, each of the proposed definitions retains existing language and concepts that have not proven problematic. The first option was prepared by the Commission and is intended to invite comment on the major issues related to the definition of loss, including those presented in the second option. The second option was prepared by the Criminal Law Committee (CLC) of the Judicial Conference and is included for publication in its entirety in recognition of the years of effort that the members of that committee have put into the preparation of a new definition of loss.*

*The proposed amendment would accomplish the following purposes:*

*(1) Combine the loss definitions in the commentary to the theft and fraud guidelines into one definition with a simplified format;*

*(2) Provide definitions for key concepts of loss, including “actual loss”, “pecuniary harm”, and “intended loss”;*

*(3) Provide two options for a causation standard: (A) “but for” causation standard (and an example) plus reasonable foreseeability; and (B) combine current loss concepts from §§2B1.1 and 2F1.1 and make clear “but for” causation is required but without concept of reasonable foreseeability;*

*(4) Clarify the concept of intended loss in terms of the applicability of any credits or offsets, and to resolve a circuit conflict to provide that intended loss includes unlikely or impossible losses that are intended;*

*(5) Provide two options for when loss should be measured: (A) at the time of sentencing; and (B) when the offense was detected;*

*(6) Provide three options for what should be considered the time of detection: (A) when the offense is discovered by a victim or governmental agency; (B) when the defendant should have known the offense was detected [or about to be detected]; and (C) at the earlier of those two occurrences;*

*(7) Provide two options regarding inclusion of interest: (A) to explicitly exclude interest; and (B) to provide for the inclusion of only that interest that is accrued and unpaid that was bargained for as part of a lending transaction involved in the offense;*

*(8) Exclude certain costs incurred by the government and victims in connection with prosecution and criminal investigation of the offense;*

*(9) Provide for exclusion from loss of certain economic benefits transferred to victims, to be measured at the time of detection;*

*(10) Provide an option for certain exceptions to what constitutes "economic benefits": (A)(i) benefits of "de minimis" value; or (ii) benefits that are substantially different from what the victim intended to receive; and (B) services fraudulently rendered by defendants posing as licensed professionals and for goods falsely represented as approved by a regulatory agency or for which regulatory approval was obtained by fraud;*

*(11) Provide two options for excluding certain benefits transferred to victims of investment fraud schemes, both of which would resolve a circuit conflict: (A) exclude gain to an individual investor in the scheme from being used to offset the loss to other individual investors in the scheme; and (B) exclude benefits transferred to victims designed to lure additional investments in the scheme from being used to offset the loss;*

*(12) Provide greater clarity regarding the flexibility that judges have in estimating loss;*

*(13) Provide four options for the use of gain: (A) allow the use of gain as one of the factors to be used in estimating loss; (B) allow use of pecuniary gain as an alternative measure of loss if the gain is greater than loss; (C) provide for use of gain when loss cannot reasonably be determined or when gain is greater than loss; and (D) allow use of gain as an alternative when loss cannot reasonably be determined but the gain can be determined;*

*(14) Provide that the special loss rules establish a minimum loss rule in the specific context described;*

*(15) Further revise the special rule on determining loss in cases involving diversion of government program benefits to resolve an apparent circuit conflict;*

*(16) Reformat and clarify the provisions dealing with departures, including a bracketed option that would permit a downward departure where the loss exceeds the greater of the [defendant's] actual or intended [personal] gain; and*

*(17) Reposition into the background commentary examples from the current rules on inclusion of consequential damages in offenses involving product substitution and government contract fraud, consistent with option one regarding a causation standard.*

## **Proposed Amendment (Part C)**

### **Option One (Commission Proposal)**

#### **§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Offenses**

**Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer  
Obligations of the United States**

\* \* \*

Commentary

Application Notes:

\* \* \*

2. For purposes of subsection (b)(1).—

(A) General Rule.—Subject to the exclusions in subdivision (B), loss is the greater of actual loss or intended loss.

[Option 1: "Actual loss" means the reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).

"Reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew, or under the circumstances of the particular case, reasonably should have known, likely would result, in the ordinary course of events, from that conduct. For example, in an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer," as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), "loss" is the reasonably foreseeable pecuniary harm to the victim, which typically includes costs such as conducting a damage assessment and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.

