

PROPOSED AMENDMENT: CONSOLIDATION OF THEFT, PROPERTY DESTRUCTION AND FRAUD

Synopsis of Proposed Amendment: *This amendment consolidates the three guidelines covering theft (§2B1.1), property destruction (§2B1.3), and fraud (§2F1.1). Consolidation of these guidelines is proposed in response to concerns raised by probation officers, judges, and practitioners over the last four or five years. The issues were among those discussed during Commission public hearings in 1997 and 1998 on difficulties posed by having different commentary in the theft and fraud guidelines applicable to the calculation and definition of loss and related issues. Commentators have also noted that although theft and fraud offenses are conceptually similar, differences in guideline structure can lead to disparate penalty levels among similar cases, depending on how the offense is charged, and the court's choice of the applicable guideline pursuant to §1B1.2.*

Bracketed place holders are indicated for the loss table, definition of loss, a scholarship fraud enhancement and accompanying application note, and new commentary regarding the application of subsection (b)(3) regarding a "person in the business of receiving and selling receiving stolen property." Materials related to those issues follow the consolidation materials.

Base Offense Level: *The proposal calls for a base offense level of level 6. The current base offense level for fraud offenses is level 6; the base offense level for theft and property destruction offenses currently is level 4. As discussed prior to the December meeting, starting with the base offense level 6, the proposed loss table for the consolidated guidelines envisions two-level increments for increasing loss amounts beginning at \$5,000. Currently the loss table for theft offenses provides one-level enhancements when loss exceeds \$100, \$1,000, \$2,000, and \$5,000, respectively, so that a theft offense involving more than \$2,000 in loss results in an offense level of 7, with the possibility of an additional increase for more-than-minimal planning. Under the proposed consolidated loss table, a theft offense involving more than \$2,000 (but less than \$5,000) would receive the base offense level of 6, with no possible increase for more-than-minimal planning.*

In contrast, a fraud offense involving the same amount of loss would receive the same base offense level of 6 under the proposed table, which is one level less than applicable under the current fraud table, which would provide an offense level 7 for loss amounts between \$2,000 and \$5,000, respectively, because the current fraud loss table provides a one-level increase (from the BOL of level 6) for loss amounts in excess of \$2,000 (but less than \$5,000).

Sentencing Data: *This change in base offense level would impact theft and property destruction offenses for which the loss was \$1,000 or less. In FY 1999, 629 of 3,308 theft offenders (19.0 %) and 31 of 76 of property destruction offenders (40.8 %) had losses of \$1,000 or less. Increasing the base offense level from four to six would produce a one or two-level increase for these offenders. Of the 629 theft offenders, 125 (19.9 %) would be subject to an increased zone in the Sentencing Table, and six of the 31 (19.3 %) of the property destruction*

offenders would be subject to such an increase in zone.

More than One Victim: The issue has been raised as to whether the number of victims should play a greater role in punishment of economic offenses. Guideline 2F1.1(b)(2) (Fraud) currently provides a two-level increase if the offense involved (A) more than minimal planning, **or** (B) a scheme to defraud more than one victim.¹ Commission data informs us how often one of those two applies, but it does not differentiate between the two. Commission staff will explore past coding efforts (e.g., identity theft, cellular telephone cloning, and perhaps others) to see if data exists on how often offenses involve more than one victim and, if so, how many.

The economic crime package of amendments considered by the last Commission included the elimination of the adjustment for more-than-minimal planning, and it was envisioned that the adjustment for scheme to defraud more-than-one victim would be eliminated at the same time. Although the Commission could consider retaining the adjustment for more-than-one victim as a freestanding specific offense characteristic, if a victim-based enhancement is desired, there are arguments why consideration should be given to creating an SOC that provides more appropriate enhancements based on the number of victims. If the adjustment were retained unmodified in a consolidated guideline, it would apply to cases currently sentenced under §2B1.1 where it is not currently applicable. Also, in its current form it might be hard to justify providing a two-level increase in every case in which there is more-than-one victim, particularly in the face of the new Chapter Three adjustment in the vulnerable victim guideline (§3A1.1) that provides (only) a two-level increase if the offense involved “a large number of [vulnerable] victims.”

