

**Synopsis of Proposed Amendment:** *The following proposed amendments are intended to be made in conjunction with a change to the loss tables in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or §2F1.1 (Fraud and Deceit). The amendments provide a 1-level increase in several guidelines that refer to the loss tables for cases in which the loss is more than \$2,000 but not more than \$5,000. This increase would be provided to avoid a 1-level decrease that would otherwise occur for offenses involving losses of more than \$2,000 but not more than \$5,000 because the proposed table does not provide the first increase for loss amount until loss exceeds \$5,000.*

**Proposed Amendments (Part D):**

**§2B2.3. Trespass**

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(b) Specific Offense Characteristics

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

(3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

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

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(b) Specific Offense Characteristic

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

(1) If the greater of the amount obtained or demanded (A) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

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

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(b) Specific Offense Characteristics

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

(1) If the greater of the value of the bribe or the improper benefit to be conferred (A) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

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

\* \* \*

(b) Specific Offense Characteristics

~~(+) If the face value of the counterfeit items exceeded \$2,000 increase by the corresponding number of levels from the table at §2F1.1 (Fraud and Deceit):~~

(1) If the face value of the counterfeit items (A) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

\* \* \*

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

\* \* \*

(b) Specific Offense Characteristics

~~(+) If the infringement amount exceeded \$2,000, increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to that amount:~~

- (1) If the infringement amount (A) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

\* \* \*

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

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(b) Specific Offense Characteristics

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

- (1) If the retail value of the motor vehicles or parts (A) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

\* \* \*

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

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

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

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

- (A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest (i) exceeded \$2,000 but

did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

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

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(b) Specific Offense Characteristics

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

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

(A) If the value of the gratuity (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

\* \* \*

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

\* \* \*

(b) Specific Offense Characteristic

(1) ~~If the value of the gratuity exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit)~~If the value of the gratuity (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

\* \* \*

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

\* \* \*

(b) Specific Offense Characteristic

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

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

(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

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

\* \* \*

(b) Specific Offense Characteristics

\* \* \*

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

- (2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.

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

\* \* \*

- (b) Specific Offense Characteristics

\* \* \*

- (2) (Apply the Greatest) If the offense involved:
  - (A) Distribution for pecuniary gain, increase by the number of levels from the table in ~~§2F1.1 (Fraud and Deceit)~~ §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.

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**§2G3.1. Importing, Mailing, or Transporting Obscene Matter; Transferring Obscene Matter to a Minor**

\* \* \*

- (b) Specific Offense Characteristics
  - (1) (Apply the Greatest) If the offense involved:
    - (A) Distribution for pecuniary gain, increase by the number of levels from the table in ~~§2F1.1 (Fraud and Deceit)~~ §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.

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

**Obscene Material**

\* \* \*

(b) Specific Offense Characteristics

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- (2) If 6 plus the offense level from the table at ~~2F1.1(b)(1)~~ in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the volume of commerce attributable to the defendant is greater than the offense level determined above, increase to that offense level.

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

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(b) Specific Offense Characteristics

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

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

- (A) If the market value of the fish, wildlife, or plants (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount, [but in no event more than [18] levels]; or

\* \* \*

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

- (a) Base Offense Level: 6 plus the number of offense levels from the table in ~~§2F1.1 (Fraud and Deceit)~~ §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the funds.

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(E) PROPOSED AMENDMENT: TECHNICAL AND CONFORMING AMENDMENTS

§1B1.2. Applicable Guidelines

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Commentary

Application Notes:

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

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

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Commentary

Application Notes:

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

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

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Commentary

\* \* \*

Application Notes:

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3. *"Counterfeit," as used in this section, means an instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety. Offenses involving genuine instruments that have been altered are covered under ~~§2F1.1 (Fraud and Deceit)~~ §2B1.1 (Theft, Property Destruction, and Fraud).*

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

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Commentary

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Background: *This guideline treats copyright and trademark violations much like theft and fraud.*

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

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§2B2.3. **Trespass**

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Commentary

Application Notes:

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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).

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§2B3.1. **Robbery**

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Commentary

Application Notes:

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3. 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).

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

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Commentary

Application Notes:

1. Subsection (b)(3), referring to an "organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts," provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or "chop shop." "Vehicles" refers to all forms of vehicles, including aircraft and watercraft. See Commentary to ~~§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)~~§2B1.1 (Theft, Property Destruction, and Fraud).
2. The term "increase by the corresponding number of levels from the table in ~~§2F1.1 (Fraud~~

~~and Deceit~~ §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount” as used in subsection (b)(1), refers to the number of levels corresponding to the retail value of the motor vehicles or parts involved.

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

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Commentary

Application Notes:

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

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

\* \* \*

Commentary

Application Notes:

\* \* \*

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

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

(a) Base Offense Level:

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(2) if the conduct was theft or destruction of mail, apply ~~§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)~~ §2B1.1 (Theft, Property Destruction, and Fraud);

~~(3) if the conduct was destruction of mail, apply §2B1.3 (Property Damage or Destruction);~~

Commentary

\* \* \*

*Background:* The statutory provision covered by this guideline is sometimes used to prosecute offenses more accurately described as theft or destruction of mail. In such cases, ~~§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)~~ or ~~§2B1.3 (Property Damage or Destruction)~~ Theft, Property Destruction, and Fraud

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**§2J1.1. Contempt**

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Commentary

Application Notes:

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2. For offenses involving the willful failure to pay court-ordered child support (violations of 18 U.S.C. § 228), the most analogous guideline is ~~§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)~~ §2B1.1 (Theft, Property Destruction, and Fraud). The amount of the loss is the amount of child support that the defendant willfully failed to pay. *Note:* This guideline applies to second and subsequent offenses under 18 U.S.C. § 228(a)(1) and to any offense under 18 U.S.C. § 228(a)(2) and (3). A first offense under 18 U.S.C. § 228(a)(1) is not covered by this guideline because it is a Class B misdemeanor.

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

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

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(3) 2 plus the offense level from ~~§2F1.1 (Fraud and Deceit)~~ if the offense was committed in connection with a scheme to defraud; or §2B1.1 Theft,

Property Destruction, and Fraud).

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

(b) Specific Offense Characteristics

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

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

(a) Base Offense Level: 6

(b) Cross References

(1) If the offense involved fraud, apply ~~§2F1.1 (Fraud and Deceit)~~§2B1.1(Theft, Property Destruction, and Fraud).

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Commentary

Application Notes:

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

\* \* \*

4. *The Commission has not promulgated a guideline for violations of 21 U.S.C. § 333(e) (offenses involving human growth hormones). Offenses involving anabolic steroids are covered by Chapter Two, Part D (Offenses Involving Drugs). In the case of an offense involving a substance purported to be an anabolic steroid, but not containing any active ingredient, apply ~~§2F1.1 (Fraud and Deceit)~~§2B1.1 Theft, Property Destruction, and Fraud) with "loss" measured by the amount paid, or to be paid, by the victim for such substance.*

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

- (a) Base Offense Level: 6
- (b) Cross Reference
  - (1) If the offense involved more than one vehicle, apply ~~§2F1.1 (Fraud and Deceit)~~§2B1.1 Theft, Property Destruction, and Fraud).

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Commentary

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*Background: The base offense level takes into account the deceptive aspect of the offense assuming a single vehicle was involved. If more than one vehicle was involved, the guideline for fraud and deception, ~~§2F1.1~~§2B1.1 (Theft, Property Destruction, and Fraud) is to be applied because it is designed to deal with a pattern or scheme.*

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**§2Q1.6. Hazardous or Injurious Devices on Federal Lands**

- (a) Base Offense Level (Apply the greatest):
  - \* \* \*
  - (2) If the intent was to obstruct the harvesting of timber, and property destruction resulted, apply ~~§2B1.3 (Property Damage or Destruction)~~§2B1.1 (Theft, Property Destruction, and Fraud);

\* \* \*

**§2T1.6. Failing to Collect or Truthfully Account for and Pay Over Tax**

- \* \* \*
- (b) Cross Reference
  - (1) Where the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it, apply ~~§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)~~§2B1.1 (Theft, Property Destruction, and Fraud) if the resulting offense level is

greater than that determined above.

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

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Commentary

Application Notes:

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

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

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

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

\* \* \*

(d)

\* \* \*

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

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Commentary

Application Notes:

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6. *Subsection (d) likely will be used with the greatest frequency. It provides that most property crimes (except robbery, burglary, extortion and the like), drug offenses, firearms offenses, and other crimes where the guidelines are based primarily on quantity or contemplate continuing behavior are to be grouped together. The list of instances in which this subsection should be applied is not exhaustive. Note, however, that certain guidelines are specifically excluded from the operation of subsection (d).*

*A conspiracy, attempt, or solicitation to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy, attempt, or solicitation is covered under subsection (d).*

*Counts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection. In such cases, the offense guideline that results in the highest offense level is used; see §3D1.3(b). The "same general type" of offense is to be construed broadly, ~~and would include, for example, larceny, embezzlement, forgery, and fraud.~~*

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

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

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Commentary

Application Notes:

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

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

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*Illustrations of the Operation of the Multiple-Count Rules*

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

~~32.~~

\* \* \*

- ~~3.~~ Defendant D was convicted of four counts arising out of a scheme pursuant to which he received kickbacks from subcontractors. The counts were as follows: (1) The defendant received \$27,000 from subcontractor A relating to contract X (Mail Fraud). (2) The defendant received \$12,000 from subcontractor A relating to contract X (Commercial Bribery). (3) The defendant received \$15,000 from subcontractor A relating to contract Y (Mail Fraud). (4) The defendant received \$20,000 from subcontractor B relating to contract Z (Commercial Bribery). The mail fraud counts are covered by ~~§2F1.1 (Fraud and Deceit)~~ §2B1.1 (Theft, Property Destruction, and Fraud). The bribery counts are covered by §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery), which treats the offense as a sophisticated

fraud. The total money involved is \$74,000, which results in an offense level of 14 under either §2B4.1 or ~~§2F1.1~~§2B1.1. Since these two guidelines produce identical offense levels, the combined offense level is 14.

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

\* \* \*

Commentary

Application Notes:

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3.