For example, defendant H pays defendant D \$500 to inspect a home defendant H has contracted to purchase. Defendant D does not actually conduct an inspection, but rather mails defendant H a fraudulent inspection report stating that the property is free of all defects. Two days before closing, an underground oil tank – which must be removed before the sale may close – is discovered on the property. Due to the resulting unavoidable delay caused by the need to remove the tank, the closing must be postponed. Because defendant H's lease on his present residence expired on the original closing date, defendant H must locate temporary housing at additional cost. Further, defendant H loses the financing he had obtained and must procure new financing, at a higher interest rate, from another bank. On his way to the new bank to complete the paper work for the new loan, defendant H is in an automobile accident resulting in damage to the vehicle and injuries to defendant H. The \$500 paid for the inspection report is includeable in loss as a direct loss. The increased rental payment for temporary housing and the cost resulting from the higher interest rates are also included in loss because they follow in the ordinary course and, therefore, are foreseeable. However, although the damage incurred in the automobile accident would not have occurred but for the fraud, it nevertheless did not follow in the ordinary course of events and was not foreseeable by a reasonable person in the defendant's position. Accordingly, it is not included in

loss.]

[Option 2: "Actual loss" means the pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). "Pecuniary harm" includes the value of the property taken, damaged, or destroyed, and the value of money and services unlawfully taken. Ordinarily, in a case in which property is taken or destroyed, the loss is the fair market value of the particular property at issue. If the market value is difficult to ascertain or inadequately measures harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim.]

"Intended loss" means the pecuniary harm that was intended to result from the conduct for which the defendant is accountable under §1B1.3. "Intended loss" includes intended 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)[so long as the intended loss reasonably would have resulted if the facts were as the defendant believed them to be].

[Option 1:

(B) Time of measurement.—Loss ordinarily should be measured at the time of sentencing, except as provided herein.]

[Option 2:

(B) Time of measurement.—Loss ordinarily should be measured at the time the offense was detected. An offense is detected [ Option 2A: when the offense is discovered by a victim or a governmental agency.][Option 2B: when the defendant knew or reasonably should have known that the offense was detected [or about to be detected] by a victim or a public law enforcement agency.][Option 2C: the earlier of when an offense is discovered by a victim or a governmental agency or the defendant knew or reasonably should have known that the offense was detected [or about to be detected] by a victim or a public law enforcement agency.]

(C) Exclusions from Loss.—

[Option 1: (i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other opportunity costs.]

[Option 2: (i) Interest of any kind, except if it is bargained for as part of a lending transaction that is involved in the offense. In such a case, the court shall include any such interest that is accrued and unpaid as of the time the defendant knew or should have known that the offense had been detected.]

(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, even if such costs are reasonably foreseeable.

*[(iii) The value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the offense was detected.]*

*(I) For purposes of this subdivision.—*

*"Economic benefit" [includes][means] money, property, or services performed.*

*"Transferred means pledged or otherwise provided as collateral, returned, repaid, or otherwise conveyed.*

*(II) The value of any "economic benefit" transferred to the victim by the defendant ordinarily shall be measured at the time the offense was detected.*

*(III) However, in a case involving collateral pledged by a defendant, the "economic benefit" of such collateral to the victim for purposes of this subdivision is the amount the victim has recovered at the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the "economic benefit" of the collateral is its value at the time of sentencing.*

*[(IV) However, loss shall not be reduced by the value of:*

*(1) [benefits of de minimis value transferred by the defendant to the victim(s)][economic benefit transferred to the victim that has little or no value to the victim because it is substantially different from what the victim intended to receive]; or*

*(2) services fraudulently rendered to victims by persons falsely posing as licensed professionals, or goods falsely represented as approved by a governmental regulatory agency, or goods for which regulatory approval by a government agency was obtained by fraud.]*

*[Option 1: (V) In a case involving a fraudulent investment scheme, such as a Ponzi scheme, the loss shall not be reduced by the value of the economic benefit 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).]*

*[Option 2: (V) In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the benefit transferred to victims designed to lure additional "investments" in the scheme.]*

- (D) Estimation of Loss.—In order to determine the applicable offense level, 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, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, or destroyed; or if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property or other thing of value.
- (ii) The cost of repairs to damaged property, not to exceed the replacement cost had the property been destroyed.
- (iii) The approximate number of victims multiplied by the average loss to each victim.
- (iv) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

[Option 1: (v) The gain from the offense.]

