

Economic Crime Package Amendments

The Economic Crime Package consists of six parts. Part A is a proposal to consolidate the theft, property destruction and fraud guidelines. Part B contains three options for the loss table for the consolidated guideline and two options for a revised loss table in §2T4.1 (Tax Table). Part C contains two proposals to amend the definition of loss for the consolidated guideline. Part D proposes necessary changes to several guidelines which refer to the loss tables in either §2B1.1(Larceny, Embezzlement, and Other Forms of Theft) or §2F1.1(Fraud and Deceit) if the Commission were to adopt one of the proposed new loss tables. Part E contains the technical and conforming amendments to the guidelines that would be necessary as a result of the theft and fraud consolidation. Part F contains a proposal to resolve a circuit split regarding the computation of tax loss in §2T1.1.

PART A. 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 (see Part B), definition of loss (see Part C), and the options regarding two circuit conflicts: tax loss (see Part F) and new commentary regarding the application of subsection (b)(3) regarding a "person in the business of receiving and selling receiving stolen property," and a scholarship fraud enhancement and accompanying application note. In the event that the Commission does not adopt the consolidation package, these bracketed options can be adopted separately.

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 Minimal Planning: 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 The proposal deletes this enhancement from the consolidated guideline. The more than minimal planning enhancement is deleted due to the potential overlap between this enhancement and the sophisticated means enhancement. The scheme to defraud more than one victim enhancement is deleted for two reasons: (1) 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; and (2) 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.”

As an alternative to the scheme to defraud more than one victim enhancement, this amendment provides a table for increases depending on the number of victims to provide additional punishment for offenses involving multiple victims.

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. However, if the Commission adopts the SOC providing for a two-level reduction if loss is less than \$2,000, it might be necessary to retain this floor of level 6.

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

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

destruction offenders (18.4 %) received increases as a result of this floor; two offenders (2.6 %) received one level increases and twelve offenders (15.8 %) received two level increases.

In the Business of Receiving and Selling Stolen Property: *Guideline 2B1.1(b)(4)(B) provides a 2-level enhancement if the offense involved receiving stolen property and the defendant was in the business of receiving and selling stolen property. The proposed amendment addresses an issue that has arisen in case law regarding what conduct qualifies a defendant for the 4-level enhancement.*

In determining what “in the business of” means, three circuits apply what has been coined the “fence test” in which the court must consider (1) if the stolen property was bought and sold, and (2) to what extent the stolen property transactions encouraged others to commit property crimes. Three other circuits have adopted the “totality of the circumstances test” that focuses on the “regularity and sophistication” of the defendant’s operation. Though the factors considered by all of these circuits are similar, the approaches are different.

The fence test involves making an ultimate determination of whether (1) the stolen property was bought and sold, and (2) the stolen property transactions encouraged others to commit property crimes. In making this determination, the court considers factors such as the regularity of the defendant’s operation, the volume of the business, the quick turnover of the stolen items, the value of the stolen items, the sophistication of the defendant’s operation, any use of a legitimate business to facilitate the turnover of the stolen items, the defendant’s connections with thieves and purchasers of the stolen items, and the use of technology and communications.

The totality of the circumstances test involves consideration of the circumstances in each case with particular emphasis on the regularity and sophistication of the defendant’s operation, looking at such factors as the amount of income generated through fencing activities, the value of the property handled, the defendant’s past activities, the defendant’s demonstrated interest in continuing or expanding the operation, the use of technology and communication, and the defendant’s connections with thieves and purchasers of stolen property.

This amendment adopts the totality of the circumstances test. The determination “in the business of” will be made based on the circumstances surrounding the defendant and his business as opposed to the effect the fencing operation has in encouraging others to commit crimes.

College Scholarship Fraud

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

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

misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency.

The amendment adds an additional alternative enhancement to subsection (b)(4) that applies if the offense involves a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education. This proposed enhancement is targeted at the provider of the financial assistance or scholarship services, not the individual applicant for such assistance or scholarship, consistent with the intent of the legislation.

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

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

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

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

- *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) *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 [if the resulting offense level is greater].

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

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

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><i>Guideline</i></u> | <u><i>Number</i></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 (Part A):

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 \$5,000, increase the offense level as follows:
[See Part B, for loss table options.]
 - (2) If the offense involved:

| <u>Number Victims</u> | <u>Increase in Level</u> |
|-----------------------|--------------------------|
| (A) [5 - 10] | add 2 |
| (B) [11 - 25] | add [4] |
| (C) [26 -100] or more | add [6]. |
 - (3) If the theft was from the person of another, increase by **2** levels.
 - (4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by **2** levels.
 - (5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit any foreign government, foreign instrumentality, or foreign agent, increase by **2** levels.
 - (6) If the offense was committed through mass-marketing, increase by **2** levels.
 - (7) If the offense involved theft to, damage of or destruction of property from a national cemetery, increase by **2** levels.
 - (8) If the loss was less than \$2,000 or less, decrease by **2** levels.
 - (9) 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; or [(D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education increase by **2** levels]. If the resulting offense level is less than level **10**, increase to level **10**.

(10) 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**.

(11) 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**.

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

(13) 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**.

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

[Option 2: (15) 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 (A) none of subdivisions (1) or (2) of this subsection apply; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (e.g., 18 U.S.C. § 1001, §1341, §1342, or §1343); and (C) the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline in Chapter Two, apply that other guideline [if the resulting offense level is greater].

(d) Special Instruction

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

Commentary

Statutory Provisions: 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 - See Part C]

3. Controlled substances should be valued at their estimated street value.

[4. Enhancement for Business of Receiving and Selling Stolen Property.—

(A) In General.—The court shall consider the totality of the circumstances to determine whether a defendant was in the business of receiving and selling stolen property for purposes of subsection (b)(4).