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

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

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- (a) §§2B1.1, ~~2B1.3~~2B1.4, 2B2.3, 2B4.1, 2B5.3, 2B6.1;

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§§2F1.1, 2F1.2;

\* \* \*

Commentary

Application Notes:

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- 2. If the Chapter Two offense guideline for a count is not listed in subsection (a) or (b) above, but the applicable guideline results in the determination of the offense level by use of a listed guideline, apply the provisions of §§8C2.2 through 8C2.9 to that count. For example, where the conduct set forth in a count of conviction ordinarily referenced to §2N2.1 (an offense guideline not listed in subsection (a)) establishes ~~§2F1.1 (Fraud and Deceit)~~§2B1.1 (Theft, Property Destruction, and Fraud) as the applicable offense guideline (an offense guideline listed in subsection (a)), §§8C2.2 through 8C2.9 would apply because the actual offense level is determined under ~~§2F1.1 (Fraud and Deceit)~~§2B1.1 (Theft, Property Destruction, and

*Fraud).*

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APPENDIX A - STATUTORY INDEX

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7 U.S.C. § 6	<del>2F1-12B1.1</del>	
7 U.S.C. § 6b(A)	<del>2F1-12B1.1</del>	
7 U.S.C. § 6b(B)	<del>2F1-12B1.1</del>	
7 U.S.C. § 6b(C)	<del>2F1-12B1.1</del>	
7 U.S.C. § 6c	<del>2F1-12B1.1</del>	
7 U.S.C. § 6h	<del>2F1-12B1.1</del>	
7 U.S.C. § 6o	<del>2F1-12B1.1</del>	
		* * *
7 U.S.C. § 13(a)(2)	<del>2F1-12B1.1</del>	
7 U.S.C. § 13(a)(3)	<del>2F1-12B1.1</del>	
7 U.S.C. § 13(a)(4)	<del>2F1-12B1.1</del>	
		* * *
7 U.S.C. § 13(d)	<del>2F1-22B1.4</del>	
7 U.S.C. § 13(f)	<del>2F1-22B1.4</del>	
		* * *
7 U.S.C. § 23	<del>2F1-12B1.1</del>	
		* * *
7 U.S.C. § 270	<del>2F1-12B1.1</del>	
		* * *
7 U.S.C. § 2024(b)	<del>2F1-12B1.1</del>	
7 U.S.C. § 2024(c)	<del>2F1-12B1.1</del>	
		* * *
12 U.S.C. § 631	<del>2F1-12B1.1</del>	
		* * *
15 U.S.C. § 50	<del>2F1-12B1.1, 2J1.1, 2J1.5</del>	
15 U.S.C. § 77e	<del>2F1-12B1.1</del>	
15 U.S.C. § 77q	<del>2F1-12B1.1</del>	
15 U.S.C. § 77x	<del>2F1-12B1.1</del>	
15 U.S.C. § 78j	<del>2F1-12B1.1, 2F1-22B1.4</del>	
15 U.S.C. § 78ff	<del>2F1-12B1.1</del>	
		* * *
15 U.S.C. § 80b-6	<del>2F1-12B1.1</del>	
15 U.S.C. § 158	<del>2F1-12B1.1</del>	
15 U.S.C. § 645(a)	<del>2F1-12B1.1</del>	
15 U.S.C. § 645(b)	<del>2B1.1, 2F1-1</del>	
15 U.S.C. § 645(c)	<del>2B1.1, 2F1-1</del>	
		* * *

15 U.S.C. § 714m(a)	<del>2F1-1</del> 2B1.1	
15 U.S.C. § 714m(b)	2B1.1, <del>2F1-1</del>	
15 U.S.C. § 1281	<del>2B1-3</del> ,2B1.1	* * *
15 U.S.C. § 1644	<del>2F1-1</del> 2B1.1	
15 U.S.C. § 1681q	<del>2F1-1</del> 2B1.1	
15 U.S.C. § 1693n(a)	<del>2F1-1</del> 2B1.1	
15 U.S.C. § 1281	<del>2B1-3</del> 2B1.1(for offenses committed prior to July 5, 1994)	
		* * *
16 U.S.C. § 114	2B1.1, <del>2B1-3</del>	
16 U.S.C. § 117c	2B1.1, <del>2B1-3</del>	
16 U.S.C. § 123	2B1.1, <del>2B1-3</del> , 2B2.3	
16 U.S.C. § 146	2B1.1, <del>2B1-3</del> , 2B2.3	
16 U.S.C. § 413	2B1.1, <del>2B1-3</del>	
16 U.S.C. § 433	2B1.1, <del>2B1-3</del>	
		* * *
16 U.S.C. § 831t(b)	<del>2F1-1</del> 2B1.1	
16 U.S.C. § 831t(c)	<del>2F1-1</del> 2B1.1, 2X1.1	
		* * *
18 U.S.C. § 32(a),(b)	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2A5.1, 2A5.2, <del>2B1-3</del> 2B1.1, 2K1.4, 2X1.1	
		* * *
18 U.S.C. § 33	2A2.1, 2A2.2, <del>2B1-3</del> 2B1.1, 2K1.4	
		* * *
18 U.S.C. § 37	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A3.1, 2A3.4, 2A4.1, 2A5.1, 2A5.2, <del>2B1-3</del> 2B1.1, 2B3.1, 2K1.4, 2X1.1	
18 U.S.C. § 43	<del>2B1-3</del> 2B1.1	
		* * *
18 U.S.C. § 112(a)	2A2.1, 2A2.2, 2A2.3, 2A4.1, <del>2B1-3</del> 2B1.1, 2K1.4	
		* * *
18 U.S.C. § 152	2B4.1, <del>2F1-1</del> 2B1.1, 2J1.3	
18 U.S.C. § 153	2B1.1, <del>2F1-1</del>	
18 U.S.C. § 155	<del>2F1-1</del> 2B1.1	
		* * *

18 U.S.C. § 225            2B1.1, 2B4.1, ~~2F1.1~~

\* \* \*

18 U.S.C. § 285            2B1.1, ~~2F1.1~~  
18 U.S.C. § 286            ~~2F1.1~~2B1.1  
18 U.S.C. § 287            ~~2F1.1~~2B1.1  
18 U.S.C. § 288            ~~2F1.1~~2B1.1  
18 U.S.C. § 289            ~~2F1.1~~2B1.1  
18 U.S.C. § 332            2B1.1, ~~2F1.1~~  
18 U.S.C. § 335            ~~2F1.1~~2B1.1

\* \* \*

18 U.S.C. § 470            2B1.1, 2B5.1, ~~2F1.1~~  
18 U.S.C. § 471            2B1.1, 2B5.1, ~~2F1.1~~  
18 U.S.C. § 472            2B1.1, 2B5.1, ~~2F1.1~~  
18 U.S.C. § 473            2B1.1, 2B5.1, ~~2F1.1~~  
18 U.S.C. § 474            2B1.1, 2B5.1, ~~2F1.1~~  
18 U.S.C. § 474A          2B1.1, 2B5.1, ~~2F1.1~~  
18 U.S.C. § 476            2B1.1, 2B5.1, ~~2F1.1~~  
18 U.S.C. § 477            2B1.1, 2B5.1, ~~2F1.1~~  
18 U.S.C. § 478            ~~2F1.1~~2B1.1  
18 U.S.C. § 479            ~~2F1.1~~2B1.1  
18 U.S.C. § 480            ~~2F1.1~~2B1.1  
18 U.S.C. § 481            ~~2F1.1~~2B1.1  
18 U.S.C. § 482            ~~2F1.1~~2B1.1  
18 U.S.C. § 483            ~~2F1.1~~2B1.1  
18 U.S.C. § 484            2B1.1, 2B5.1, ~~2F1.1~~  
18 U.S.C. § 485            2B1.1, 2B5.1, ~~2F1.1~~  
18 U.S.C. § 486            2B1.1, 2B5.1, ~~2F1.1~~

\* \* \*

18 U.S.C. § 488            ~~2F1.1~~2B1.1

\* \* \*

18 U.S.C. § 491            2B1.1, 2B5.1, ~~2F1.1~~  
18 U.S.C. § 493            2B1.1, 2B5.1, ~~2F1.1~~  
18 U.S.C. § 494            ~~2F1.1~~2B1.1  
18 U.S.C. § 495            ~~2F1.1~~2B1.1  
18 U.S.C. § 496            ~~2F1.1~~2B1.1, 2T3.1  
18 U.S.C. § 497            ~~2F1.1~~2B1.1  
18 U.S.C. § 498            ~~2F1.1~~2B1.1  
18 U.S.C. § 499            ~~2F1.1~~2B1.1

		* * *
18 U.S.C. § 500	2B1.1, 2B5.1, <del>2F1.1</del>	
18 U.S.C. § 501	2B1.1, 2B5.1, <del>2F1.1</del>	
18 U.S.C. § 502	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 503	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 505	<del>2F1.1</del> 2B1.1, 2J1.2	
18 U.S.C. § 506	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 507	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 508	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 509	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 510	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 513	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 514	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 642	2B1.1, 2B5.1, <del>2F1.1</del>	
		* * *
18 U.S.C. § 656	2B1.1, <del>2F1.1</del>	
18 U.S.C. § 657	2B1.1, <del>2F1.1</del>	
		* * *
18 U.S.C. § 659	2B1.1, <del>2F1.1</del>	
		* * *
18 U.S.C. § 663	2B1.1, <del>2F1.1</del>	
		* * *
18 U.S.C. § 665(a)	2B1.1, <del>2F1.1</del>	
		* * *
18 U.S.C. § 666(a)(1)(A)	2B1.1, <del>2F1.1</del>	
		* * *
18 U.S.C. § 709	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 712	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 911	<del>2F1.1</del> 2B1.1, 2L2.2	
		* * *
18 U.S.C. § 914	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 915	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 917	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 970(a)	<del>2B1.1</del> 2B1.1, 2K1.4	
		* * *
18 U.S.C. § 1001	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1002	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1003	2B1.1, 2B5.1, <del>2F1.1</del>	
18 U.S.C. § 1004	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1005	<del>2F1.1</del> 2B1.1	

18 U.S.C. § 1006	<del>2F1.1</del> 2B1.1, 2S1.3	
18 U.S.C. § 1007	<del>2F1.1</del> 2B1.1, 2S1.3	
		* * *
18 U.S.C. § 1010	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1011	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1012	2B1.1, 2C1.3, <del>2F1.1</del>	
18 U.S.C. § 1013	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1014	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1015	<del>2F1.1</del> 2B1.1, 2J1.3, 2L2.1, 2L2.2	
18 U.S.C. § 1016	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1017	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1018	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1019	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1020	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1021	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1022	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1023	2B1.1, <del>2F1.1</del>	
		* * *
18 U.S.C. § 1025	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1026	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 1028	<del>2F1.1</del> 2B1.1, 2L2.1, 2L2.2	
18 U.S.C. § 1029	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 1030(a)(4)	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1030(a)(5)	<del>2B1.1</del> 2B1.1	
		* * *
18 U.S.C. § 1030(a)(6)	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 1031	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1032	2B1.1, 2B4.1, <del>2F1.1</del>	
18 U.S.C. § 1033	2B1.1, <del>2F1.1</del> , 2J1.2	
18 U.S.C. § 1035	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 1341	2B1.1, 2C1.7, <del>2F1.1</del>	
18 U.S.C. § 1342	2B1.1, 2C1.7, <del>2F1.1</del>	
18 U.S.C. § 1343	2B1.1, 2C1.7, <del>2F1.1</del>	
18 U.S.C. § 1344	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1347	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 1361	<del>2B1.1</del> 2B1.1	
18 U.S.C. § 1362	<del>2B1.1</del> 2B1.1, 2K1.4	
18 U.S.C. § 1363	<del>2B1.1</del> 2B1.1, 2K1.4	
		* * *
18 U.S.C. § 1366	<del>2B1.1</del> 2B1.1	

18 U.S.C. § 1422	2B1.1, 2C1.2, <del>2F1.1</del>	* * *
		* * *
18 U.S.C. § 1702	2B1.1, <del>2B1.3</del> , 2H3.3	
18 U.S.C. § 1703	2B1.1, <del>2B1.3</del> , 2H3.3	
18 U.S.C. § 1704	2B1.1, <del>2F1.1</del>	
18 U.S.C. § 1705	<del>2B1.3</del> 2B1.1	
18 U.S.C. § 1706	<del>2B1.3</del> 2B1.1	
		* * *
		* * *
18 U.S.C. § 1708	2B1.1, <del>2F1.1</del>	
		* * *
18 U.S.C. § 1712	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 1716C	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 1720	<del>2F1.1</del> 2B1.1	
		* * *
		* * *
18 U.S.C. § 1728	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 1852	2B1.1, <del>2B1.3</del>	
18 U.S.C. § 1853	2B1.1, <del>2B1.3</del>	
18 U.S.C. § 1854	2B1.1, <del>2B1.3</del>	
		* * *
18 U.S.C. § 1857	<del>2B1.3</del> 2B1.1, 2B2.3	
		* * *
18 U.S.C. § 1861	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 1902	<del>2F1.1</del> 2B1.4	
		* * *
18 U.S.C. § 1919	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1920	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 1923	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 1992	2A1.1, <del>2B1.3</del> <sup>2B1.1</sup> 2B1.1, 2K1.4, 2X1.1	
		* * *
18 U.S.C. § 2071	2B1.1, 2B1.3	
18 U.S.C. § 2072	<del>2F1.1</del> 2B1.1	
18 U.S.C. § 2073	<del>2F1.1</del> 2B1.1	
		* * *
18 U.S.C. § 2197	<del>2F1.1</del> 2B1.1	
		* * *