If the Commission wants to provide additional punishment for offenses involving a number of victims, an amendment could be considered that would provide a table for increases depending on the number of victims. For example, if the offenses involves

- [5][10] or more victims, add [1][2] levels,
- [10][25] or more victims, add [2][4] levels,
- [25 - 100] or more victims, add [3][6] levels.

Theft of Undelivered U.S. Mail: The current “floor” offense level of level 6 for the theft of undelivered United States mail is proposed to be deleted because the proposal raises the base offense level from level 4 to 6 for such offenses, making the floor unnecessary.

Sentencing Data: In Fiscal Year 1999 200 of the 3,308 theft offenders (6.0 %) received offense level increases due to the floor for theft of U.S. mail. Eighty-three offenders (2.5 %) received one level increases; 115 offenders (3.5 %) received two level increases. A total of 14 property destruction offenders (18.4 %) received increases as a result of this floor; two offenders (2.6

¹ Significantly, the more-than-one victim bump does not apply in cases sentenced under §2B1.1.

%) received one level increases and twelve offenders (15.8 %) received two level increases.

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

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

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

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

- *Reckless voluntary manslaughter (§2A1.4): BOL 14*
- *Operating a common carrier under influence of drugs or alcohol, no death or serious bodily injury resulting (§2D2.3): BOL 13*
- *Arson creating a substantial risk of death or serious bodily injury (§2K1.4): BOL 20*
- *Immigration smuggling offense creating a substantial risk of death or serious bodily injury (§2L1.1): 2-level enhancement, “floor” of level 18*
- *Environmental offenses resulting in risk of death or serious bodily injury (§§2Q1.1, 2Q1.2, 2Q1.3, 2Q1.4): Offense level varies from level 17 to level 24.*

Sentencing Data: *In fiscal year 1999 only .8 % of all fraud offenders received an enhancement for the risk of serious bodily injury. Thirty four of 6,114 offenders (0.6 %) received a two-level increase. Due to the “floor” offense level, two offenders (0.01 %) received a four-level*

increase; seven (0.1 %) received a five-level increase; and eight (0.1 %) received a seven-level increase.

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

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

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

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

Additional Cross References:

- (A) *Additional Cross Reference to Bribery/Gratuity guidelines—The proposal provides for an additional cross reference to the bribery and gratuity guidelines to address situations in which a broadly worded fraud statute, such as 18 U.S.C. §§ 1001, 1341, 1342, or 1343, may be used (perhaps for jurisdictional purposes) to prosecute conduct the essence of which is bribery or giving a gratuity.*

- (B) *General Cross Reference— This proposal adds a more generally applicable cross reference that would apply whenever a broadly applicable fraud statute is used to reach conduct that is more specifically addressed in another Chapter Two guideline. This option is drafted in such a way that both it and the bribery cross reference could be added to the guideline.*

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

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

Sentencing Data: *As one means of estimating the extent of use of current Application Note 14 in the fraud guideline, staff assessed the frequency with which offenders sentenced in fiscal year 1999 were convicted solely of a generally applicable fraud statute and sentenced under a guideline other than fraud (§2F1.1).*

Twenty four offenders were convicted of 18 U.S.C. § 1001 alone and sentenced under a guideline other than fraud. The table below shows the guidelines under which these offenders were sentenced.