(B) Factors to Consider.—The following is a non-inclusive list of factors that the court may consider in determining whether the defendant was in the business of receiving and selling stolen property for purposes of subsection (b)(4):

(i) the regularity or sophistication of the defendant's activities;

(ii) the value and size of the inventory of stolen property maintained by the defendant;

(iii) the extent to which the defendant's activities encouraged or facilitated other crimes;
or

(iv) *the defendant's past activities involving stolen property.*]

6. Application of Subsection (b)(9).—

- (A) In General.—*The adjustments in §2F1.1(b)(9) are alternative rather than cumulative. If in a particular case, however, all of the enumerated factors applied, an upward departure might be warranted.*
- (B) Misrepresentation Defendant Was Acting On Behalf of Charitable Institution. — *Subsection (b)(9)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.*
- (C) Fraud in Contravention of Prior Judicial Order. — *Subsection (b)(9)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (e.g., a violation of a condition of release addressed in §2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in §4A1.1 (Criminal History Category)).*

[(D) College Scholarship Fraud.—

For the purposes of subsection (b)(9)(D)—

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

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

- (E) Non-Applicability of Enhancement.—*If the conduct that forms the basis for an enhancement under (b)(9)(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)(10).—

- (A) Definition of United States.—“United States” means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.
- (B) Sophisticated Means Enhancement.—For purposes of subsection (b)(10)(C), “sophisticated means” means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.
- (C) Non-Applicability of Enhancement.—If the conduct that forms the basis for an enhancement under subsection (b)(10) 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)(11).—

(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)(11)(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)(11)(C)(i)—Examples of conduct to which this subsection should apply are as follows:

- (i) *A defendant obtains an individual's name and social security number from a source (e.g., from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.*
 - (ii) *A defendant obtains an individual's name and address from a source (e.g., from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.*
- (D) *Nonapplicability of subsection (b)(11)(C)(i):*—*Examples of conduct to which this subsection should not apply are as follows:*
- (i) *A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.*
 - (ii) *A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.*
- (E) *Subsection (b)(11)(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 8.

9. Chop Shop Enhancement.—For purposes of (b)(12), 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)(14), 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)(15).—

In General.—For the purposes of (b)(15), 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)(3) provides a cross reference to another Chapter Two guideline in cases in which the defendant is convicted of a general fraud statute, and the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline [and the resulting offense level is greater]. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 would be more apt, and false statements to a customs officer, for which §2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses.
 - (B) Identification Documents.—Offenses involving identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply §2L2.1 (Trafficking in a Document Relating to Naturalization) or §2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than §2F1.1.
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.

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. Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.

This guideline is designed to apply to a wide variety of fraud cases. 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.

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

Subsection (b)(10) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.

Subsections (b)(11)(A) and (B) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.

*Subsection (b)(11)(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)(13)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Subsection (b)(14) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73.

Subsection (b)(15) 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 deleting more than minimal planning.

§1B1.1. Application Instructions

* * *

Commentary

Application Notes:

1.

* * *

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

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

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

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

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

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

* * *

4.

* * *

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

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

§2A2.2. Aggravated Assault

* * *

Commentary

Application Notes:

* * *

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

* * *

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

Conforming amendment to §2B2.1 to move 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

* * *

Commentary

Application Notes:

1. ~~"More than minimal planning," "firearm,"~~ "Firearm" "destructive device," and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions).
2. Valuation of loss is discussed in the Commentary to ~~§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)~~ §2B1.1 (Theft, Property Destruction, and Fraud).

* * *

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

(B) PROPOSED AMENDMENT: LOSS TABLES FOR CONSOLIDATED GUIDELINE AND §2T4.1 (TAX TABLE)

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

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

Option One for both §§2B1.1 and 2T4.1 corresponds to the loss table considered by the previous Commission in April 1998. Option Two for both guidelines corresponds to a table prepared by staff in November 2000 as an alternative to the other two options.

A third option is proposed for §2B1.1 that was suggested by the Criminal Law Committee. The CLC did not propose an option for §2T4.1 (which explains why there are only two options for the tax loss table).

(1) Proposed Amendment (Part B): Loss Table for §2B1.1

At §2B1.1(b)(1), insert one of the three options presented, immediately following:

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

Option One (April 1998):

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

| | | |
|-----|-------------------------|---------------|
| (M) | More than \$20,000,000 | add 22 |
| (N) | More than \$50,000,000 | add 24 |
| (O) | More than \$100,000,000 | add 26 |

Option Two (November 2000):

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

Option Three (CLC Proposal):

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

(2) Proposed Amendment (Part B): Loss Table for §2T4.1

At §2T4.1, delete (A) through (U), and insert one of the two options presented.

Option One (April 1998):

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

Option Two (November 2000):

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

(C) PROPOSED AMENDMENT: REVISED DEFINITION OF LOSS FOR OFFENSES SENTENCED PURSUANT TO §2B1.1, THE CONSOLIDATED GUIDELINE

Synopsis of Proposed Amendment: *The proposed amendment provides two major options to create one definition of loss for offenses sentenced pursuant to §2B1.1 (Larceny, Embezzlement and Other Forms of Theft) and §2F1.1 (Fraud and Deceit). Each option is designed to resolve circuit conflicts, address case law and application issues, and to promote consistency in application. To the extent practicable, each of the proposed definitions retains existing*

language and concepts that have not proven problematic. The first option was prepared by staff and is intended to invite comment on the major issues related to the definition of loss, including those presented in the second option. The second option was prepared by the Criminal Law Committee (CLC) of the Judicial Conference and is included for publication as an accommodation because of the years of effort that the members of that committee have put into the preparation of a new definition of loss.