18 U.S.C. § 2272	<del>2F1-1</del> 2B1.1	
		* * *
18 U.S.C. § 2275	<del>2B1-3</del> 2B1.1, 2K1.4	
18 U.S.C. § 2276	<del>2B1-3</del> 2B1.1, 2B2.1	
		* * *
18 U.S.C. § 2280	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, <del>2B1-3</del> 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1	
18 U.S.C. § 2281	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A2.1, 2A2.2, 2A2.3, 2A4.1, <del>2B1-3</del> 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1	
		* * *
18 U.S.C. § 2314	2B1.1, <del>2F1-1</del>	
18 U.S.C. § 2315	2B1.1, <del>2F1-1</del>	
		* * *
18 U.S.C. § 2332a	2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.5, 2A2.1, 2A2.2, <del>2B1-3</del> 2B1.1, 2K1.4	
		* * *
19 U.S.C. § 1434	<del>2F1-1</del> 2B1.1, 2T3.1	
19 U.S.C. § 1435	<del>2F1-1</del> 2B1.1, 2T3.1	
19 U.S.C. § 1436	<del>2F1-1</del> 2B1.1, 2T3.1	
		* * *
19 U.S.C. § 1919	<del>2F1-1</del> 2B1.1	
19 U.S.C. § 2316	<del>2F1-1</del> 2B1.1	
		* * *
20 U.S.C. § 1097(a)	2B1.1, <del>2F1-1</del>	
20 U.S.C. § 1097(b)	<del>2F1-1</del> 2B1.1	
20 U.S.C. § 1097(d)	<del>2F1-1</del> 2B1.1	
		* * *
21 U.S.C. § 333(a)(2)	<del>2F1-1</del> 2B1.1, 2N2.1	
		* * *
22 U.S.C. § 1980(g)	<del>2F1-1</del> 2B1.1	
22 U.S.C. § 2197(n)	<del>2F1-1</del> 2B1.1	
		* * *
22 U.S.C. § 4221	<del>2F1-1</del> 2B1.1	
25 U.S.C. § 450d	2B1.1, <del>2F1-1</del>	
		* * *
26 U.S.C. § 7208	<del>2F1-1</del> 2B1.1	

		* * *
26 U.S.C. § 7214	2B1.1, 2C1.1, 2C1.2, <del>2F1.1</del>	
		* * *
26 U.S.C. § 7232	<del>2F1.1</del> 2B1.1	
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29 U.S.C. § 1141	2B1.1, 2B3.2, <del>2F1.1</del>	
		* * *
38 U.S.C. § 787	<del>2F1.1</del> 2B1.1	
		* * *
38 U.S.C. § 3502	<del>2F1.1</del> 2B1.1	
		* * *
41 U.S.C. § 423(e)	2B1.1, 2C1.1, 2C1.7, <del>2F1.1</del>	
		* * *
42 U.S.C. § 408	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1307(a)	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1307(b)	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1320a-7b	2B1.1, 2B4.1, <del>2F1.1</del>	
42 U.S.C. § 1383(d)(2)	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1383a(a)	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1383a(b)	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1395nn(a)	<del>2F1.1</del> 2B1.1	
		* * *
42 U.S.C. § 1395nn(c)	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1396h(a)	<del>2F1.1</del> 2B1.1	
		* * *
42 U.S.C. § 1713	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1760(g)	2B1.1, <del>2F1.1</del>	
42 U.S.C. § 1761(o)(1)	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 1761(o)(2)	2B1.1, <del>2F1.1</del>	
		* * *
42 U.S.C. § 3220(a)	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 3220(b)	2B1.1, <del>2F1.1</del>	
42 U.S.C. § 3426	<del>2F1.1</del> 2B1.1	
		* * *
42 U.S.C. § 3791	2B1.1, <del>2F1.1</del>	
42 U.S.C. § 3792	<del>2F1.1</del> 2B1.1	
42 U.S.C. § 3795	2B1.1, <del>2F1.1</del>	
42 U.S.C. § 5157(a)	<del>2F1.1</del> 2B1.1	
		* * *
45 U.S.C. § 359(a)	<del>2F1.1</del> 2B1.1	
46 U.S.C. § 1276	<del>2F1.1</del> 2B1.1	
		* * *
49 U.S.C. § 121	<del>2F1.1</del> 2B1.1(for offenses committed prior to July 5, 1994)	

\* \* \*

49 U.S.C. § 11903      ~~2F1-12B1.1~~  
49 U.S.C. § 11904      ~~2F1-12B1.1~~ (2B4.1 for offenses committed prior to January 1, 1996)

\* \* \*

49 U.S.C. § 14912      ~~2F1-12B1.1~~  
49 U.S.C. § 16102      ~~2F1-12B1.1~~

\* \* \*

49 U.S.C. § 60123(d)    ~~2B1-32B1.1~~  
49 U.S.C. § 80116      ~~2F1-12B1.1~~  
49 U.S.C. § 80501      ~~2B1-32B1.1~~  
49 U.S.C. App. § 1687(g)    ~~2B1-32B1.1~~(for offenses committed prior to July 5, 1994)

**Part F: Computing Tax Loss under §2T1.1**

**Synopsis of Proposed Amendment:** *This proposed amendment addresses a circuit conflict regarding how tax loss under §2T1.1 (Tax Evasion) is computed for cases that involve a defendant's under-reporting of income on both individual and corporate tax returns. Such a case often arises when (1) the defendant fails to report, and pay corporate income taxes on, income earned by the corporation, (2) diverts that unreported corporate income for the defendant's personal use, and (3) fails to report, and to pay personal income taxes on, that income. The proposed amendment clarifies that the amount of the tax loss is the aggregate amount of federal income tax that would have due by both the corporation and the individual defendant.*

*More specifically, the circuits are split on which methodology should be used to calculate tax loss in these cases. Two circuits use a sequential calculation method the aggregate tax loss. Under this method, the court determines the corporate federal income tax that would have been due, subtracts that amount from the amount diverted to the defendant personally, then determines the personal federal income tax that would have been due on the reduced diverted amount. See United States v. Harvey, 996 F.2d 919 (7<sup>th</sup> Cir. 1993); United States v. Martinez-Rios, 143 F.3d 662 (2d Cir. 1998). In contrast, one circuit holds that the court should determine the aggregate tax loss by adding the corporate federal income tax that would have been due on the total amount of unreported income and the personal federal income tax that would have been due on that total amount. See United States v. Cseplo, 42 F.3d 36 (6<sup>th</sup> Cir. 1994).*

*The amendment adopts the Harvey approach, clarifying the existing rule in Application Note 7 of §2T1.1 that "if the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together".*

*The amendment also clarifies that the loss in §2T1.1 refers to federal, and not state and local, tax loss. The alternative interpretation of this provision would greatly complicate the guideline because of the multitude of state and local tax rates and provisions.*

*The amendment also adds an application note to §2T1.1 clarifying that a tax evasion count and a count charging the offense that provided the income on which tax was evaded are grouped together under §3D1.2(c). This application note is consistent with the longstanding view of the staff as to how such counts should be treated for grouping purposes.*

**Proposed Amendment (Part F)**

**§2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents**

\* \* \*

(c) Special Instructions

For the purposes of this guideline --

- (1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).

Notes:

(A) If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved improperly claiming a deduction or an exemption, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction or exemption (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(C) If the offense involved improperly claiming a deduction to provide a basis for tax evasion in the future, the tax loss shall be treated as equal to 28% of the amount of the improperly claimed deduction (34% if the taxpayer is a corporation) plus 100% of any false credits claimed against tax, unless a more accurate determination of the tax loss can be made.

(D) If the offense involved (i) conduct described in paragraphs (A), (B), or (C); and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.

- (2) If the offense involved failure to file a tax return, the tax loss is the amount of tax that the taxpayer owed and did not pay.

Notes:

(A) If the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made.

(B) If the offense involved (i) conduct described in paragraph (A), and; and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.

\* \* \*

Commentary

\* \* \*

Application Notes:

1. *"Tax loss" is defined in subsection (c). The tax loss does not include interest or penalties. Although the definition of tax loss corresponds to what is commonly called the "criminal figures," its amount is to be determined by the same rules applicable in determining any other sentencing factor. In some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts.*

*"Tax loss" means federal tax loss; it does not include state or local tax loss.*

\* \* \*

7. *If the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together. Accordingly, in a case in which a defendant fails to report income derived from a corporation on either the defendant's individual tax return or the corporate tax return, the tax loss is the aggregate amount due to the treasury from the offenses taken together. For example, the defendant, the sole owner of a corporation, fraudulently understates the corporation's income in the amount of \$100,000 on the corporation's tax return, diverts the funds to his own use, and does not report these funds on the defendant's individual tax return. For purposes of this example, assume that the applicable tax rate is 34% and the applicable individual tax rate is 28%. The tax loss attributable to the defendant's corporate tax returns is \$34,000 (\$100,000 multiplied by 34%). The tax loss attributable to the defendant's individual tax return is based on the unreported \$100,000 in income less the \$34,000 in corporate tax on these same funds. This avoids "double counting" because the \$34,000 in corporate tax reduces the defendant's effective income from \$100,000 to \$66,000. The tax loss attributable to the defendant's individual tax return is \$18,480 (\$66,000 multiplied by 28%). Consequently, the aggregate tax loss for the offenses, taken together, is \$52,480 (\$34,000 plus \$18,480).*

8. *If the defendant is sentenced for a count charging an offense from which the defendant derived income and a count charging a tax offense involving that criminally derived income, the counts are to be grouped together as closely related counts under subsection (c) of §3D1.2 (Groups of Closely Related Counts). Such counts are to be grouped together whether or not the amount of criminally derived income is sufficient to warrant the enhancement under subsection (b)(1).*

**Issues for Comment:**

1. *The proposed amendment uses a sequential method to determine tax loss in cases in which the defendant is both the individual and the corporate tax payer. The Commission invites comment on whether §2T1.1 instead should be amended to provide that, in such cases, the aggregate tax loss is the sum of (A) the total amount of unreported income multiplied by the corporate tax rate; and (B) the total amount of unreported income multiplied by the individual tax rate.*
2. *The Commission also invites comment on whether the definition of "tax loss" should include interest and penalties in evasion-of-payment tax cases. Such cases are distinguishable from evasion-of-assessment tax cases.*
3. *The Commission also invites comment on whether the "sophisticated concealment" enhancement in §§2T1.1(b)(2) and 2T1.4(b)(2) should be revised to conform to the "sophisticated means" enhancement in §2F1.1(b)(6)(C), including imposition of a minimum of offense level of level 12.*

**Proposed Amendment: Aggravating and Mitigating Factors in Fraud and Theft Cases**

13. **Synopsis of Proposed Amendment:** *This amendment proposes two options to provide for the consideration of a number of aggravating and mitigating factors that may be present in theft and fraud cases. Option One provides for a four-level increase if the offense involved significantly aggravating factors, a two-level increase if the offense involved aggravating factors, a two-level decrease if the offense involved mitigating factors, and a four-level decrease if the offense involved significantly mitigating factors. Option One provides a non-exhaustive list of aggravating and mitigating factors for the court to consider in determining whether, on balance and after weighing the presence and intensity of the factors, the offense involves significantly aggravating, aggravating, mitigating, or significantly mitigating factors. In contrast, Option Two provides for a two-level increase if the offense involved certain aggravating factor(s) and no mitigating factors or if the aggravating factor(s) present in the case outweigh all mitigating factors present in the case, and a two-level decrease if the offense involved certain mitigating factors and no aggravating factors or if the mitigating factor(s) present in the case outweigh all aggravating factors present in the case. Option Two provides an exhaustive list of aggravating and mitigating factors that may trigger application of the enhancement.*

*An issue for comment follows regarding whether any of the factors in the existing specific offense characteristics in the fraud (§2F1.1), theft (§2B1.1), and property destruction (§2B1.3) guidelines should be incorporated into the aggravating and mitigating factors found in either of Option One or Two and, accordingly, eliminated as a specific offense characteristic within the guideline.*

**Proposed Amendment: Option One: Aggravating and Mitigating Factors in Fraud and Theft Cases**

**§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**

\* \* \*

Section 2B1.1, as amended by Amendment 12, is further amended by redesignating subsections (b)(8) through (b)(14) as subsections (b)(9) through (b)(15), respectively; and by inserting after subsection (b)(7) the following:

(b) Specific Offense Characteristics

\* \* \*

(8) If the offense involved—

- (A) aggravating circumstances, increase by 2 levels;
- [(B) significantly aggravating circumstances, increase by 4 levels;]
- (C) mitigating circumstances, decrease by 2 levels;
- [(D) significantly mitigating circumstances, decrease by 4 levels.]