*Sentencing Guidelines for 18 U.S.C. § 1001
Non-§2F1.1 Offenders*

<u>Guideline</u>	<u>Number</u>
<i>Blackmail §2B3.3</i>	<i>1</i>
<i>Obstruction of Justice §2J1.2</i>	<i>2</i>
<i>Perjury §2J1.3</i>	<i>1</i>
<i>Firearms §2K2.1</i>	<i>1</i>
<i>Unlawful Entry §2L1.2</i>	<i>4</i>

<i>Trafficking Documents §2L2.1</i>	<i>1</i>
<i>Possession of Documents §2L2.2</i>	<i>2</i>
<i>Toxic Substances §2Q1.2</i>	<i>4</i>
<i>Structuring §2S1.3</i>	<i>1</i>
<i>Tax Evasion §2T1.1</i>	<i>3</i>
<i>Accessory After the Fact §2X3.1</i>	<i>3</i>
<i>Misprision of Felony §2X4.1</i>	<i>1</i>

Twenty offenders had as their sole statute of conviction either 18 U.S.C. §§ 1341, 1342, or 1343 and were sentenced under guidelines other than fraud. The table below summarizes the distribution of sentencing guidelines for these offenders.

*Sentencing Guidelines for 18 U.S.C. §§ 1341, 1342, or 1343
Non-§2F1.1 Offenders*

<u><i>Guideline</i></u>	<u><i>Number</i></u>
<i>Theft §2B1.1</i>	<i>1</i>
<i>Blackmail §2B3.3</i>	<i>1</i>
<i>Commercial Bribery §2B4.1</i>	<i>6</i>
<i>Bribery §2C1.1</i>	<i>1</i>
<i>Intangible Right §2C1.7</i>	<i>1</i>
<i>Offense on Release §2J1.7</i>	<i>1</i>
<i>Arson §2K1.4</i>	<i>7</i>
<i>Money Laundering §2S1.1</i>	<i>1</i>
<i>Attempt/Conspiracy §2X1.1</i>	<i>1</i>

Proposed Amendment:

Strike the heading to Part B of Chapter Two, the heading to Subpart 1 of Part B of Chapter Two, the Introductory Commentary to such subpart, §§2B1.1, 2B1.3, and 2F1.1, and insert the following:

PART B - BASIC ECONOMIC OFFENSES

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

Introductory Commentary

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

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

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristics
 - (1) If the loss exceeded [\$10,000], increase the offense level as follows:
[INSERT LOSS TABLE]
 - (2) If the theft was from the person of another, increase by **2** levels.
 - (3) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.
 - (4) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit any foreign government, foreign instrumentality, or foreign agent, increase by **2** levels.
 - (5) If the offense [(A) involved a scheme to defraud more than one victim, or (B)] was committed through mass-marketing; increase by **2** levels.
 - (6) If the offense involved theft, damage or destruction of property from a national cemetery, increase by **2** levels.
 - (7) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; or (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines[(D) POSSIBLE SCHOLARSHIP FRAUD ENHANCEMENT], increase by **2** levels. If the resulting offense

level is less than level **10**, increase to level **10**.

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

- (9) If the offense involved—

- (A) the possession or use of any device-making equipment;
- (B) the production or trafficking of any unauthorized access device or counterfeit access device; or
- (C) (i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or
(ii) the possession of 5 or more means of identification that unlawfully were produced from another means of identification or obtained by the use of another means of identification,

increase by **2** levels. If the resulting offense level is less than level **12**, increase to level **12**.

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

- (11) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

- (12) If the offense substantially jeopardized the safety and soundness of a financial institution increase by **4** levels. If the resulting offense level is less than level **24**, increase to level **24**.

[Option 1:

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

[Option 2:

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

(c) Cross References

- (1) If (A) a firearm, destructive device, explosive material, or controlled

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

- (2) If the offense involved arson, or property damage by use of explosives, apply §2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.
- [(3) If the offense involved (A) commercial bribery, or (B) bribery, gratuity, or a related offense involving a public official, apply §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) or a guideline from Chapter Two, Part C (Offenses Involving Public Officials), as most appropriate [, if the offense level is greater than that determined above].]
- [(4) If (A) none of subdivisions (1), (2), or (3) of this subsection apply; (B) the defendant was convicted under a statute proscribing false , fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, 1341, 1342, or 1343); and (C) the conduct set forth in the count of conviction is more specifically covered by another guideline in Chapter Two, apply that other guideline.]