The proposed amendment would accomplish the following purposes:

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

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

(3) Provide two options for a causation standard: (A) “but for” causation standard (and an example) plus reasonable foreseeability²; and (B) combine current loss concepts from §§2B1.1 and 2F1.1 and make clear “but for” causation is required but without concept of reasonable foreseeability;

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

(5) Provide two options for when loss should be measured: (A) at the time of sentencing; and (B) when the offense was detected³;

(6) Provide three options for what should be considered the time of detection: (A) when the offense is discovered by a victim or governmental agency; (B) when the defendant should have known the offense was detected [or about to be detected]⁴; and (C) at the earlier of those two occurrences;

(7) Provide two options regarding inclusion of interest: (A) to explicitly exclude interest⁵; and (B) to provide for the inclusion of only that interest that is accrued and unpaid that was bargained for as part of a lending transaction involved in the offense;

² Option Two would adopt this option.

³ Option Two would adopt this option.

⁴ Option Two would adopt this option.

⁵ Option Two would adopt this option.

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

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

(10) Provide an option for certain exceptions to what constitutes “economic benefits”: (A)(i) *benefits of “de minimis” value⁶; or (ii) benefits that are substantially different from what the victim intended to receive; and (B) services fraudulently rendered by defendants posing as licensed professionals and for goods falsely represented as approved by a regulatory agency or for which regulatory approval was obtained by fraud⁷;*

(11) Provide two options for excluding certain benefits transferred to victims of investment fraud schemes, both of which would resolve a circuit conflict: (A) exclude gain to an individual investor in the scheme from being used to offset the loss to other individual investors in the scheme⁸; and (B) exclude benefits transferred to victims designed to lure additional investments in the scheme from being used to offset the loss;

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

(13) Provide four options for the use of gain: (A) allow the use of gain as one of the factors to be used in estimating loss; (B) allow use of pecuniary gain as an alternative measure of loss if the gain is greater than loss; (C) provide for use of gain when loss cannot reasonably be determined or when gain is greater than loss; and (D) allow use of gain as an alternative when loss cannot reasonably be determined but the gain can be determined⁹;

(14) Provide that the special loss rules establish a minimum loss rule in the specific context described¹⁰;

(15) Further revise the special rule on determining loss in cases involving diversion of government program benefits to resolve an apparent circuit conflict¹¹;

⁶Option Two would adopt this option.

⁷Option Two would adopt this option.

⁸Option Two would adopt this option.

⁹Option Two would adopt this option.

¹⁰CLC has not taken a position on this issue. We expect that they will support it.

¹¹CLC has not taken a position on this issue. We expect that they will support it.

(16) Reformat and clarify the provisions dealing with departures, including a bracketed option that would permit a downward departure where the loss exceeds the greater of the [defendant's] actual or intended [personal] gain¹²; and

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

Proposed Amendment (Part C):

Option One (Commission Proposal):

In the Commentary to §§2B1.1 and 2F1.1 captioned "Application Notes" insert after Note 1 the following new Note 2:

2. *This Note applies to the determination of loss for purposes of subsection (b)(1).*
 - (A) *General Rule.—Subject to the exclusions in subdivision (B), loss is the greater of actual loss or intended loss.*

[Option 1 - adopt causation standard of "but for" plus reasonable foreseeability.

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

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

Suppose H pays D \$500 to inspect a home H has contracted to purchase. D does not actually conduct an inspection, but rather mails H a fraudulent inspection report stating that the property is free of all defects. Two days before closing, an underground oil tank – which must be removed before the sale may close – is discovered on the property. Due to the resulting unavoidable delay caused by the need to remove the tank, the closing must be postponed. Because H's lease on his present residence expired on the original closing date, H must locate temporary housing at additional cost. Further, H loses the financing he had obtained and must procure new financing, at a higher interest rate,

¹²The CLC draft proposed this concept. It is included in Option One to make it parallel to Option Two, not because Commission staff supports it.

from another bank. On his way to the new bank to complete the paper work for the new loan, H is in an automobile accident resulting in damage to the vehicle and injuries to H. The \$500 paid for the inspection report is includeable in loss as a direct loss. The increased rental payment for temporary housing and the cost resulting from the higher interest rates are also included in loss because they follow in the ordinary course and, therefore, are foreseeable. However, although the damage incurred in the automobile accident would not have occurred but for the fraud, it nevertheless did not follow in the ordinary course of events and was not foreseeable by a reasonable person in the defendant's position. Accordingly, it is not included in loss.”]

[Option 2 - combine current loss concepts from §§2B1.1 and 2F1.1; make clear “but for” causation is required but without concept of reasonable foreseeability.

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

“Pecuniary harm” includes the value of the property taken, damaged, or destroyed, and the value of money and services unlawfully taken.¹³ Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim.]

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

(B) Time of measurement: Loss should ordinarily be measured at the time

[Option 1: of sentencing, except as provided herein.]

[Option 2: the offense was detected.

(i) For purposes of this guideline, an offense is detected when

[Sub-Option 1: discovered by a victim or a governmental agency]

[Sub-Option 2: the defendant knew or reasonably should have known that the offense was detected [or about to be detected] by a victim or a public law enforcement agency.]]

[Sub-Option 3: the earlier of [Option 1] and [Option 2].]

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

¹³ See §§2B1.1, comment. (n. 2) and 2F1.1, comment. (n. 9).

[Option 1 - exclude all interest.

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

[Option 2 - allow use of bargained-for interest; insert language in the loss definition prior to “exclusions” from loss.