[In cases falling between (A) and (B), increase by 3 levels; in cases falling between (C) and (D), decrease by 3 levels.]

\* \* \*

Commentary

Application Notes:

\* \* \*

17. (A) *Whether an offense involved aggravating circumstances or significantly aggravating circumstances is based on consideration of the presence and intensity of aggravating factors, such as the following:*
- (i) *the offense caused or risked reasonably foreseeable, substantial non-monetary harm;*
  - (ii) *false statements were made for the purpose of facilitating some other crime;*
  - (iii) *the offense caused reasonably foreseeable, physical or psychological harm or emotional trauma;*
  - (iv) *the offense endangered national security or military readiness;*
  - (v) *the offense caused a loss of confidence in an important institution;*
  - (vi) *the offense involved the knowing endangerment of the solvency of one or more victims;*
  - (vii) *the offense involved more than [10][25] victims;*
  - (viii) *the offense involved the destruction or damage to irreplaceable items of cultural, historical or archeological significance;*
  - [(ix) *the loss amount determined above was at or near the highest amount possible for the range of loss that corresponds to the applicable offense level determined by the loss table].*
- (B) *Whether an offense contains mitigating circumstances or significantly mitigating circumstances is based on consideration of the presence and intensity of mitigating factors such as the following:*
- (i) *the defendant, prior to detection of the offense, made significant efforts to limit the pecuniary harm caused by the crime;*
  - (ii) *[the defendant's attempted offense was impossible or extremely unrealistic;]*
  - (iii) *the defendant's actual or intended gain was substantially less than the loss determined above;*
  - (iv) *the offense was not committed for commercial advantage or financial gain;*
  - (v) *the offense was committed because of extreme financial hardship [caused*



*by extraordinary unforeseen circumstances not caused by the defendant and beyond the defendant's control] [caused by excessive costs for the life sustaining needs of the defendant or his immediate family];*

(vi) *the offense involved minimal or no planning;*

[(vii) *the loss amount determined above was at or near the lowest amount possible for the range of loss that corresponds to the applicable offense level determined by the loss table].*

(C) *In a case involving both aggravating and mitigating factors, the court will determine, after consideration of all of the factors, whether the case involves, on balance, aggravating[, significantly aggravating,] or mitigating[, or significantly mitigating] circumstances.*

(D) *When applying this section, the court must make specific findings regarding the offense characteristics, and clearly articulate the factors and weight given those factors, that the court is relying on to determine whether the offense involved aggravating circumstances, [significantly aggravating circumstances,] mitigating circumstances [or significantly mitigating circumstances]. Such a determination should be based on the presence and intensity, rather than on a simple counting, of the factors listed above.*

(E) *Consistent with the overall structure of the guidelines, the government bears the burden of persuasion in establishing the factors associated with aggravating circumstances, while the defendant bears the burden of persuasion in establishing the factors associated with mitigating circumstances.*

(F) *Application of this section does not preclude consideration of any of these factors, for the purposes of an upward or downward departure, even though the reason for the departure has been taken into consideration in determining the guideline range, if the court determines that the factor is present to an unusual or extraordinary degree.*

**Proposed Amendment:        Option Two: Aggravating and Mitigating Factors in Fraud and Theft Cases**

**§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**

\* \* \*

Section 2B1.1, as amended by Amendment 12, is further amended by redesignating subsections (b)(8) through (b)(14) as subsections (b)(9) through (b)(15), respectively; and by inserting after subsection (b)(7) the following:

- \* \* \*
- (b) Specific Offense Characteristics
- \* \* \*
- (8) If the offense—
- (A) involved (i) at least one qualifying aggravating factor and no qualifying mitigating factors, or (ii) one or more qualifying aggravating factors the seriousness of which outweigh the mitigating effect of all qualifying mitigating factors present in the offense, increase by 2 levels; or
- (B) involved (i) at least one qualifying mitigating factor and no qualifying aggravating factors, or (ii) one or more qualifying mitigating factors the mitigating effect of which outweigh the seriousness of all qualifying aggravating factors present in the offense, decrease by 2 levels.

Commentary

\* \* \*

Application Notes:

\* \* \*

17. For purposes of subsection (b)(8):

*"Qualifying aggravating factor" means any of the following:*

- (A) *the offense involved [a large number of] [more than 10] victims, and subsection (b)(3) is not applicable;*
- (B) *the offense [involved the knowing endangerment of the solvency of one or more victims] [caused one or more victims to suffer insolvency or substantial financial hardship]; and subsection (b)(8) does not apply;*
- (C) *the offense caused reasonably foreseeable, substantial non-monetary harm (e.g., physical or psychological harm or emotional trauma);*
- (D) *the defendant's conduct was unusually heinous, cruel, brutal or degrading to a victim;*
- (E) *the offense was committed for the purpose of facilitating another crime;*

- (F) *the offense endangered public health or safety, national security, or military readiness;*
- (G) *the offense (i) substantially disrupted an important government function; or (ii) caused a loss of confidence in an important institution and the enhancement in subsection (b)(8)(A) does not apply; or*
- (H) *the offense involved destruction or substantial damage to unique property of environmental, cultural, historical, or archeological significance.*

*"Qualifying mitigating factor" means any of the following:*

- (A) *prior to detection of the offense, the defendant remedied, or made every reasonable effort to remedy, the harm resulting from the offense;*
- (B) *the defendant's attempted offense (i) did not involve a government "sting" operation; (ii) was highly improbable of success; and (iii) did not result in actual loss;*
- (C) *the defendant neither intended to profit, nor actually profited, from the offense, and the offense was not committed for the purpose of inflicting non-monetary harm; or*
- (D) *the defendant committed the offense in order to avoid a perceived greater harm, other than the avoidance or mitigation of personal financial hardship, (e.g., the defendant committed the offense in order to fund medical treatment for a gravely ill family member).*

*Subsection (b)(8) applies in cases in which qualifying aggravating factors or qualifying mitigating factors are present to such a degree that an increase or a decrease in the sentence, respectively, is appropriate. An increase or a decrease in the sentence pursuant to subsection (b)(8) shall not apply in a case in which both qualifying aggravating factors and qualifying mitigating factors are present, but the seriousness of the qualifying aggravating factors is equal to the mitigating effect of the qualifying mitigating factors.*

*Application of subsection (b)(8) does not preclude consideration of any of the factors listed in such subsection for purposes of an upward or downward departure if the court determines that the factor is present to an unusual or extraordinary degree.*

**Issue for Comment:** *The Commission invites comment whether any of the factors in the existing specific offense characteristics in the fraud (§2F1.1), theft (§2B1.1), and property destruction (§2B1.3) guidelines should be incorporated into the aggravating and mitigating factors found in*

either of Option One or Two and, accordingly, eliminated as a separate specific offense characteristic within the guideline.

**Proposed Amendment: Sentencing Table Amendment and Alternative to Sentencing Table Amendment**

- 14. Synopsis of Proposed Amendment:** *In August 2000, the Commission indicated that one of its policy priorities would be to begin a review of the guidelines relating to Criminal History. See 65 FR 50034, 50035 (Aug. 16, 2000). As part of that long range review and as part of a review of the Economic Crime Package set forth in Amendment #12, the Commission is publishing Part I of this amendment (i.e., the proposed Sentencing Table amendment) as one item that may facilitate public discussion and inform Commission consideration about related issues. The Sentencing Table amendment proposes to change the Sentencing Table in Chapter Five by expanding each of Zones B and C by two levels in Criminal History Categories I and II.*

*The second part of this amendment, intended as an alternative to the Sentencing Table amendment, proposes a new guideline, which would be added at the end of Chapter Three or in Chapter Five immediately following the Sentencing Table. It provides a two-level reduction in offense level for certain less serious economic offenses, in furtherance of the statutory command in 28 U.S.C. § 994(j). The eligibility criteria generally parallel those determined by Congress under 18 U.S.C. § 3553(f) to gain relief from applicable controlled substance mandatory minimums. Certain additional requirements are added in order to more fully define the categories of first offenders who have not been convicted of a "crime of violence or an otherwise serious offense." Importantly, eligibility for the reduction also hinges on making, or committing to make, full restitution.*

**Proposed Amendment:**

**Option 1 (Sentencing Table Amendment)**

The Sentencing Table in Chapter Five, Part A, is amended by increasing Zone B by two levels in Criminal History Category I (so that Zone B contains offense levels 9, 10, 11, and 12 in Criminal History Category I); by increasing Zone B by two levels in Criminal History Category II (so that Zone B contains offense levels 6, 7, 8, 9, 10, and 11 in Criminal History Category II); by increasing Zone C by two levels in Criminal History Category I (so that Zone C contains offense levels 13, 14, 15, and 16 in Criminal History Category I); and by increasing Zone C by two levels in Criminal History Category II (so that Zone C contains offense levels 12, 13, 14, and 15 in Criminal History Category II).

The proposed amendment as executed is as follows:

**SENTENCING TABLE**  
**(in months of imprisonment)**

	Offense Level	Criminal History Category (Criminal History Points)					
		I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
Zone A	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
Zone B	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
Zone D	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

**Option 2 (Alternative to Sentencing Table Amendment)**

Chapter Five, Part A, is amended by adding at the end the following:

**§5A1.2. Adjustment for Certain Less Serious Economic Crimes**

If each of subsections (a) through (f) applies, decrease the offense level by 2 levels—

- (a) the defendant's Chapter Two offense level is determined solely by applying one or more of the following offense guidelines in Chapter Two:
  - (1) §§2B1.1, 2B1.3, 2B2.1, 2F1.1, 2N2.1, 2N1.3, 2S1.1, 2S1.2, 2S1.3, 2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.8, 2T2.1, 2T2.2, 2T3.1;
  - (2) §2X1.1 (if the Chapter Two offense level for the substantive offense or offenses is determined solely from a guideline in subsection (a)(1));
  - (3) §2X2.1, §2X3.1, §2X4.1 (if the Chapter Two offense level for the underlying offense is determined solely from a guideline in subsection (a)(1));
  - (4) §2X5.1 (if the Chapter Two offense level is determined solely from a guideline in subsection (a)(1) determined to be sufficiently analogous).
- (b) the defendant has no criminal history points;
- (c) the defendant did not use violence or a threat of violence or possess or use a firearm or other dangerous weapon;
- (d) the offense did not involve bodily injury or a conscious or reckless risk of serious bodily injury;
- (e) the defendant did not receive an increase in offense level under any of the following guideline sections:
  - (1) §2B1.1(b)(4)(B) - (b)(7);
  - (2) §2F1.1(b)(4) - (b)(8);
  - (3) §2S1.1(b)(1);
  - (4) §2S1.2(b)(1)(A);

- (5) §2S1.3(b)(1);
  - (6) §2T1.1(b)(1) or (b)(2);
  - (7) §2T1.4(b)(1) or (b)(2);
  - (8) Chapter Three, Parts A, B, or C;
  - (9) §4B1.3; and
- (f) the defendant, prior to sentencing, (1) voluntarily makes full restitution; or (2)(A) notifies the government and the court that the defendant agrees to make full restitution as determined by the court,(B) fully cooperates with the government and the court in determining the amount of such restitution; and (C) makes partial restitution to the extent able to do so.