(d) Special Instruction

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

Commentary

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

Application Notes:

- 1. “Financial institution” as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be

registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

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

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

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

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

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

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

2. [DEFINITION OF LOSS]
3. Controlled substances should be valued at their estimated street value.
4. [POSSIBLE APPLICATION NOTE ON "PERSON IN THE BUSINESS OF RECEIVING AND SELLING STOLEN PROPERTY "]
5. [Scheme to defraud more than one victim].—"Scheme to defraud more than one victim" as used in subsection (b)(5)(A), refers to a design or plan to obtain something of value from more than one person. In this context, "victim" refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would

involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.]

6. Application of Subsection (b)(7).—

- (A) In General.—*The adjustments in §2F1.1(b)(7) are alternative rather than cumulative. If in a particular case, however, all of the enumerated factors applied, an upward departure might be warranted.*
- (B) Subsection (b)(7)(A). — *This subsection provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fundraiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.*

[POSSIBLE APPLICATION NOTE REGARDING SCHOLARSHIP FRAUD]

- (C) Subsection (b)(7)(C). — *This subsection provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).*
- (D) Non-Applicability of Enhancement.—*If the conduct that forms the basis for an enhancement under (b)(7)(B) or (C) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.*

7. Application of Subsection (b)(8).—

- (A) *Sophisticated Means Enhancement.*— For purposes of subsection (b)(8)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.
- (B) *Definition of United States.*—"United States" means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa
- (C) *Non-Applicability of Enhancement.*—If the conduct that forms the basis for an enhancement under subsection (b)(8) is the only conduct that forms the basis for an adjustment under §3C1.1 (Obstruction of Justice), do not apply an adjustment under §3C1.1.

8. *Application of Subsection (b)(9).*—

(A) *Definitions:*

"Counterfeit access device" (A) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (B) also includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service. "Telecommunications service" has the meaning given that term in 18 U.S.C. § 1029(e)(9).

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

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

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

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

- (B) *Subsection (b)(9)(C)(i).*—This subsection applies in a case in which a means of

identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

(C) *Examples of Conduct Under (b)(9)(C)(i)* —*The following non-exhaustive list describes conduct that typically would warrant an enhancement under this subsection:*

- (i) *A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.*
- (ii) *A defendant obtains an individual's name and address from a source (e.g., from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.*

(D) *Examples of Conduct Under (b)(9)(C)(i)*: —*The following non-exhaustive list describes conduct that typically would warrant an enhancement under this subsection:*

- (i) *A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.*
- (ii) *A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.*

(E) *Subsection (b)(9)(C)(ii)*.—*This subsection applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.*

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

- (i) *The offense caused substantial harm to the victim's reputation or credit*

record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.

- (ii) *An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in the individual's name.*
- (iii) *The defendant produced or obtained numerous means of identification with respect to one individual and essentially assumed that individual's identity.*

(G) *Counterfeit Access Devices.*—*In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device. In any such case, loss shall be not less than \$500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than \$100 per unused means. For purposes of this application note, "counterfeit access device" and "unauthorized access device" have the meaning given those terms in Application Note 15.*

9. *Chop Shop Enhancement.*—*For purposes of (b)(10), an minimum measure of loss is provided in the case of an ongoing, sophisticated operation (such as an auto theft ring or "chop shop") to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts. "Vehicles" refers to all forms of vehicles, including aircraft and watercraft.*

10. *Substantially Jeopardized the Safety and Soundness of a Financial Institution.*—*For the purposes of subsection (b)(12), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.*

11. *Application of Subsection of (b)(13).*—

In General.—*For the purposes of (b)(13), the defendant shall be considered to have derived more than \$1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000.*

Gross receipts from the offense.—*"Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).*