Interest shall be included in determining loss only if it is bargained for as part of a lending transaction that is involved in the offense. The court shall include any such interest that is accrued and unpaid as of the time the defendant knew or should have known that the offense had been detected.]

- (ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense, even if such costs are reasonably foreseeable.*
- (iii) *Loss shall be by [determined by excluding the value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the offense was detected.*
 - (a) *For purposes of this subsection: (A) "economic benefit" [includes] [means] money, property, or services performed; and (B) "transferred" means pledged or otherwise provided as collateral, returned, repaid, or otherwise conveyed.*
 - (b) *The value of any “economic benefit” transferred to the victim by the defendant for purposes of Subsection (C) shall ordinarily be measured at the time the offense was detected.*
 - (c) *However, in a case involving collateral pledged by a defendant, the “economic benefit” of such collateral to the victim for purposes of Subsection (C) is the amount the victim has recovered at the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the “economic benefit” of the collateral is its value at the time of sentencing.*

[Option 1 - no exceptions to excluding all benefits]

[Option 2 -

- (d) *However, loss shall not be reduced by the value of:*
 - (1) *[benefits of de minimis value transferred by the defendant to the victim(s)][economic benefit transferred to the victim that has little or no value to the victim because it is substantially different from what the victim intended to receive]; or*

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

[Option 1 -

- (e) *In applying subdivision (B) in a case involving a fraudulent investment scheme, such as a Ponzi scheme, the loss shall not be reduced by the value of the economic benefit transferred to any individual investor in the scheme in excess of that investor's principal investment (i.e., the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).]*

[Option 2 - No credit for benefit transferred to victims designed to lure additional "investments" in the scheme.]

- (D) *Estimation of Loss.—In order to determine the applicable offense level, the court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).*

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

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

[Option 1

- (v) *The gain from the offense.]*

[Option 2:

5. *Pecuniary Gain. The court shall use the defendant's pecuniary gain as an alternative measure of loss if: (i) the pecuniary gain is greater than loss (which may be zero).*

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

[Option 3: use gain either: (i) when loss cannot reasonably be determined; or (ii) when gain is greater than loss.]

[Option 4: only use gain when loss cannot reasonably be determined. Define “gain” as including only illegal proceeds, not allowing reduction for costs of conducting the illegal activity (with would be allowed if “pecuniary gain” is used, which is defined as the before-tax profit.)

(E) Gain. *The court shall use the defendant’s gain as an alternative measure of loss if the loss cannot reasonably be determined but the gain can be determined.*

“Gain” includes the proceeds from the illegal activity.]

[(E or F)] Special Rules. *The following special rules shall be used to assist in determining loss in the cases indicated:*

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

(ii) Government Benefits. *In a case involving government benefits (e.g., grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, the loss is \$50.*

In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required and actual wages paid.

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

In the commentary to §§2B1.1 and 2F1.1 captioned “Application Notes” insert at the end the following:

11. Departure Considerations.

- (A) Upward Departure Considerations. *There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:*
- (i) *A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.*
 - (ii) *The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest.*
 - (iii) *The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, anticipated profits, amounts based on an agreed-upon return or rate of return, or other opportunity costs, not included in the determination of loss for purposes of subsection (b)(1). (See Application Note 2).*
 - (iv) *The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1). (See Application Note 2).*
 - (v) *The offense (1) endangered the solvency or financial security of one or more victims.*
- (B) Downward Departure Considerations. *There also may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted. For example, if a primary objective of the offense was a mitigating, non-monetary objective, such as to fund medical treatment for a sick parent, a downward departure may be warranted:*
- (i) *The primary objective of the offense was a mitigating, non-monetary objective, such as to fund medical treatment for a sick parent. However, if, in addition to that primary objective, a substantial objective of the offense was to benefit the defendant economically, a downward departure for this reason would not ordinarily be warranted.*
 - [(ii) *The loss significantly exceeds the greater of the [defendant's] actual or intended [personal] gain, and therefore significantly overstates the culpability of the defendant.*]

Background:

* * *

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

the offense level under this guideline. Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.

[If option 1 is adopted for causation the following language would be appropriate:

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

* * *

[Make all technical and conforming amendments necessary to fully execute this amendment.]

* * *

Option Two (Criminal Law Committee Proposal):

In the Commentary to §§2B1.1 and 2F1.1 captioned "Application Notes" insert after Note 1 the following new Note 2:

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

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

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

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

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

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

- (i) *Interest of any kind, finance charges, late fees, penalties, anticipated profits, or amounts based on an agreed-upon return or rate of return.*
- (ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense, even if such costs are reasonably foreseeable.*

(C) Credits In Determining Loss.

(i) *Loss shall be determined by excluding the value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the offense was detected. However, loss shall not be reduced by the value of:*

(a) *benefits of de minimis value transferred by the defendant to the victim(s).*

[A minority of the Subcommittee would also include as an exclusion from the provisions allowing a credit the following:]

(b) *services fraudulently rendered to victims by persons falsely posing as licensed professionals, or goods falsely represented as approved by a*

governmental regulatory agency, or goods for which regulatory approval by a government agency was obtained by fraud.