Commentary

Application Notes:

1. *For the purposes of this guideline—*

*"Dangerous weapon" and "firearm," as used in subdivision (2), "bodily injury," "offense," and "serious bodily injury," are defined in the Commentary to §1B1.1 (Application Instructions).*

*"Full restitution" means the amount of restitution required by law under 18 U.S.C. § 3663.*

*"No criminal history points," means the defendant has zero criminal history points as determined under §4A1.1 (Criminal History Category).*

*"Substantive offense" has the meaning given that term in §2X1.1, Application Note 3.*

2. *If the Chapter Two offense guideline for a count is not listed in subsection (a) above, but the applicable guideline results in the determination of the Chapter Two offense level solely by use of one or more listed guidelines, the defendant qualifies for a reduction under this guideline. For example, where the conduct set forth in a count of conviction ordinarily referenced to §2E5.3 (an offense guideline not listed in subsection (a)) establishes §2F1.1 (Fraud and Deceit) as the applicable offense guideline (an offense guideline listed in subsection (a)), this guideline would apply because the actual offense level is determined under §2F1.1 (Fraud and Deceit).*

**Proposed Amendment: Firearms Table**

15. **Synopsis of Proposed Amendment:** *This proposed amendment presents two options for implementing the recommendation of the Bureau of Alcohol, Tobacco and Firearms (ATF)*

to increase the penalties in §2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition) for offenses involving more than 100 firearms.

Option 1 amends the firearms table in §2K2.1 to provide an additional one-level increase for offenses that involve 100-199 firearms, and an additional two-level increase for offenses that involve more than 200 firearms. The ATF reports that these increases are needed to provide adequate and proportionate punishment in cases that involve large numbers of firearms. Under the current table, a defendant who trafficked in 200 firearms receives the same six-level enhancement as a defendant who trafficked in 50 firearms. According to the ATF, from 1995 through 1997, nearly a quarter of all defendants sentenced under §2K2.1 for trafficking more than 50 firearms received sentences of less than one year, or no term of imprisonment whatsoever, despite the encouraged upward departure provided in Application Note 15 to §2K2.1.

Option 1 also makes a conforming change to Application Note 16 regarding upward departures.

Option 2 amends the table to provide increases of two level increments and compresses the table by providing a wider range for the number of firearms for each increase. Compressing the table in this manner diminishes some of the fact-finding required to determine how many firearms were involved in the offense.

**Proposed Amendment:**

**Option 1: ATF Proposal**

**§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

\* \* \*

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

	<u>Number of Firearms</u>	<u>Increase in Level</u>
(A)	3-4	add 1
(B)	5-7	add 2
(C)	8-12	add 3
(D)	13-24	add 4
(E)	25-49	add 5
(F)	<del>50 or more</del> 50-99	add 6
(G)	100-199	add 7
(H)	200 or more	add 8.



\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

16. An upward departure may be warranted in any of the following circumstances: (1) the number of firearms significantly substantially exceeded fifty200; (2) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (3) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (4) the offense posed a substantial risk of death or bodily injury to multiple individuals.

\* \* \*

**Option 2: Two-level increments**

**§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

\* \* \*

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

	<u>Number of Firearms</u>	<u>Increase in Level</u>
(A)	3-4	add 1
(B)	5-7	add 2
(C)	8-12	add 3
(D)	13-24	add 4
(E)	25-49	add 5
(F)	50 or more	add 6
(A)	3-7	add 2
(B)	8-24	add 4
(C)	25-99	add 6
(D)	100-199	add 8
(E)	200 or more	add 10

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

- 16. *An upward departure may be warranted in any of the following circumstances: (1) the number of firearms significantly substantially exceeded fifty200; (2) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (3) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (4) the offense posed a substantial risk of death or bodily injury to multiple individuals.*

**Proposed Amendment: Prohibited Person Definition**

- 16. **Synopsis of Proposed Amendment:** *This proposed amendment modifies the definition of "prohibited person" in §§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials) and 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to refer to the relevant prohibited persons statutes for explosive and firearm offenses, respectively. (There is no statutory definition of "prohibited person".) The relevant statutory provision for §2K1.3 is 18 U.S.C. § 842(i), and for §2K2.1, the relevant statutory provisions are 18 U.S.C. § 922(g) and (n).*

*The proposed amendment also clarifies that the relevant time to determine whether a person qualifies as a "prohibited person" is as of the time the defendant committed the instant offense. This clarification is consistent with the proposed amendment on prior felonies, which provides that increased base offense levels are only applied if the defendant committed the instant offense subsequent to sustaining certain felony convictions.*

**Proposed Amendment:**

**§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials**

\* \* \*

- (a) Base Offense Level (Apply the Greatest):
  - (1) **24**, if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense; ~~or~~
  - (2) **20**, if the defendant had one prior felony conviction of either a crime of violence or a controlled substance offense; ~~or~~
  - (3) **16**, if the defendant (A) ~~is~~ was a prohibited person at the time the defendant committed the instant offense; or (B) knowingly distributed explosive materials to a prohibited person; or

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

- 3. ~~"Prohibited person," as used in subsection (a)(3), means anyone who: (i) is under indictment for, or has been convicted of, a "crime punishable by imprisonment for a term exceeding one year," as defined at 18 U.S.C. § 841(l); (ii) is a fugitive from justice; (iii) is an unlawful user of, or is addicted to, any controlled substance; or (iv) has been adjudicated as a mental defective or involuntarily committed to a mental institution. For purposes of subsection (a)(3), "prohibited person" means any person designated in 18 U.S.C. § 842(i).~~

\* \* \*

**§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

\* \* \*

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

- (1) 26, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense; ~~or~~
- (2) 24, if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense; ~~or~~
- (3) 22, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant had one prior felony conviction of either a crime of violence or controlled substance offense; ~~or~~
- (4) 20, if --

\* \* \*

- (B) the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); and the defendant (i) ~~is~~ was a prohibited person at the time the defendant committed the instant offense; or (ii) is convicted under 18 U.S.C. § 922(d); ~~or~~

\* \* \*

- (5) 18, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); or
- (6) 14, if the defendant (A) is was a prohibited person at the time the defendant committed the instant offense; or (B) is convicted under 18 U.S.C. § 922(d); or

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

6. ~~"Prohibited person," as used in subsections (a)(4)(B) and (a)(6), means anyone who: (i) is under indictment for, or has been convicted of, a "crime punishable by imprisonment for more than one year," as defined by 18 U.S.C. § 921(a)(20); (ii) is a fugitive from justice; (iii) is an unlawful user of, or is addicted to, any controlled substance; (iv) has been adjudicated as a mental defective or involuntarily committed to a mental institution; (v) being an alien, is illegally or unlawfully in the United States; (vi) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child as defined in 18 U.S.C. § 922(d)(8); or (vii) has been convicted in any court of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33). For purposes of subsections (a)(4)(B) and (a)(6), a "prohibited person" is any person designated in 18 U.S.C. § 922(g) or § 922(n).~~

**Proposed Amendment: Prior Felonies**

17. **Synopsis of Proposed Amendment:** *This proposed amendment resolves a circuit conflict regarding whether a crime committed after the commission of the instant offense of felon in possession of a firearm, but sentenced before sentencing on the instant offense, is counted as a "felony conviction" for purposes of determining the defendant's base offense level. The proposed amendment adopts the minority view that an offense committed after the commission of any part of the offense cannot be counted as a "felony conviction". Accordingly, the proposed amendment clarifies, in §2K2.1(a)(1), (a)(2), (a)(3) and (a)(4)(A), that the instant offense must have been committed subsequent to sustaining the prior felony conviction(s). In so doing, the proposed amendment adopts a rule that is consistent with the requirements concerning the use of prior convictions under §§4B1.1 (Career Offender) and 4B1.2 (Definitions of Terms Used in Section 4B1.1).*

*The proposed amendment also makes conforming changes to §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving*

Explosive Materials).

**Proposed Amendment:**

**§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials;  
Prohibited Transactions Involving Explosive Materials**

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

- (1) ~~24, if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense, or committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;~~
- (2) ~~20, if the defendant had one prior felony conviction of either a crime of violence or a controlled substance offense, or committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;~~

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

2. ~~"Crime of violence," "controlled substance offense," and "prior felony conviction(s)," as used in subsections (a)(1) and (a)(2), are defined at §4B1.2 (Definitions of Terms Used in Section 4B1.1), subsection (a), subsection (b), and Application Note 1 of the Commentary, respectively. [For purposes of determining the number of such convictions under subsections (a)(1) and (a)(2), count any such prior conviction that receives any points under §4A1.1 (Criminal History Category).]~~

~~For purposes of this guideline—~~

~~"Controlled substance offense" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~

~~"Crime of violence" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~

~~"Felony conviction" means a prior adult federal or state conviction for an offense~~

*punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).*

\* \* \*

9. *For purposes of applying subsection (a)(1) or (a)(2), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1), use only those felony convictions that are counted separately under §4A1.1 (a), (b), or (c). See §4A1.2(a)(2); §4A1.2, comment. (n.3).*

*Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), or (a)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

**§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition**

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

- (1) ~~26~~, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant ~~had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or~~ committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
- (2) ~~24~~, if the defendant ~~had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or~~ committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense.
- (3) ~~22~~, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant ~~had one prior felony conviction of either a crime of violence or controlled substance offense; or~~ committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;
- (4) 20, if --

- (A) the defendant ~~had one prior felony conviction of either a crime of violence or a controlled substance offense; or committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or~~
  - (B) the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); and the defendant (i) is a prohibited person; or (ii) is convicted under 18 U.S.C. § 922(d); ~~or~~
- (5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); ~~or~~
  - (6) **14**, if the defendant (A) is a prohibited person; or (B) is convicted under 18 U.S.C. § 922(d); ~~or~~

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

- 5. ~~"Crime of violence," "controlled substance offense," and "prior felony conviction(s)," are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1), subsection (a), subsection (b), and Application Note 1 of the Commentary, respectively. [For purposes of determining the number of such convictions under subsections (a)(1), (a)(2), (a)(3), and (a)(4)(A), count any such prior conviction that receives any points under §4A1.1 (Criminal History Category).]~~

~~For purposes of this guideline—~~

~~"Controlled substance offense" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~

~~"Crime of violence" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).~~

~~"Felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult~~

conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

\* \* \*

15. For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) or (a)(2), use only those felony convictions that are counted separately under §4A1.1 (a), (b), or (c). See §4A1.2(a)(2); §4A1.2, comment. (n.3).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

\* \* \*

#### **Proposed Amendment: Immigration**

18. **Synopsis of Proposed Amendment:** This amendment modifies §2L1.2(b)(1) (Unlawful Entering or Remaining in the United States) to provide more graduated sentencing enhancements based on the seriousness of the prior aggravated felony conviction. Subsection (b)(1)(A) currently provides a 16-level enhancement if the defendant was previously deported after a criminal conviction, and the conviction was for an aggravated felony.

