

Proposed Guideline Amendments for Public Comment



***United States Sentencing Commission
January 14, 1998***

Official text of the proposed amendments can be found in the January 6, 1998, edition of the Federal Register (Vol. 63, No. 3, Part II).

INDEX TO GUIDELINE AMENDMENTS PROPOSED FOR PUBLIC COMMENT

<u>AMDT. NO.</u>	<u>PAGE NO.</u>	<u>ISSUE</u>
1	1	Theft, Fraud, and Tax Loss Tables (§§2B1.1, 2F1.1, 2T4.1) —(A) presents two options for revising the theft, fraud, and tax loss tables to raise penalties for economic offenses that have medium to high dollar losses in order to achieve better proportionality with guideline penalties for other offenses of comparable seriousness; and (B) includes issues for comment on (i) suggested construction of the loss tables other than those proposed by the amendment; and (ii) whether, if "more than minimal planning" is built into the loss tables, departures based on the extent of planning involved should be prohibited.
2	9	Guidelines that Refer to the Theft and Fraud Loss Tables (Chapter Two) —(A) indicates the changes that might be called for in guidelines that refer to the theft or fraud loss tables if the Commission were to adopt one of the loss tables proposed in Amendment 1; (B) proposes an alternative monetary table that does not incorporate "more than minimal planning"; (C) includes issue for comment on the appropriate starting point for a loss table applicable to offenses sentenced under §2B2.3 (Trespass) that involve invasion of a protected computer; and (D) includes issues for comment on (i) whether any of the referenced guidelines should refer to the fraud loss table proposed in Amendment 1 instead of the Alternative Monetary Table; (ii) whether the increase in offense level resulting from reference to a particular monetary table should, for any of the referenced guidelines, be capped at a certain number of levels; and (iii) whether any of the guidelines that refer to the current fraud loss table should continue to refer to that table if the Commission adopts a new fraud loss table.
3	27	Consolidation of Theft, Fraud Property Destruction, and Fraud Guidelines (§§2B1.1, 2B1.3, and 2F1.1) —(A) consolidates the theft, property destruction, and fraud guidelines; and (B) includes issues for comment on (i) whether Application Note 10 of the proposal should be stated as an explicit cross reference to the most applicable guideline; and (ii) whether any of the specific offense characteristics in the proposal should be eliminated.
4	51	Definition of Loss (§§2B1.1 and 2F1.1) —(A) presents two options for revising the definition of loss in the theft and fraud guidelines; and (B) includes issues for comment on (i) the standard of causation; (ii) fair market value; (iii) interest; (iv) credits against loss and benefit received by victims; (v) the diversion of government benefits; (vi) gain; (vii) intended loss; (viii) the risk of loss; (ix) loss amounts that over- or understate the significance of the offense; and (x) additional special rules.

- 5 76 **Issues Related to Revision of Loss Tables (§§2B1.1, 2F1.1, and 2T4.1)**—(A) proposes deletion of the "more than minimal planning" enhancement; (B) proposes a two-level reduction in the theft and fraud guidelines for cases involving only limited or insignificant planning, if "more than minimal planning" is built into the loss tables; (C) adds an enhancement to the theft and fraud guidelines for sophisticated concealment; and (D) eliminates the four-level increase currently required for defendants who derive more than \$1 million in gross receipts from financial institutions while maintaining the current floor of level 24 for such defendants.
- 6 96 **Telemarketing Fraud - Issues for Comment**—whether (i) telemarketing fraud should be treated differently in the guidelines from other fraud; (ii) the guidelines adequately address fraud offenses that impact multiple victims; (iii) the vulnerable victim guideline (§3A1.1) adequately addresses revictimization concerns; (iv) listed departure factors in §2F1.1 and Chapter 5, Part K should be converted into specific offense characteristics; (v) the proposed amendments adequately address concerns about the use of sophisticated means; and (vi) there are additional factors that should be taken into account under the guidelines for telemarketing offenses.