- (ii) *In a case involving a fraudulent investment scheme, such as a “Ponzi scheme,” the loss shall not be reduced by the value of the economic benefit transferred to any investor in the scheme in excess of that investor’s principal investment (i.e., the gain to one investor in the scheme shall not be used to offset the loss to another investor in the scheme).*
- (iii) *For purposes of this subsection: (A) "economic benefit" means money, property, or services performed; and (B) "transferred" includes pledged or otherwise provided as collateral, returned, repaid, or otherwise conveyed.*

(D) *Time of measurement:* *Loss should ordinarily be measured at the time the offense was detected.*

- (i) *For purposes of this guideline, an offense is detected when the defendant knew or reasonably should have known that the offense was detected by a victim or a public law enforcement agency.*
- (ii) *Except as provided in subsection (D)(iii), the value of any “economic benefit” transferred to the victim by the defendant for purposes of Subsection (C) shall be measured at the time the offense was detected.*
- (iii) *However, in a case involving collateral pledged by a defendant, the “economic benefit” of such collateral to the victim for purposes of Subsection (C) is the amount the victim has recovered at the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the “economic benefit” of the collateral is its value at the time of sentencing.*

(E) *Estimation of Loss.* *The court need not determine the precise amount of the loss. Rather, it need only make a reasonable estimate of loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court’s loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).*

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

- (i) *The fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, or destroyed; or if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property or other thing of value.*
- (ii) *The cost of repairs to damaged property, not to exceed the replacement cost had the property been destroyed.*
- (iii) *The approximate number of victims multiplied by the average loss to each victim.*

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

(e) *The offense involved a substantial risk that a victim would lose a significant portion of his or her net worth or suffer other significant financial hardship.*

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

(a) *The primary objective of the offense was a mitigating, non-monetary objective, such as to fund medical treatment for a sick parent. However, if, in addition to that primary objective, a substantial objective of the offense was to benefit the defendant economically, a downward departure for this reason would not ordinarily be warranted.*

(b) *The loss significantly exceeds the greater of the defendant's actual or intended personal gain, and therefore significantly overstates the culpability of the defendant.*

* * *

Background:

* * *

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

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

* * *

[Make all technical and conforming amendments necessary to fully execute this amendment.]

(D) PROPOSED AMENDMENT: REFERRING GUIDELINES FOR THEFT AND FRAUD

Synopsis of 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.*

Proposed Amendments (Part D):

§2B2.3. Trespass

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

* * *

~~(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.

* * *

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

- (a) Base Offense Level: **9**
- (b) Specific Offense Characteristic

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

(1) If the greater of the amount obtained or demanded (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.

* * *

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

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

(b) Specific Offense Characteristics

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

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

* * *

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

(a) Base Offense Level: **9**

(b) Specific Offense Characteristics

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

(1) If the face value of the counterfeit items (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

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

(b) Specific Offense Characteristics

~~(1) 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

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

(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

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

(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.

* * *

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

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

* * *

- (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

- (a) Base Offense Level: 7
- (b) Specific Offense Characteristic

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

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

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

~~(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a~~

public official, whichever is greater, exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or

- (A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, (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.

* * *

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

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

* * *

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

- (2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (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.

* * *

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

- (a) Base Offense Level: **17**

(b) Specific Offense Characteristics

* * *

(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.
- (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.
- (C) Distribution to a minor, increase by **5** levels.
- (D) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.
- (E) Distribution other than distribution described in subdivisions (A) through (D), increase by **2** levels.

* * *

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

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

(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.
- (B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.
- (C) Distribution to a minor, increase by **5** levels.
- (D) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.
- (E) Distribution other than distribution described in subdivisions (A) through (D), increase by **2** levels.

* * *

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

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

* * *

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

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

* * *

- (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
 - (B) If the offense involved (i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as set forth in 50 C.F.R. § 216.15); (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 C.F.R. Part 17); or (iii) fish, wildlife, or plants that are listed in Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 C.F.R. Part 23), increase by **4** levels.

§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.

(E) **PROPOSED AMENDMENT: TECHNICAL AND CONFORMING AMENDMENTS**

§1B1.2. **Applicable Guidelines**

* * *

Commentary

Application Notes:

1.

* * *

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) §2F1.1 (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.

* * *

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

* * *

Commentary

Application Notes:

* * *

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.

* * *

§2F1.2. Insider Trading

_____ (a) Base Offense Level: 8

_____ (b) Specific Offense Characteristic

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

_____ Commentary

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

Application Note:

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

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

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

* * *

§2B1.4. Insider Trading

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

Commentary

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

Application Note:

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

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

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

* * *

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

* * *

- 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).

* * *

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

* * *

Commentary

* * *

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, the infringement amount in subsection (b)(1) serves as a principal factor in determining the offense level for intellectual property offenses.

* * *

§2B2.3. Trespass

* * *

Commentary

Application Notes:

* * *

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).

* * *

§2B3.1. Robbery

* * *

Commentary

Application Notes:

* * *

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).

* * *

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

* * *

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 "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.*

* * *

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

* * *

Commentary

Application Notes:

* * *

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

* * *

§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)~~§2B1.1(Theft, Property Destruction, and Fraud) and includes both actual and intended loss.

* * *

§2H3.3. Obstructing Correspondence

- (a) Base Offense Level:

* * *

- (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)~~ is to be applied.

§2J1.1. Contempt

* * *

Commentary

Application Notes:

* * *

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.

* * *

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

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

* * *

- (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

* * *

- (2) If the base offense level is not determined under (a)(~~3~~), and the offense occurred on a national cemetery, increase by **2** levels.

* * *

§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).

* * *

Commentary

Application Notes:

* * *

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 propertybribery).*

* * *

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.*

§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).

* * *

Commentary

* * *

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.

§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.

* * *

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

* * *

Commentary

Application Notes:

* * *

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.*

* * *

§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;~~

* * *

Commentary

Application Notes:

* * *

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.~~

* * *

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

* * *

- (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.

* * *

Commentary

Application Notes:

* * *

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.~~

* * *

§3D1.5. Determining the Total Punishment

* * *

Illustrations of the Operation of the Multiple-Count Rules

* * *

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.