The Commission has received comment that §2L1.2 often results in offense levels that are disproportionate to the seriousness of the prior aggravated felony conviction. This occurs for two primary reasons. First, 8 U.S.C. § 1101(a)(43) and, by reference, §2L1.2, defines aggravated felony very broadly. Second, subsection (b)(1) neither distinguishes among the many types of aggravated felonies for purposes of triggering the 16-level enhancement, nor provides for smaller increases for less serious aggravated felonies.

The proposed amendment is intended to achieve more proportionate punishment by providing tiered sentencing enhancements based on the period of imprisonment the defendant actually served for the prior aggravated felony. In addition, the amendment contains two options for providing increased punishment for the most serious aggravated felonies. Under Option One, the 16-level enhancement would be triggered not only by the period of imprisonment actually served but also by all aggravated felonies involving death, serious bodily injury, the discharge or other use of a firearm or dangerous weapon, or a serious drug trafficking offense, regardless of the period of imprisonment actually served by the defendant. Alternatively, Option Two would encourage an upward departure in such cases, which could result in an increase greater than the 16-level enhancement for these most serious aggravated felonies.



*The Commission invites comment as to whether the 16-level enhancement provided by subsection (b)(1) should be graduated on some basis other than period of imprisonment actually served, perhaps by extending the approach taken by Option 1 throughout the other tiers. In addition, the Commission invites comment as to whether aggravated felonies that were committed beyond a certain number of years prior to the instant offense should not count for purposes of triggering subsection (b)(1).*

**Proposed Amendment:**

**§2L1.2. Unlawfully Entering or Remaining in the United States**

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

(b) Specific Offense Characteristic

(1) If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in the United States following a removal order issued after a criminal conviction, increase as follows (if more than one applies, use the greater):

~~(A) If the conviction was for an aggravated felony, increase by 16 levels.~~

(A) If the conviction was for an aggravated felony; and—

(i) (I) the defendant actually served a period of imprisonment of at least ten years for such conviction; or

[Option One:

(II) the aggravated felony involved death, serious bodily injury, the discharge or other use of a firearm or dangerous weapon, or a serious drug trafficking offense],

increase by **16** levels;

(ii) the defendant actually served a period of imprisonment of at least five years but less than ten years, increase by **[10][12]** levels;

(iii) the defendant actually served a period of imprisonment of at least two years but less than five years, increase by **[8]** levels; or

(iv) (I) the defendant actually served a period of

imprisonment of less than two years, or (II) the sentence imposed was only a term of probation or other sentence alternative to a term of imprisonment, or a combination of probation and other sentence alternative to a term of imprisonment, increase by [6] levels.

- (B) If the conviction was for (i) any ~~other~~ felony other than an aggravated felony, or (ii) three or more misdemeanors that are crimes of violence or ~~misdemeanor~~ controlled substance offenses, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326.  
For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—~~For purposes of this guideline—~~:

~~"Deported after a conviction," means that the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction. An alien has previously been "deported" if he or she has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.~~

~~"Remained in the United States following a removal order issued after a conviction," means that the removal order was subsequent to the conviction, whether or not the removal order was in response to such conviction.~~

~~"Aggravated felony," is defined as the meaning given that term in 8 U.S.C. § 1101(a)(43) without regard to the date of conviction of the aggravated felony.~~

~~"Crime of violence" and "controlled substance offense" are defined in §4B1.2. For purposes of subsection (b)(1)(B), "crime of violence" includes offenses punishable by imprisonment for a term of one year or less.~~

~~"Controlled substance offense"—~~

- (A) means an offense under federal or state law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; and

- (B) includes—
- (i) unlawfully possessing a listed chemical with intent to manufacture a controlled substance (see 21 U.S.C. § 841(d)(1));
  - (ii) unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (see 21 U.S.C. § 843(a)(6));
  - (iii) maintaining any place for the purpose of facilitating an offense described in subdivision (A) (see 21 U.S.C. § 856);
  - (iv) using a communications facility in committing, causing, or facilitating an offense described in subdivision (A) (see 21 U.S.C. § 843(b)); and
  - (v) the offenses of aiding and abetting, conspiring, and attempting to commit any offense described in subdivision (A) or (B)(i), (ii), (iii), or (iv).

~~"Firearms offense" means any offense covered by Chapter Two, Part K, Subpart 2, or any similar offense under state or local law.~~

"Felony offense" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

"Misdemeanor" means any federal, state, or local offense punishable by imprisonment for a term of imprisonment of one year or less.

"Serious bodily injury" has the meaning given that term in Application Note 1 of the Commentary to §1B1.1 (Application Instructions).

"Serious drug trafficking offense" has the meaning given that term in Application Note 1 of the Commentary to §5K2.20 (Aberrant Behavior).

2. Application of Subsection (b)(1).—For purposes of subsection (b)(1):

- (A) A defendant shall be considered to be deported if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.
- (B) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction.
- (C) A defendant shall be considered to have remained in the United States following a removal order issued after a conviction if the removal order was subsequent to the

conviction, whether or not the removal order was in response to such conviction.

(D) *The period of imprisonment that the defendant actually served for the aggravated felony includes, in the case of a defendant who escaped from imprisonment, time the defendant would have served if the defendant had not escaped.*

~~2. This guideline applies only to felonies. A first offense under 8 U.S.C. § 1325(a) is a Class B misdemeanor for which no guideline has been promulgated. A prior sentence for such offense, however, is to be considered under the provisions of Chapter Four, Part A (Criminal History).~~

~~3. In the case of a defendant with repeated prior instances of deportation, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).~~

~~4.3. Computation of Criminal History Points.—An adjustment under subsection (b) for a prior felony conviction applies in addition to any criminal history points added for such conviction in Prior felony and misdemeanor convictions taken into account under subsection (b) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).~~

~~5. Aggravated felonies that trigger the adjustment from subsection (b)(1)(A) vary widely. If subsection (b)(1)(A) applies, and (A) the defendant has previously been convicted of only one felony offense, (B) such offense was not a crime of violence or firearms offense, and (C) the term of imprisonment imposed for such offense did not exceed one year, a downward departure may be warranted based on the seriousness of the aggravated felony.~~

~~4. Departure Provisions.—~~

[Option Two:

(A) Upward Departure Provisions.—There may be cases in which subsection (b)(1) applies but the applicable enhancement understates the seriousness of the aggravated felony taken into account under that subsection. In such cases, an upward departure may be warranted. For example an upward departure may be warranted if the aggravated felony involved any of the following:

(i) *Serious bodily injury, as defined in Application Note 1 of the Commentary to §1B1.1 (Application Instructions), or death.*

(ii) *The discharge or other use of a firearm or a dangerous weapon.*

(iii) *A serious drug trafficking offense, as defined in §5K2.20 (Aberrant Behavior).]*

(B) Downward Departure Provision.—A downward departure may be warranted in a case in which the defendant was not advised, at the time the defendant previously was deported or removed, of the criminal consequences of reentry after deportation

or removal.

**Issues for Comment:** *The Commission invites comment regarding whether the enhancement in §2L1.2(b)(1) for a previous conviction for an aggravated felony should be graduated based on a factor other than, or in addition to, the period of imprisonment the defendant actually served for the aggravated felony. Should the enhancement be graduated based on the type of aggravated felony involved? For example, should the approach of Option One for subsection (b)(1)(A)(i) be extended to subdivisions (ii) through (iv) of subsection (b)(1)?*

*The Commission also invites comment on whether the enhancement in §2L1.2(b)(1) for a previous conviction for an aggravated felony should take into consideration only aggravated felonies that were committed within a specified time period, e.g., fifteen years, or the counting rules provided by §4A1.2 (Definitions and Instructions for Computing Criminal History).*

**Proposed Amendment: Nuclear, Biological, and Chemical Weapons**

**19. Synopsis of Proposed Amendment:** *This is a two-part amendment.*

*First, in response to the sense of Congress contained in section 1423(a) of the National Defense Authorization Act for Fiscal Year 1997 that guideline penalties are inadequate for certain offenses involving the importation, attempted importation, exportation, and attempted exportation of nuclear, chemical, and biological weapons, materials, or technologies, the proposed amendment increases by four levels the base offense levels in §§2M5.1 (the guideline covering the evasion of export controls) and 2M5.2 (the guideline covering the exportation of arms, munitions, and military equipment without a license). A four-level increase is proposed for those offenses in subsection (a)(1) of both §§2M5.1 and 2M5.2 to make the penalty structure for those offenses proportional to other national security guidelines in Chapter Two, Part M. In addition, the Statutory Index is proposed to be amended to refer one of the offenses, 50 U.S.C. § 1701 (which currently is not referenced in the Statutory Index), to both §§2M5.1 and 2M5.2.*

*Second, the proposed amendment substantially revises §2M6.1 (the guideline covering the unlawful acquisition, alteration, use, transfer, or possession of nuclear material, weapons, or facilities) in order to incorporate into that guideline two relatively new offenses, 18 U.S.C. § 175, relating to biological weapons, and 18 U.S.C. § 229, relating to chemical weapons. Specifically, the amendment proposes to modify §2M6.1 in the following ways:*

- (1) It provides two alternative base offense levels. The first base offense level of level 42 applies if the offense was committed with the intent to injure the United States or to aid a foreign government or foreign terrorist organization. This incorporates into the base offense level the 12-level enhancement currently found in the guideline for such intent and does not change the overall offense level for these offenses. "Foreign terrorist organizations" are added because Congress has found that such groups are investing in the acquisition of unconventional weapons such as nuclear, biological, and chemical agents. It is anticipated that this base offense*

level will apply to cases as apparently originally contemplated by the guideline, *i.e.*, the acquisition of nuclear material from defense, or even civilian, nuclear facilities in order to assist foreign governments, thereby creating a threat to the national security, as well as to cases that implicate the national security but involve biological and chemical weapons.

The proposed amendment provides that, if the base offense level of level 42 applies, none of the adjustments in subsection (b) shall apply. This is intended to cap the very high offense level attendant to this base offense level and also to preclude the possibility of a downward adjustment if the offense involved only a threat. However, if death results, the cross reference allows for the possibility of a higher offense level through application of the first degree murder guideline.

It is anticipated that the second base offense level, of level [28][30], will apply in most cases, specifically those cases that do not threaten the national security of the United States.