[Option 2:

- (E) Pecuniary Gain.—The court shall use the defendant’s pecuniary gain as an alternative measure of loss if the pecuniary gain is greater than loss (which may be zero).

"Pecuniary gain" has the meaning given that term in Application Note 3(h) of the Commentary to §8A1.2 (Application Instructions - Organizations) (i.e., the before-tax profit resulting from the relevant conduct of the offense).]

[Option 3:

- (E) Pecuniary Gain.—The court shall use the defendant’s pecuniary gain as an alternative measure of loss if (i) loss cannot reasonably be determined; or (ii) gain is greater than loss.

"Pecuniary gain" has the meaning given that term in Application Note 3(h) of the Commentary to §8A1.2 (Application Instructions - Organizations) (i.e., the before-tax profit resulting from the relevant conduct of the offense).]

[Option 4:

(E) Gain.—The Court shall use the defendant's gain if loss cannot reasonably be determined. For purposes of this application note, "gain" means the proceeds from the illegal activity.]

[( F) Special Rules.—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. In any such case, loss 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 application note, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 15.

(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, the loss is \$50.

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 and actual wages paid.

In the case of a loan (e.g., a student educational loan), the value of the benefits shall be considered to be not less than the amount of savings in interest over the life of the loan compared to alternative loan terms for which the applicant would have qualified.]

(G) Departure Considerations.—

(i) 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.
- (III) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, anticipated profits, amounts based on an agreed-upon return or rate of return, or other opportunity 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) The offense endangered the solvency or financial security of one or more victims.

(ii) Downward Departure Considerations. There also 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. The following is a non-exhaustive list of factors that the court may consider in determining whether a downward departure is warranted.

- (I) The primary objective of the offense was a mitigating, non-monetary objective, such as to fund medical treatment for a sick parent. However, if, in addition to that primary objective, a substantial objective of the offense was to benefit the defendant economically, a downward departure for this reason would not ordinarily be warranted.
- [(II) The loss significantly exceeds the greater of the [defendant's] actual or intended [personal] gain, and therefore significantly overstates the culpability of the defendant.]

\* \* \*

Background:

\* \* \*

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the pecuniary harm caused by their



crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline. Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.

[Except as excluded above, both direct and indirect pecuniary harm that is a reasonably foreseeable result of the offense will be taken into account in determining the loss. Accordingly, in any particular case, the determination of loss may include consideration of factors not specifically set forth in this guideline. For example, in an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer," as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), "loss" is the reasonably foreseeable pecuniary harm to the victim, which typically includes costs such as conducting a damage assessment and restoring the system and data to their condition prior to the offense [, and any lost revenue due to interruption of service]. Likewise, in a product substitution case, the loss includes the victim's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or modifying the product so that it can be used for its intended purpose, plus the victim's reasonably foreseeable cost of correcting the actual or potential disruption to the victim's business caused by the product substitution. Similarly, in a defense contract fraud case, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable.]

\* \* \*

#### Option Two (Criminal Law Committee Proposal)

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

\* \* \*

#### Commentary

\* \* \*

#### 2. For purposes of subsection (b)(1)—

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

"Actual loss" means the reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).

"Reasonably foreseeable pecuniary harm" means pecuniary harm that the

*defendant knew or, under the circumstances of the particular case, reasonably should have known likely would result in the ordinary course of events from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).*

*"Intended loss" means the pecuniary harm that was intended to result from the conduct for which the defendant is accountable under §1B1.3, even if that harm would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an intended insurance fraud in which the claim exceeded the insured value), so long as the intended loss would reasonably have resulted if the facts were as the defendant believed them to be.*

(B) Exclusions from Loss.—*Loss does not include the following:*

- (i) *Interest of any kind, finance charges, late fees, penalties, anticipated profits, or amounts based on an agreed-upon return or rate of return.*
- (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, even if such costs are reasonably foreseeable.*

(C) Credits In Determining Loss.—

- (i) *Loss shall be determined by excluding the value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the offense was detected. However, loss shall not be reduced by the value of:*
  - (a) *benefits of de minimis value transferred by the defendant to the victim(s).*
  - (b) *services fraudulently rendered to victims by persons falsely posing as licensed professionals, or goods falsely represented as approved by a governmental regulatory agency, or goods for which regulatory approval by a government agency was obtained by fraud.*
- (ii) *In a case involving a fraudulent investment scheme, such as a "Ponzi scheme," the loss shall not be reduced by the value of the economic benefit transferred to any investor in the scheme in excess of that investor's principal investment (i.e., the gain to one investor in the scheme shall not be used to offset the loss to another investor in the scheme).*
- (iii) *For purposes of this subsection: (A) "economic benefit" means money, property, or services performed; and (B) "transferred" includes pledged or otherwise provided as collateral, returned, repaid, or otherwise conveyed.*