* * *

43. 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.

* * *

§8A1.2. Application Instructions - Organizations

* * *

Commentary

Application Notes:

* * *

3.

* * *

(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).

* * *

§8C2.1. Applicability of Fine Guidelines

* * *

(a) §§2B1.1, ~~2B1.3~~2B1.4, 2B2.3, 2B4.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.4, ~~2C1.6~~, 2C1.7;
§§2D1.7, 2D3.1, 2D3.2;
§§2E3.1, 2E4.1, 2E5.1, 2E5.3;
~~§§2F1.1, 2F1.2;~~

* * *

Commentary

Application Notes:

* * *

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).*

APPENDIX A - STATUTORY INDEX

* * *

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

| | | |
|-----------------------|---|-------|
| 15 U.S.C. § 645(b) | 2B1.1, 2F1.1 | * * * |
| 15 U.S.C. § 714m(a) | 2F1.1 2B1.1 | |
| 15 U.S.C. § 714m(b) | 2B1.1, 2F1.1 | * * * |
| 15 U.S.C. § 1644 | 2F1.1 2B1.1 | |
| 15 U.S.C. § 1681q | 2F1.1 2B1.1 | |
| 15 U.S.C. § 1693n(a) | 2F1.1 2B1.1 | |
| 15 U.S.C. § 1281 | 2B1.3 2B1.1 (for offenses committed prior to July 5, 1994) | * * * |
| 16 U.S.C. § 114 | 2B1.1, 2B1.3 | |
| 16 U.S.C. § 117c | 2B1.1, 2B1.3 | |
| 16 U.S.C. § 123 | 2B1.1, 2B1.3 , 2B2.3 | |
| 16 U.S.C. § 146 | 2B1.1, 2B1.3 , 2B2.3 | |
| 16 U.S.C. § 413 | 2B1.1, 2B1.3 | |
| 16 U.S.C. § 433 | 2B1.1, 2B1.3 | * * * |
| 16 U.S.C. § 831t(b) | 2F1.1 2B1.1 | |
| 16 U.S.C. § 831t(c) | 2F1.1 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, 2B1.3 2B1.1, 2K1.4, 2X1.1 | * * * |
| 18 U.S.C. § 33 | 2A2.1, 2A2.2, 2B1.3 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, 2B1.3 2B1.1, 2B3.1, 2K1.4, 2X1.1 | |
| 18 U.S.C. § 43 | 2B1.3 2B1.1 | * * * |
| 18 U.S.C. § 112(a) | 2A2.1, 2A2.2, 2A2.3, 2A4.1, 2B1.3 2B1.1, 2K1.4 | * * * |
| 18 U.S.C. § 152 | 2B4.1, 2F1.1 2B1.1, 2J1.3 | |
| 18 U.S.C. § 153 | 2B1.1, 2F1.1 | |
| 18 U.S.C. § 155 | 2F1.1 2B1.1 | * * * |
| 18 U.S.C. § 217 | 2C1.6 2 | * * * |

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, ~~2F1.1~~
18 U.S.C. § 501 2B1.1, 2B5.1, ~~2F1.1~~

| | | |
|--------------------------|---|-------|
| 18 U.S.C. § 502 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 503 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 505 | 2F1.1 2B1.1, 2J1.2 | |
| 18 U.S.C. § 506 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 507 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 508 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 509 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 510 | 2F1.1 2B1.1 | * * * |
| 18 U.S.C. § 513 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 514 | 2F1.1 2B1.1 | * * * |
| 18 U.S.C. § 642 | 2B1.1, 2B5.1, 2F1.1 | * * * |
| 18 U.S.C. § 656 | 2B1.1, 2F1.1 | |
| 18 U.S.C. § 657 | 2B1.1, 2F1.1 | * * * |
| 18 U.S.C. § 659 | 2B1.1, 2F1.1 | * * * |
| 18 U.S.C. § 663 | 2B1.1, 2F1.1 | * * * |
| 18 U.S.C. § 665(a) | 2B1.1, 2F1.1 | * * * |
| 18 U.S.C. § 666(a)(1)(A) | 2B1.1, 2F1.1 | * * * |
| 18 U.S.C. § 709 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 712 | 2F1.1 2B1.1 | * * * |
| 18 U.S.C. § 911 | 2F1.1 2B1.1, 2L2.2 | * * * |
| 18 U.S.C. § 914 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 915 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 917 | 2F1.1 2B1.1 | * * * |
| 18 U.S.C. § 970(a) | 2B1.1 2B1.1, 2K1.4 | * * * |
| 18 U.S.C. § 1001 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 1002 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 1003 | 2B1.1, 2B5.1, 2F1.1 | |
| 18 U.S.C. § 1004 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 1005 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 1006 | 2F1.1 2B1.1, 2S1.3 | |
| 18 U.S.C. § 1007 | 2F1.1 2B1.1, 2S1.3 | * * * |
| 18 U.S.C. § 1010 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 1011 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 1012 | 2B1.1, 2C1.3, 2F1.1 | |
| 18 U.S.C. § 1013 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 1014 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 1015 | 2F1.1 2B1.1, 2J1.3, 2L2.1, 2L2.2 | |