- (2) It provides a six-level decrease, in subsection (b)(1), if the offense involved only a threat to use a nuclear, biological, or chemical weapon or material, and there was no conduct evidencing an intent to carry out the threat. After review of the cases and meeting with representatives of the Department of Justice and the Federal Bureau of Investigations, it became apparent that the least culpable offenders, and the least serious of these offenses, are those that involve non-credible threats. The extent of the adjustment (*i.e.*, six levels) mirrors in reverse the six-level increase in the threatening communications guideline, §2A6.1, if the conduct involved an actual intent to carry out the threat.
- (3) It provides, in brackets, a two-level enhancement, in subsection (b)(2), if the offense involved particularly dangerous types of nuclear, chemical, and biological weapons and materials. Those weapons and materials are defined in the guideline commentary by reference to the applicable statutory and regulatory provisions. This enhancement acknowledges the distinctions already made in international treaties, provisions of title 18, United States Code, the relevant regulatory schemes, and by representatives of the Department of Justice and the Federal Bureau of Investigations, that certain types of weapons and materials are inherently more lethal and pose a greater threat to the public safety.
- (4) It provides an enhancement, in subsection (b)(3), if any victim sustained serious bodily injury or death. This enhancement is modeled after the enhancement found in §2N1.1, the guideline covering tampering with consumer products. Like that guideline, the amendment provides commentary (in the background) stating that the base offense level reflects that the offense typically will involve a risk of serious bodily injury or death or will cause or intend to cause bodily injury.
- (5) It provides two options for cases involving a substantial disruption of public, governmental, or business functions or services, or the substantial expenditure of

*funds for clean up and decontamination efforts. Option One provides for a four-level enhancement in such cases. Option Two provides for an upward departure provision.*

- (6) *It provides two cross references, if the resulting offense level is greater, if death resulted (in which case the first or second degree murder guideline would apply) or if the offense was tantamount to attempted murder (in which case the attempted murder guideline would apply). These cross references are also modeled after cross references found in §2N1.1, the guideline for tampering with consumer products.*
- (7) *It provides a special instruction that if the defendant is convicted of one count involving the death of, serious bodily injury to, or attempted murder of, more than one victim, the grouping rules will be applied as if the defendant had been convicted of separate counts for each such victim.*
- (8) *It amends the Statutory Index to refer 18 U.S.C. §§ 175 and 229 to §2M6.1 and to delete a number of guideline references for 18 U.S.C. § 2332a and instead provide a reference for that offense to §§2K1.4 (in the case of weapons of mass destruction that are explosive devices and 2M6.1 (in the case of other weapons of mass destruction).*

*Three issues for comment follow the proposed amendment.*

**Proposed Amendment:**

**§2M5.1. Evasion of Export Controls**

- (a) Base Offense Level (Apply the greater):
  - (1) ~~22~~[26], if national security controls or ~~nuclear-proliferation~~ controls relating to the proliferation of nuclear, biological, or chemical weapons or materials were evaded; or
  - (2) 14, otherwise.

\* \* \*

**§2M5.2. Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License**

- (a) Base Offense Level:
  - (1) ~~22~~[26], except as provided in subdivision (2) below;

- (2) 14, if the offense involved only non-fully automatic small arms (rifles, handguns, or shotguns), and the number of weapons did not exceed ten.

\* \* \*

**PART M - OFFENSES INVOLVING NATIONAL DEFENSE  
AND WEAPONS OF MASS DESTRUCTION**

\* \* \*

**6. ~~ATOMIC ENERGY~~ NUCLEAR, BIOLOGICAL, AND CHEMICAL WEAPONS AND  
MATERIALS AND OTHER WEAPONS OF MASS DESTRUCTION**

**§2M6.1. Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use,  
Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological  
Agents, Chemical Weapons, or Other Weapons of Mass Destruction**

(a) Base Offense Level: ~~30~~

(1) [42], if the offense was committed with intent (A) to injure the United States; or (B) to aid a foreign nation or a foreign terrorist organization; or

(2) [28][30], otherwise.

(b) Specific Offense Characteristics

~~(1) If the offense was committed with intent to injure the United States or to aid a foreign nation, increase by 12 levels:~~

If subsection (a)(2) applies, and:

(1) If the offense (A) involved a threat to use a nuclear weapon, nuclear material, nuclear byproduct material, biological agent, chemical weapon, or other weapon of mass destruction; and (B) did not involve any conduct evidencing an intent or ability to carry out the threat, decrease by [6] levels.

[(2) If the offense involved (A) a select biological agent; (B) a listed precursor or a listed toxic chemical; (C) nuclear material or nuclear byproduct material; or (D) a weapon of mass destruction that contains any agent, precursor, toxic chemical, or material referred to in subdivision (A), (B), or (C), increase by [2] levels.]

(3) If (A) any victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) any victim sustained serious bodily injury,



increase by 2 levels; or (C) the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

[Option One: (4) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by [4] levels.]

(c) Cross References

- (1) If the offense resulted in death, apply §2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or §2A1.2 (Second Degree Murder) in any other case, if the resulting offense level is greater than that determined above.
- (2) If the offense was tantamount to attempted murder, apply §2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level is greater than that determined above.

(d) Special Instruction

- (1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts) shall be applied as if the defendant had been convicted of a separate count for each such victim.

Commentary

Statutory Provisions: 18 U.S.C. §§ 175, 229, 831, 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)); 42 U.S.C. §§ 2077(b), 2122, 2131. Also, 18 U.S.C. § 831 (only where the conduct is similar to that proscribed by the aforementioned statutory provisions). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Biological agent" has the meaning given that term in 18 U.S.C. § 178(1).

"Chemical weapon" has the meaning given that term in 18 U.S.C. § 229F(1).

"Foreign terrorist organization" (A) means an organization that engages in terrorist activity that threatens the security of a national of the United States or the national security of the United States; and (B) includes an organization designated by the Secretary of State as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. § 1219). "National of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(22)).

"Listed precursor or listed toxic chemical" means a precursor or toxic chemical, respectively, listed in Schedule I of the Annex on Chemicals to the Chemical Weapons Convention. *See* 18 U.S.C. § 229F(6)(B), (8)(B). "Precursor" has the meaning given that term in 18 U.S.C. § 229F(6)(A). "Toxic chemical" has the meaning given that term in 18 U.S.C. § 229F(8)(A).

"Nuclear byproduct material" has the meaning given that term in 18 U.S.C. § 831(f)(2).

"Nuclear material" has the meaning given that term in 18 U.S.C. § 831(f)(1).

"Select biological agent" means a biological agent or toxin identified by the Secretary of Health and Human Services on the select agent list established pursuant to section 511(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. 104–132. *See* 42 C.F.R. part 62. "Toxin" has the meaning given that term in 18 U.S.C. § 178(2).

"Weapon of mass destruction" (A) has the meaning given that term in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D); and (B) includes any radiological dispersal device, regardless of whether the radioactive material contained in that radiological dispersal device was nuclear material, nuclear byproduct material, or other radioactive material (such as low-grade medical, industrial, or research radioactive waste). "Radiological dispersal device" means any device, including any weapon or equipment, other than a nuclear explosion, specifically designed to disseminate radioactive material in order to cause property destruction, damage, or bodily injury by means of the radiation produced by the decay of the radioactive material.

2. Inapplicability of Subsection (b) to Subsection (a)(1) Cases.—If subsection (a)(1) applies, do not apply subsection (b).
3. Applicability of Subsections (b)(2) and (b)(4) in Threat Cases.—The application of subsection (b)(1) in a case involving a threat shall not preclude the application of either subsection (b)(2) or subsection (b)(4) in such a case.
4. Application of Special Instruction.—Subsection (d) applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under subsection (a), subsections (a) and (b), or subsection (c).

5. Inapplicability of §3A1.4 in Certain Cases.—If subsection (a)(1) applies because the offense was committed with the intent to aid an international foreign terrorist organization, do not apply §3A1.4 (Terrorism).
6. Departure Provisions.—
  - (A) Upward Departure Provisions.—There may be cases in which the offense level determined above substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of circumstances in which an upward departure may be warranted:
    - (i) The offense posed a substantial risk of death or serious bodily injury to numerous victims (e.g., chlorine gas was released in a crowded movie theater).
    - (ii) The offense caused extreme psychological injury. See §5K2.3 (Extreme Psychological Injury).
    - (iii) The offense caused substantial property damage or monetary loss. See §5K2.5 (Property Damage or Loss).

[Option Two:

- (iv) The offense resulted in substantial disruption of public, governmental, or business functions or services, or the response to the offense required a substantial expenditure (e.g., to provide environmental decontamination of the affected area). See, e.g., §5K2.7 (Disruption of Governmental Function).]
- (B) Downward Departure Provision.—There may be cases in which the offense level determined above substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted. For example, in the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.

Background: The base offense level reflects that this offense typically poses a risk of death or serious bodily injury to one or more victims; or causes, or is intended to cause, bodily injury.

## APPENDIX A - STATUTORY INDEX

\* \* \*

18 U.S.C. § 155	2F1.1
18 U.S.C. § 175	2M6.1
18 U.S.C. § 201(b)(1)	2C1.1

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18 U.S.C. § 228	2J1.1	
18 U.S.C. § 229	2M6.1	
18 U.S.C. § 241	2H1.1, 2H2.1	
		* * *
18 U.S.C. § 2332a	<del>2A1.1, 2A1.2, 2A1.3,</del>	
	<del>2A1.4, 2A1.5, 2A2.1,</del>	
	<del>2A2.2, 2B1.3, 2K1.4, 2M6.1</del>	
		* * *
50 U.S.C. App. § 462	2M4.1	
50 U.S.C. App. § 1701	2M5.1, 2M5.2	
50 U.S.C. App. § 2410	2M5.1	

**Issues for Comment:**

1. *The Commission invites comment on whether the above proposal appropriately addresses the offenses in 18 U.S.C. § 175, relating to biological weapons, and in 18 U.S.C. § 229, relating to chemical weapons. Specifically, are these offenses more appropriately addressed through a guideline that incorporates into the base offense level any or all of the aggravating factors that may be associated with these offenses (e.g., the inherent psychological harm, the risk of bodily harm, and the economic harm associated with cleanup and decontamination efforts), or is it preferable to address these harms as specific offense characteristics?*
2. *The Commission also invites comment on how threats to use nuclear, biological, or chemical weapons should be punished under the guidelines. Should there be a greater differentiation in punishment under proposed §2M6.1 between offenses that involve only the threatened use of such weapons (whether or not the defendant engaged in conduct evidencing an intent or ability to carry out the threat) and other conduct punished under that guideline? Alternatively, should the threatened use of such weapons be punished under §2A6.1 (Threatening or Harassing Communications), and if so, how severely should such conduct be punished in relation to other types of threats punished under that guideline?*
3. *How should attempts, conspiracies, and solicitations to commit an offense under 18 U.S.C. § 175 or § 229 be covered under the guidelines? Should such attempts, conspiracies, and solicitations be expressly covered by the proposed new guideline, §2M6.1, or should §2X1.1 (Attempt, Solicitation, or Conspiracy) apply?*

**20. Proposed Amendment: Money Laundering**

*Overview*

*The proposed amendment consolidates the two current money laundering guidelines,*

§§2S1.1 and 2S1.2, and applies to convictions under either 18 U.S.C. § 1956 or §1957. The primary feature of the consolidated amendment structure is that it ties offense levels for money laundering more closely to the underlying criminal conduct that was the source of the criminally derived funds. The amendment accomplishes this objective by separating money laundering offenders, regardless of the statute of conviction, into two categories for purposes of determining the base offense level. The base offense level is determined differently, depending on whether the defendant is a "direct" or a "third party" money launderer (money launderers who commit the underlying offense which generated the criminal proceeds versus money launderers who did not commit the underlying offense). Specific offense characteristics are included in this proposed amendment to increase the total offense level in order to assure greater punishment for those money laundering defendants whose conduct is considered more serious and harmful to the societal interests which the money laundering laws are designed to protect.

### **Base Offense Level**

Subsection (a) provides two distinct methods for determining the base offense level, depending on whether the defendant is a "direct" money launderer or a "third party" money launderer. Subsection (a)(1) sets the base offense level for "direct" money launderers at the offense level for the underlying offense from which the laundered funds were derived (*i.e.*, the base offense level and all applicable specific offense characteristics for the underlying offense), if the offense level for the underlying offense can be determined. A data analysis of a representative sample of 259 money laundering cases conducted by the Commission indicated that subsection (a)(1) would apply to 86 percent of defendants sentenced under the guideline (*i.e.*, "direct" money launderers comprise 86 percent of the money laundering defendants).

This proposed amendment excludes from application of subsection (a)(1) offenders who otherwise would be accountable for the underlying offense solely on the basis of §1B1.3(a)(1)(B) (*i.e.*, jointly undertaken criminal activity). However, this limitation has minimal practical consequence. Commission data indicate that less than one percent of defendants who would not be categorized as "direct" money launderers because of this limitation would be subject to subsection (a)(1) if it were expanded to include defendants who would be otherwise accountable for the underlying offense under §1B1.3(a)(1)(B). The Commission invites comment as to whether application of subsection (a)(1) should be expanded to include offenders who otherwise would be accountable for the underlying offense solely on the basis of §1B1.3(a)(1)(B).