- (D) Time of measurement: Loss should ordinarily be measured at the time the offense was detected.
- (i) For purposes of this guideline, an offense is detected when the defendant knew or reasonably should have known that the offense was detected by a victim or a public law enforcement agency.
  - (ii) Except as provided in subsection (D)(iii), the value of any "economic benefit" transferred to the victim by the defendant for purposes of Subsection (C) shall be measured at the time the offense was detected.
  - (iii) However, in a case involving collateral pledged by a defendant, the "economic benefit" of such collateral to the victim for purposes of Subsection (C) is the amount the victim has recovered at the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the "economic benefit" of the collateral is its value at the time of sentencing.
- (E) Estimation of Loss. The court need not determine the precise amount of the loss. Rather, it need only make a reasonable estimate of 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 and using as appropriate and practicable under the circumstances, factors such as the following:
- (i) The fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, or destroyed; or if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property or other thing of value.
  - (ii) The cost of repairs to damaged property, not to exceed the replacement cost had the property been destroyed.
  - (iii) The approximate number of victims multiplied by the average loss to each victim.
  - (iv) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.
- (F) Gain. The court shall use the defendant's gain as an alternative measure of loss when loss cannot otherwise reasonably be determined, but the defendant's gain can reasonably be determined.

- (G) Special Rules. *The following special rules shall be used to assist in determining actual loss in the cases indicated:*
- (i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes. *In a case involving stolen or counterfeit credit cards (see 15 U.S.C. § 1602(k)), stolen or counterfeit access devices (see 18 U.S.C. § 1029(e)(1)), or purloined numbers or codes, the actual loss includes any unauthorized charges made with the credit cards, access devices, or numbers or codes. The actual loss determined for each such credit card, access device, number or code shall be not less than \$500.*
  - (ii) Diversion of Government Program Benefits. *In a case involving diversion of government program benefits, actual loss is the value of the benefits diverted from intended recipients or uses. For example, if the defendant was the lawful recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, the loss is \$50.*
  - (iii) Davis-Bacon Act Cases. *In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the actual loss is the difference between the legally required and actual wages paid.*
- (H) Departure Considerations.
- (1) Upward Departure Considerations. *There may be cases in which the loss substantially understates the seriousness of the offense or the culpability of the defendant. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:*
    - (a) *A primary objective of the offense was an aggravating, non-monetary objective, such as to inflict emotional harm.*
    - (b) *The offense resulted in 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.*
    - (c) *The offense created a risk of substantial loss beyond the loss determined above.*
    - (d) *The offense endangered the solvency or financial security of one or more victims.*
    - (e) *The offense involved a substantial risk that a victim would lose a significant portion of his or her net worth or suffer other significant*

*financial hardship.*

(2) *Downward Departure Considerations.* *There may be cases in which the loss substantially overstates the seriousness of the offense or the culpability of the defendant. In such cases, a downward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a downward departure is warranted:*

- (a) *The primary objective of the offense was a mitigating, non-monetary objective, such as to fund medical treatment for a sick parent. However, if, in addition to that primary objective, a substantial objective of the offense was to benefit the defendant economically, a downward departure for this reason would not ordinarily be warranted.*
- (b) *The loss significantly exceeds the greater of the defendant's actual or intended personal gain, and therefore significantly overstates the culpability of the defendant.*

*Background:*

\* \* \*  
\* \* \*

*The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.*

*Both direct and indirect pecuniary harm that is a reasonably foreseeable result of the offense will be taken into account in determining the loss. For example, in an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer," as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), "loss" is the reasonably foreseeable pecuniary harm to the victim, which typically includes costs such as conducting a damage assessment and restoring the system and data to their condition prior to the offense. Likewise, in a product substitution case, the loss includes the victim's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or modifying the product so that it can be used for its intended purpose, plus the victim's reasonably foreseeable cost of correcting the actual or potential disruption to the victim's business caused by the product substitution. Similarly, in a defense contract fraud case, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable.*

**Part D. Referring Guidelines for Theft and Fraud**