Circuit Conflicts—(A) addresses a circuit conflict by limiting the departure on aberrant behavior to a spontaneous and thoughtless act; (B) addresses a circuit conflict on the enhancement in the fraud guideline for the misrepresentation of acting on behalf of a charitable organization by providing enhancements for the legitimate employee of the organization who makes a misrepresentation to persons outside the organization and for the defendant who pretends to be an employee or authorized agent of the organization; (C) presents two options for addressing the circuit conflict regarding whether filing fraudulent forms with bankruptcy and probate courts violates a judicial order for purposes of the enhancement in the fraud guideline; (D) addresses the circuit conflict regarding whether the guideline procedure of grouping a failure to appear count of conviction with the underlying offense violates the statutory mandate of imposing a consecutive sentence by making it more clear that the method outlined for determining the sentence for failure to appear ensures an incremental, consecutive sentence, clearly distinguishing the pertinent statutes, and adding a departure provision if the offense conduct involves multiple obstructive behavior; (E) (i) addresses a circuit conflict by providing that the abuse of position of trust adjustment applies to the imposter; and (ii) provides issue for comment on whether §3B1.3 should be amended to exclude application to the imposter; (F) presents three options for addressing a circuit conflict on whether the term "instant offense," as used in §3C1.1, includes obstruction that occurs in cases closely related to the defendant's case or only those cases specifically related to the offense of conviction; (G) addresses a circuit conflict by excluding a defendant's denial of drug use while in pretrial release from application of the obstruction of justice guideline; (H) presents two options for addressing a circuit conflict on whether confinement in a community treatment center or halfway house following revocation of parole, probation, or supervised release qualifies as "incarceration" in determining the defendant's subsequent criminal history score; and (I) presents four options for addressing a circuit conflict on whether a diminished capacity departure is precluded if the defendant committed a "crime of violence".

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| 7(A) | 120 | Grounds for Departure (§5K2.0) —issue for comment on whether §5K2.0 should be amended to incorporate the analysis and holding of <i>Koon v. United States</i> , 116 S.Ct. 2835 (1996). |
| 8 | 120 | Homicide (Chapter Two, Part A) —issue for comment on review and possible amendment of homicide guidelines, specifically (A) second degree murder (§2A1.2); (B) voluntary manslaughter (§2A1.3); (C) involuntary manslaughter (§2A1.4); and (D) closely related guidelines. |
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- 9 122 **Electronic Copyright Infringement (§2B5.3)**—*issue for comment on how to amend §2B5.3 (Copyright Infringement) to best effectuate congressional directive to the Commission in the No Electronic Theft Act.*
- 10 123 **Property Offense at National Cemeteries** —*(A) proposes an enhancement of not less than two levels for offenses against the property of a national cemetery in response to the Veteran’s Cemetery Protection Act of 1997; and (B) includes issue for comment on whether floor offense level should also be provided for such offenses.*
- 11 126 **Prohibited Persons in Firearms Guideline (§2K2.1)**—*(A) expands definition of prohibited person to include person convicted for misdemeanor crime of domestic violence; and (B) increases base offense level for persons who knowingly sell a firearm to a prohibited person.*
- 12 129 **Conditions of Probation and Supervised Release** —*(A) adds a discretionary condition of probation regarding deportation; (B) deletes reference to "just punishment" in supervised release guideline; and (C) indicates that discretionary conditions of probation and supervised release are policy statements.*

**1998 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES,
POLICY STATEMENTS, AND OFFICIAL COMMENTARY**

**Fraud, Theft, Tax, and Related Offenses
Chapter Two**

1. Synopsis of Proposed Amendment: *During the 1997-98 amendment cycle, the Sentencing Commission has identified as a priority issue for consideration the definition of "loss" and the weight it is given in the theft, fraud, and tax guidelines. The following are two proposed options for revising the loss tables for the theft, fraud, and tax guidelines. The purpose of both options is to raise penalties for economic offenses that have medium to high dollar losses in order to achieve better proportionality with the guideline penalties for other offenses of comparable seriousness. With the exception of the proposed tax tables at low dollar losses, each of the proposed tables uses two-level incremental increases in offense levels.*

Option 1:

(A) §2B1.1 (Theft): The proposed loss table incorporates the two-level "more than minimal planning" (MMP) enhancement currently treated as a separate specific offense characteristic in the theft guideline. The first level from that enhancement is built in at amounts exceeding \$10,000; the second level from that enhancement is built in at amounts exceeding \$20,000. In addition, beginning at amounts exceeding \$40,000, the severity of the offense levels in the proposed theft loss table is greater than the severity of the offense levels in the current theft loss table, plus an enhancement for MMP.

(B) §2F1.1 (Fraud): The proposed change provides for an initial increase in the loss table from a base offense level of 6 to an offense level of 8 at more than \$5,000, whereas the initial increase in the current fraud loss table is an increase from a base offense level of 6 to an offense level of 7 at more than \$2,000. The proposed loss table incorporates the MMP enhancement currently treated as a separate specific offense characteristic in the fraud guideline. The first level of that enhancement is built in at amounts exceeding \$10,000; the second level from that enhancement is built in at amounts exceeding \$20,000. In addition, beginning at \$40,000, the severity of the offense levels in the proposed fraud loss table is greater than the severity of the offense levels in the current fraud loss table, plus an enhancement for MMP.