For "third party" money launderers (*i.e.*, defendants who did not commit or would not be accountable for the underlying offense under §1B1.3(a)(1)(A)), subsection (a)(2) sets the base offense level at level eight, plus an increase based on the value of the laundered funds from the table in subsection (b)(1) of §2F1.1 (Fraud and Deceit). Subsection (a)(2) also applies to "direct" money laundering defendants for whom subsection (a)(1) would apply but the offense level for the underlying offense is impossible or impracticable to determine.

*Under the structure of this proposed amendment, there may be some cases in which the "third party" money launderers will receive a higher base offense level than the offenders who committed the underlying offense. This conceivably could occur in cases in which the underlying offense that generated the criminally derived proceeds is a fraud or other economic crime covered by a guideline that uses the table in subsection (b)(1) of §2F1.1, and the loss calculation is less than the value of the laundered funds. For example, the underlying offense may have involved the fraudulent sale of stock for \$200,000 that was worth \$180,000. The defendant did not commit the underlying offense, but laundered all of the \$200,000. In such a case, the value of the laundered funds is \$200,000, but the loss amount for purposes of §2F1.1(b)(1) is \$20,000. In such a case, the "third party" money laundering defendant may receive a higher base offense level than the Chapter Two offense level for the offender who committed the fraud.*

*Three options in Application Note 3 are presented for addressing this type of case. Option 1 provides that a downward departure may be warranted in such a case, but limits the extent of such a departure to the offense level for the underlying offense conduct that would result if the base offense level were determined using subsection (a)(1). Option 2 creates a rule that the value of the funds is the lesser of either the actual value of the laundered funds or the value of the loss as calculated for purposes of §2F1.1(b)(1). Option 3 provides no specific provision to address this type of case.*

*An analysis conducted by the Commission indicates that this type of case will rarely occur. In its sample of 259 cases, Commission identified no cases in which the loss amount was less than the value of laundered funds. In fact, this issue can arise only in "third party" money laundering cases, which comprise only 14 percent (36 of 259 cases) of the money laundering cases in the representative sample. Furthermore, in the overwhelming majority – 89 percent – of those 36 "third party" cases, the underlying offense was a drug offense, which does not give rise to this problem. In its sample, the Commission identified only three "third party" money laundering cases for which the underlying offense was a fraud or other economic crime.*

### **Adjustments**

*In addition to the base offense level, the proposed amendment contains a number of adjustments. Consistent with the approach of tying the base offense level to the underlying offense that generated the criminally derived funds, subsection (b)(1) provides a [2][4][6] level enhancement for "third party" money launderers who know or believe that any of the laundered funds were the proceeds of, or were intended to promote, certain types of more serious underlying criminal conduct; specifically, drug trafficking, crimes of violence, offenses involving firearms, explosives, national security, terrorism, and the sexual exploitation of a minor.*

*Subsection (b)(2) provides four alternative enhancements, with the greatest applicable enhancement to be applied. Subsection (b)(2)(A) provides a [2][3][4] level increase if the*

defendant is a "third party" money launderer who is "in the business" of laundering funds. This adjustment reflects the view that, similar to a professional "fence" (*see* §2B1.1(b)(4)(B)), defendants who routinely engage in laundering funds on behalf of third parties and who gain financially from engaging in such transactions warrant additional punishment because they encourage the commission of additional underlying criminal offenses. Application Note 6 directs the court to consider the totality of the circumstances in determining whether a defendant was in the business of laundering funds and provides a non-exhaustive list of factors to be considered in making this determination. The Commission invites comment as to whether eligibility for this enhancement should be expanded to include "direct" money launderers who launder the criminal derived proceeds of others, in addition to their own criminally derived proceeds.

Subsection (b)(2)(B) provides a [2][3] level enhancement if any of the laundered funds were used [or intended to be used] to [significantly][materially] promote further criminal conduct. Application Note 5 limits applicability of this enhancement to the use of laundered funds to further criminal conduct in addition to, or beyond, the criminal conduct from which the laundered funds were derived, as opposed to underlying offenses that were completed at the time of the laundering. This enhancement attempts to provide increased punishment for two types of offense conduct: (1) cases in which the defendant uses criminally derived funds to cause criminal conduct in addition to or beyond the criminal conduct that initially generated the criminally derived funds that are the subject of the money laundering conviction; or (2) cases in which the defendant reinvests all or some of the laundered funds back into an ongoing criminal scheme to finance the continued operation or expansion of the criminal scheme.

Subsection (b)(2)(C) provides a [2][3] level enhancement if the offense involved "sophisticated concealment." Application Note 6 defines "sophisticated concealment" as especially complex or especially intricate offense conduct where the defendant takes deliberate steps to conceal the nature, location, source, ownership, or control of the criminally derived funds to make the transaction more difficult to detect. Application Note 6 also provides examples of conduct that typically constitutes sophisticated concealment. The Commission invites comment as to whether the applicability of this enhancement should be expanded to include all forms of concealment, even if the concealment is not sophisticated.

Subsection (b)(2)(D) provides a [1][2] level enhancement if the defendant launders funds with the intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code (title 26, United States Code). A conviction under the relevant subsection of 18 U.S.C. § 1956 is required for the enhancement to apply. The Commission invites comment as to whether the proposed guideline should include such an enhancement, absent additional aggravating money laundering conduct.

Subsection (b)(3) provides a [1] level increase if the defendant is a "direct" money launderer, none of the enhancements under subsection (b)(2) apply, and the value of the laundered funds is greater than \$10,000. This enhancement is intended to ensure that defendants who also commit the underlying offense receive some incremental punishment

*for the money laundering offense, even if ineligible for any of the other enhancements that reflect more aggravated money laundering offense conduct. The Commission specifically invites comment as to whether the proposed guideline should contain such an enhancement.*

*Subsection (b)(4) provides a [2] level decrease for cases in which three conditions are met: (1) the defendant did not commit the underlying offense that generated the criminally derived funds; (2) the defendant was convicted under 18 U.S.C. § 1957 only; and, (3) none of the other enhancements apply. This downward adjustment recognizes that section 1957 offenses, with no aggravating factors, may be considered less serious than section 1956 offenses because the statutory maximum of the former is half (10 years) that of the latter (20 years), and because the government is not required to prove that the section 1957 defendant knew that the offense from which the laundered funds were derived was a specified unlawful activity (see 18 U.S.C. § 1957(c)).*

*Application Note 7 provides that in a case in which the defendant is to be sentenced on a count of conviction for money laundering and a count of conviction for the underlying offense that generated the laundered funds, such counts shall be grouped pursuant to subsection (c) of §3D1.2 (Groups of Closely-Related Counts), thereby resolving a circuit conflict on this issue. Providing for grouping under §3D1.2(c) may make appropriate a conforming amendment to Application Note 5 of §3D1.2 to provide that grouping under §3D1.2(c) also applies in cases in which the base offense level from the guideline applicable to one count specifically incorporates the offense level applicable to the other related count. In such cases, the conduct that forms the basis for the base offense level in one count is the same aggravating conduct that forms the basis for the offense level of the other count.*

*The proposed amendment provides that convictions under 18 U.S.C. § 1960 (Illegal Money Transmitting Businesses; failure to obtain appropriate licenses or comply with registration requirements for money transmitting businesses) be referenced to §2T2.2 (Regulatory Offenses). The Commission invites comment as to whether such violations are more appropriately referenced to §2S1.3 (Structuring Transactions to Evade Reporting Requirements). Finally, the proposed amendment provides that convictions under 31 U.S.C. § 5326 relevant to structuring violations be referenced to §2S1.3 (Structuring Transactions).*

**Proposed Amendment:**

Delete §§2S1.1 and 2S1.2 and insert the following:

**§2S1.1. Laundrying of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity**

(a) Base Offense Level:



- (1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or otherwise would be accountable for the underlying offense under §1B1.3(a)(1)(A) (Relevant Conduct)); and (B) the offense level for that offense can be determined; or
  - (2) 8 plus the number of offense levels from the table in subsection (b)(1) of §2F1.1 (Fraud and Deceit) corresponding to the value of the laundered funds, otherwise.
- (b) Specific Offense Characteristics
- (1) If (A) subsection (a)(2) applies because the defendant did not commit the underlying offense; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence [as defined under §4B1.2(a)(1) (Definitions of Terms Used in §4B1.1)]; or (iii) an offense involving firearms, explosives, national security, terrorism, or the sexual exploitation of a minor, increase by [2][4][6] levels.
  - (2) (Apply the greatest):
    - (A) If [(i) subsection (a)(2) applies because the defendant did not commit the underlying offense; and (ii)] the defendant was in the business of laundering funds, increase by [2][3][4] levels.
    - (B) If any of the laundered funds were used [or were intended to be used] to [significantly] [materially] promote further criminal conduct, increase by [2][3] levels.
    - (C) If the offense involved sophisticated concealment, increase by [2][3] levels.
    - [(D) If the defendant is convicted (A) under 18 U.S.C. § 1956(a)(1)(A)(ii); (B) under 18 U.S.C. § 1956(a)(1)(B)(ii); (C) under 18 U.S.C. § 1956(a)(2)(B)(ii); (D) under 18 U.S.C. § 1956(a)(3)(C); or (E) of attempting, aiding or abetting, or conspiracy to commit any of the offenses referred to in subdivisions (A) through (D), increase by [1][2] levels.]
  - [(3) If (A) subsection (a)(1) applies; (B) subsection (b)(2) does not apply; and (C) the value of the laundered funds is greater than \$10,000, increase by [1] level.]

- [ (4) If (A) subsection (a)(2) applies because the defendant did not commit the underlying offense; (B) the defendant is convicted under 18 U.S.C. § 1957; and (C) none of the enhancements in subsections (b)(1) and (b)(2) apply, decrease by [2] levels.]

Commentary

Statutory Provisions: 18 U.S.C. §§ 1956, 1957.

Application Notes:

1. Definitions.—For purposes of this guideline:

"Crime of violence" has the meaning given that term in subsection (a)(1) of §4B1.2 (Definitions of Terms Used in §4B1.1).

"Criminally derived funds" means any funds derived [or represented to be derived] from conduct constituting a criminal offense.

"Laundered funds" means the property, funds, or monetary instrument involved in the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of 18 U.S.C. § 1956 or § 1957.

"Laundering funds" means the making of a transaction, financial transaction, monetary transaction, or transmission, or the transporting of, property, funds, or a monetary instrument in violation of 18 U.S.C. § 1956 or § 1957.

"Sexual exploitation of a minor" means an offense involving (A) promoting prostitution by a minor; (B) sexually exploiting a minor by production of sexually explicit visual or printed material; (C) distribution of material involving the sexual exploitation of a minor, or possession of material involving the sexual exploitation of a minor with intent to distribute; or (D) aggravated sexual abuse sexual abuse, or abusive sexual contact, involving a minor. "Minor" means an individual under the age of 18 years.

2. Application of Subsection (a)(1).—

- (A) Multiple Underlying Offenses.— In cases in which subsection (a)(1) applies and there is more than one underlying offense, the offense level for the underlying offense is to be determined under the procedures set forth in Application Note 3 of the Commentary to §1B1.5 (Interpretation of References to Other Guidelines).
- (B) Defendants Otherwise Accountable.—In order for subsection (a)(1) to apply, the defendant must have committed the underlying offense or be otherwise accountable for the underlying offense under §1B1.3(a)(1)(A) (Relevant Conduct). The fact that the defendant was involved in laundering criminally derived funds after the