| | | | | |
|------------------------|--------------------------------------|--|---|---|
| 18 U.S.C. § 1016 | 2F1.1 2B1.1 | | | |
| 18 U.S.C. § 1017 | 2F1.1 2B1.1 | | | |
| 18 U.S.C. § 1018 | 2F1.1 2B1.1 | | | |
| 18 U.S.C. § 1019 | 2F1.1 2B1.1 | | | |
| 18 U.S.C. § 1020 | 2F1.1 2B1.1 | | | |
| 18 U.S.C. § 1021 | 2F1.1 2B1.1 | | | |
| 18 U.S.C. § 1022 | 2F1.1 2B1.1 | | | |
| 18 U.S.C. § 1023 | 2B1.1, 2F1.1 | | * | * |
| | | | * | * |
| 18 U.S.C. § 1025 | 2F1.1 2B1.1 | | | |
| 18 U.S.C. § 1026 | 2F1.1 2B1.1 | | | |
| | | | * | * |
| 18 U.S.C. § 1028 | 2F1.1 2B1.1, 2L2.1, 2L2.2 | | | |
| 18 U.S.C. § 1029 | 2F1.1 2B1.1 | | | |
| | | | * | * |
| | | | * | * |
| 18 U.S.C. § 1030(a)(4) | 2F1.1 2B1.1 | | | |
| 18 U.S.C. § 1030(a)(5) | 2B1.3 2B1.1 | | | |
| | | | * | * |
| 18 U.S.C. § 1030(a)(6) | 2F1.1 2B1.1 | | | |
| | | | * | * |
| 18 U.S.C. § 1031 | 2F1.1 2B1.1 | | | |
| 18 U.S.C. § 1032 | 2B1.1, 2B4.1, 2F1.1 | | | |
| 18 U.S.C. § 1033 | 2B1.1, 2F1.1 , 2J1.2 | | | |
| 18 U.S.C. § 1035 | 2F1.1 2B1.1 | | | |
| | | | * | * |
| | | | * | * |
| 18 U.S.C. § 1341 | 2B1.1, 2C1.7, 2F1.1 | | | |
| 18 U.S.C. § 1342 | 2B1.1, 2C1.7, 2F1.1 | | | |
| 18 U.S.C. § 1343 | 2B1.1, 2C1.7, 2F1.1 | | | |
| 18 U.S.C. § 1344 | 2F1.1 2B1.1 | | | |
| 18 U.S.C. § 1347 | 2F1.1 2B1.1 | | | |
| | | | * | * |
| | | | * | * |
| 18 U.S.C. § 1361 | 2B1.3 2B1.1 | | | |
| 18 U.S.C. § 1362 | 2B1.3 2B1.1, 2K1.4 | | | |
| 18 U.S.C. § 1363 | 2B1.3 2B1.1, 2K1.4 | | | |
| | | | * | * |
| | | | * | * |
| 18 U.S.C. § 1366 | 2B1.3 2B1.1 | | | |
| | | | * | * |
| | | | * | * |
| 18 U.S.C. § 1422 | 2B1.1, 2C1.2, 2F1.1 | | | |
| | | | * | * |
| | | | * | * |
| 18 U.S.C. § 1702 | 2B1.1, 2B1.3 , 2H3.3 | | | |
| 18 U.S.C. § 1703 | 2B1.1, 2B1.3 , 2H3.3 | | | |
| 18 U.S.C. § 1704 | 2B1.1, 2F1.1 | | | |
| 18 U.S.C. § 1705 | 2B1.3 2B1.1 | | | |
| 18 U.S.C. § 1706 | 2B1.3 2B1.1 | | | |
| | | | * | * |
| | | | * | * |
| | | | * | * |
| 18 U.S.C. § 1708 | 2B1.1, 2F1.1 | | | |
| | | | * | * |

| | | |
|-------------------|--|-------|
| 18 U.S.C. § 1712 | 2F1.1 2B1.1 | * * * |
| 18 U.S.C. § 1716C | 2F1.1 2B1.1 | * * * |
| 18 U.S.C. § 1720 | 2F1.1 2B1.1 | * * * |
| 18 U.S.C. § 1728 | 2F1.1 2B1.1 | * * * |
| 18 U.S.C. § 1852 | 2B1.1, 2B1.3 | |
| 18 U.S.C. § 1853 | 2B1.1, 2B1.3 | |
| 18 U.S.C. § 1854 | 2B1.1, 2B1.3 | * * * |
| 18 U.S.C. § 1857 | 2B1.3 2B1.1, 2B2.3 | * * * |
| 18 U.S.C. § 1861 | 2F1.1 2B1.1 | * * * |
| 18 U.S.C. § 1902 | 2F1.1 2B1.4 | * * * |
| 18 U.S.C. § 1919 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 1920 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 1923 | 2F1.1 2B1.1 | * * * |
| 18 U.S.C. § 1992 | 2A1.1, 2B1.3 2B1.1, 2K1.4, 2X1.1 | * * * |
| 18 U.S.C. § 2071 | 2B1.1, 2B1.3 | |
| 18 U.S.C. § 2072 | 2F1.1 2B1.1 | |
| 18 U.S.C. § 2073 | 2F1.1 2B1.1 | * * * |
| 18 U.S.C. § 2197 | 2F1.1 2B1.1 | * * * |
| 18 U.S.C. § 2272 | 2F1.1 2B1.1 | * * * |
| 18 U.S.C. § 2275 | 2B1.3 2B1.1, 2K1.4 | |
| 18 U.S.C. § 2276 | 2B1.3 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, 2B1.3 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, 2B1.3 2B1.1, 2B3.1, 2B3.2, 2K1.4, 2X1.1 | * * * |