12. Cross References.—

- (A) General Fraud Statutes.—Subsection (c)(4) provides a cross reference to another Chapter Two guideline in cases in which the defendant is convicted of a general fraud statute, and the conduct set forth in the count of conviction is more specifically covered by that other Chapter Two guideline. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 would be more apt, and false statements to a customs officer, for which §2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses.
- (B) Identification Documents.—Offenses involving identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than §2F1.1.
13. Continuing Financial Crimes Enterprise.—If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise."
14. Upward Departure in Cases Involving Theft of Information from a Protected Computer.—In cases involving theft of information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), an upward departure may be warranted where the defendant sought the stolen information to further a broader criminal purpose.
15. Multiple Count Indictments.—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).
16. Upward Departure in Cases Involving Access Devices.—Offenses involving access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. In such a case, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.
17. Vulnerable Victims.—If the fraud exploited vulnerable victims, an enhancement will apply. See §3A1.1 (Hate Crime Motivation or Vulnerable Victim).

Background: *The value of the property stolen plays an important role in determining sentences for theft and other offenses involving stolen property because it is an indicator of both the harm to the victim and the gain to the defendant. Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.*

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

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

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

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

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

Offenses that involve the use of transactions or accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly

investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum level of 12 is provided for these offenses.

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

Subsection (b)(8) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.

Subsections (b)(9)(A) and (B) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.

*Subsection (b)(9)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as "affirmative identity theft" or "breeding," in which a defendant uses another individual's name, social security number, or some other form of identification (the "means of identification") to "breed" (*i.e.*, produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines "means of identification," the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part, because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were "bred" (*i.e.*, produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been "stolen." Generally, the victim does not become aware of the offense until certain harms have already occurred (*e.g.*, a damaged credit rating or inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (*e.g.*, harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.*

Subsection (b)(11)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Subsection (b)(12) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.

Subsection (b)(13) implements the instruction to the Commission in section 2507 of Public Law 101-647.

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

Conforming amendment to §1B1.1 to remove definition of more than minimal planning:

§1B1.1. Application Instructions

* * *

Commentary

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Application Notes:

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1.

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

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

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

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

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

~~In an embezzlement, a single taking accomplished by a false book entry would constitute only minimal planning. On the other hand, creating purchase orders to, and invoices from, a dummy corporation for merchandise that was never delivered would constitute more than minimal planning, as would several instances of taking money, each accompanied by false entries.~~

Conforming amendment to §2A2.2 to move illustratons relating to more than minimal planning from application instructions guideline to assault guideline:

§2A2.2. Aggravated Assault

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Commentary

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Application Notes:

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

* * *

4. *"More than minimal planning" means more planning than is typical for commission of the offense in a simple form. "More than minimal planning" also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies. For example, waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. By contrast, luring the victim to a specific location, or wearing a ski mask to prevent identification, would constitute more than minimal planning.*

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

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

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Commentary

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Application Notes:

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

* * *

4. *"More than minimal planning" means more planning than is typical for commission of the offense in a simple form. "More than minimal planning" also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which §3C1.1 (Obstructing or Impeding the Administration of Justice) applies. For example, checking the area to make sure no witnesses were present would not alone constitute more than minimal planning. By contrast, obtaining building plans to plot a particular course of entry, or disabling an alarm system, would constitute more than minimal planning.*

Conforming amendment to §3B1.3 to move illustrations relating to abuse of trust from theft guideline to abuse of trust adjustment:

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

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Commentary

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

(A) *If the offense involved theft or embezzlement from an employee pension or welfare benefit plan (a violation of 18 U.S.C. § 664) and the defendant was a fiduciary of the benefit plan, an adjustment under this section for abuse of 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 (a violation of 29 U.S.C. § 501(c)) and the defendant was a union officer or occupied a position of trust in the union as set forth in 29 U.S.C. § 501(a), an adjustment under this section for abuse of position of trust will apply.*

Conforming amendment to §3D1.2 to remove references to theft and fraud guidelines:

§3D1.2. Groups of Closely Related Counts

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Commentary

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.~~

[Make all technical and conforming amendments to implement this amendment.]