| | | | | |
|------------------------|--|--|-------|--|
| 18 U.S.C. § 2314 | 2B1.1, 2F1.1 | | | |
| 18 U.S.C. § 2315 | 2B1.1, 2F1.1 | | | |
| | | | * * * | |
| 18 U.S.C. § 2332a | 2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.5, 2A2.1, 2A2.2, 2B1.3 2B1.1, 2K1.4 | | | |
| | | | * * * | |
| 19 U.S.C. § 1434 | 2F1.1 2B1.1, 2T3.1 | | | |
| 19 U.S.C. § 1435 | 2F1.1 2B1.1, 2T3.1 | | | |
| 19 U.S.C. § 1436 | 2F1.1 2B1.1, 2T3.1 | | | |
| | | | * * * | |
| 19 U.S.C. § 1919 | 2F1.1 2B1.1 | | | |
| 19 U.S.C. § 2316 | 2F1.1 2B1.1 | | | |
| | | | * * * | |
| 20 U.S.C. § 1097(a) | 2B1.1, 2F1.1 | | | |
| 20 U.S.C. § 1097(b) | 2F1.1 2B1.1 | | | |
| 20 U.S.C. § 1097(d) | 2F1.1 2B1.1 | | | |
| | | | * * * | |
| 21 U.S.C. § 333(a)(2) | 2F1.1 2B1.1, 2N2.1 | | | |
| | | | * * * | |
| 22 U.S.C. § 1980(g) | 2F1.1 2B1.1 | | | |
| 22 U.S.C. § 2197(n) | 2F1.1 2B1.1 | | | |
| | | | * * * | |
| 22 U.S.C. § 4221 | 2F1.1 2B1.1 | | | |
| 25 U.S.C. § 450d | 2B1.1, 2F1.1 | | | |
| | | | * * * | |
| 26 U.S.C. § 7208 | 2F1.1 2B1.1 | | | |
| | | | * * * | |
| 26 U.S.C. § 7214 | 2B1.1, 2C1.1, 2C1.2, 2F1.1 | | | |
| | | | * * * | |
| 26 U.S.C. § 7232 | 2F1.1 2B1.1 | | | |
| | | | * * * | |
| 29 U.S.C. § 1141 | 2B1.1, 2B3.2, 2F1.1 | | | |
| | | | * * * | |
| 38 U.S.C. § 787 | 2F1.1 2B1.1 | | | |
| | | | * * * | |
| 38 U.S.C. § 3502 | 2F1.1 2B1.1 | | | |
| | | | * * * | |
| 41 U.S.C. § 423(e) | 2B1.1, 2C1.1, 2C1.7, 2F1.1 | | | |
| | | | * * * | |
| 42 U.S.C. § 408 | 2F1.1 2B1.1 | | | |
| 42 U.S.C. § 1307(a) | 2F1.1 2B1.1 | | | |
| 42 U.S.C. § 1307(b) | 2F1.1 2B1.1 | | | |
| 42 U.S.C. § 1320a-7b | 2B1.1, 2B4.1, 2F1.1 | | | |
| 42 U.S.C. § 1383(d)(2) | 2F1.1 2B1.1 | | | |
| 42 U.S.C. § 1383a(a) | 2F1.1 2B1.1 | | | |

| | | |
|--------------------------|--|-------|
| 42 U.S.C. § 1383a(b) | 2F1.1 2B1.1 | |
| 42 U.S.C. § 1395nn(a) | 2F1.1 2B1.1 | * * * |
| 42 U.S.C. § 1395nn(c) | 2F1.1 2B1.1 | |
| 42 U.S.C. § 1396h(a) | 2F1.1 2B1.1 | * * * |
| 42 U.S.C. § 1713 | 2F1.1 2B1.1 | |
| 42 U.S.C. § 1760(g) | 2B1.1, 2F1.1 | |
| 42 U.S.C. § 1761(o)(1) | 2F1.1 2B1.1 | |
| 42 U.S.C. § 1761(o)(2) | 2B1.1, 2F1.1 | * * * |
| 42 U.S.C. § 3220(a) | 2F1.1 2B1.1 | |
| 42 U.S.C. § 3220(b) | 2B1.1, 2F1.1 | |
| 42 U.S.C. § 3426 | 2F1.1 2B1.1 | * * * |
| 42 U.S.C. § 3791 | 2B1.1, 2F1.1 | |
| 42 U.S.C. § 3792 | 2F1.1 2B1.1 | |
| 42 U.S.C. § 3795 | 2B1.1, 2F1.1 | |
| 42 U.S.C. § 5157(a) | 2F1.1 2B1.1 | * * * |
| 45 U.S.C. § 359(a) | 2F1.1 2B1.1 | |
| 46 U.S.C. § 1276 | 2F1.1 2B1.1 | * * * |
| 49 U.S.C. § 121 | 2F1.1 2B1.1 (for offenses committed prior to July 5, 1994) | * * * |
| 49 U.S.C. § 11903 | 2F1.1 2B1.1 | |
| 49 U.S.C. § 11904 | 2F1.1 2B1.1 (2B4.1 for offenses committed prior to January 1, 1996) | * * * |
| 49 U.S.C. § 14912 | 2F1.1 2B1.1 | |
| 49 U.S.C. § 16102 | 2F1.1 2B1.1 | * * * |
| 49 U.S.C. § 60123(d) | 2B1.1 32B1.1 | |
| 49 U.S.C. § 80116 | 2F1.1 2B1.1 | |
| 49 U.S.C. § 80501 | 2B1.1 32B1.1 | |
| 49 U.S.C. App. § 1687(g) | 2B1.1 32B1.1 (for offenses committed prior to July 5, 1994) | |

PART F: PROPOSED AMENDMENT: 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 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 been 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 (7th 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 (6th 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.

- (3) If the offense involved willful failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and did not pay.
- (4) If the offense involved improperly claiming a refund to which the claimant was not entitled, the tax loss is the amount of the claimed refund to which the claimant was not entitled.
- (5) The tax loss is not reduced by any payment of the tax subsequent to the commission of the offense.

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).

Issue for Comment: 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. 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.