(C) §2T4.1 (Tax): For tax losses of \$40,000 or less, the offense levels of the proposed tax loss table are the same as the current tax loss table. For losses of more than \$40,000, the proposed increases in offense levels are the same as the increases in offense levels in the proposed theft and fraud loss tables for like monetary amounts.

Option 2:

(A) §2B1.1 (Theft): The proposed loss table incorporates the two-level MMP enhancement currently treated as a separate specific offense characteristic in the theft guideline. The first level from that enhancement is built in at amounts exceeding \$2,000; the second level from that enhancement is built in at amounts exceeding \$5,000. (Because the proposed table also changes a "cutting point" from \$10,000 to \$12,500, only one level for more than MMP is built in for amounts between \$10,000 and \$12,500.) In addition, beginning at amounts exceeding \$12,500, the severity of the offense levels in the proposed theft loss table is greater than the severity of the offense levels in the current theft loss table, plus an enhancement for MMP.

(B) §2F1.1 (Fraud): The proposed loss table provides for an initial increase from a base offense level of 6 to an offense level of 8 at more than \$2,000, whereas the initial increase under the current fraud loss table increases the base offense level of 6 to an offense level of 7 at more than \$2,000. The proposed loss table incorporates the MMP enhancement currently treated as a separate specific offense characteristic in the fraud guideline. The first level of that enhancement is built in at amounts exceeding \$2,000; the second level from

that enhancement is built in at amounts exceeding \$5,000. (Because the proposed table also changes a “cutting point” from \$10,000 to \$12,500, only one level for MMP is built in for amounts between \$10,000 and \$12,500.) In addition, beginning at \$12,500, the severity of the offense levels in the proposed fraud loss table is greater than the severity of the offense levels in the current fraud loss table, plus an enhancement for MMP.

(C) §2T4.1 (Tax): The proposed increases in offense levels are the same as the increases in offense levels in the proposed fraud loss tables for like monetary amounts.

Option 1:

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

* * *

(b) Specific Offense Characteristics

(1) If the loss exceeded ~~\$100~~**\$2,000**, increase the offense level as follows:

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

<u>Loss Amount (Apply the Greatest)</u>	<u>Offense Level Increase</u>
(A) \$2,000 or less	no increase
(B) More than \$2,000	add 2
(C) More than \$5,000	add 4
(D) More than \$10,000	add 6
(E) More than \$20,000	add 8

(F) More than \$40,000	add 10
(G) More than \$80,000	add 12
(H) More than \$200,000	add 14
(I) More than \$500,000	add 16
(J) More than \$1,200,000	add 18
(K) More than \$2,000,000	add 20
(L) More than \$7,500,000	add 22
(M) More than \$20,000,000	add 24
(N) More than \$50,000,000	add 26
(O) More than \$100,000,000	add 28.

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

* * *

(b) Specific Offense Characteristics

(1) If the loss exceeded ~~\$2,000~~\$5,000, increase the offense level as follows:

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

Loss Amount (Apply the Greatest) Offense Level Increase

(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 \$200,000	add 12
(H) More than \$500,000	add 14
(I) More than \$1,200,000	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 \$100,000,000	add 26.

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§2T4.1. Tax Table

<u>Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
(A) \$1,700 or less	6
(B) More than \$1,700	7
(C) More than \$3,000	8
(D) More than \$5,000	9
(E) More than \$8,000	10
(F) More than \$13,500	11
(G) More than \$23,500	12
(H) More than \$40,000	13
(I) More than \$70,000	14
(J) More than \$120,000	15
(K) More than \$200,000	16
(L) More than \$325,000	17
(M) More than \$550,000	18
(N) More than \$950,000	19
(O) More than \$1,500,000	20
(P) More than \$2,500,000	21
(Q) More than \$5,000,000	22
(R) More than \$10,000,000	23
(S) More than \$20,000,000	24
(T) More than \$40,000,000	25
(U) More than \$80,000,000	26.

<u>Loss Amount (Apply the Greatest)</u>	<u>Offense Level Increase</u>
(A) \$1,700 or less	no increase
(B) More than \$1,700	add 1
(C) More than \$3,000	add 2
(D) More than \$5,000	add 3
(E) More than \$8,000	add 4
(F) More than \$13,500	add 5
(G) More than \$23,500	add 6
(H) More than \$40,000	add 8
(I) More than \$80,000	add 10

(J) More than \$200,000	add 12
(K) More than \$500,000	add 14
(L) More than \$1,200,000	add 16
(M) More than \$2,500,000	add 18
(N) More than \$7,500,000	add 20
(O) More than \$20,000,000	add 22
(P) More than \$50,000,000	add 24
(Q) More than \$100,000,000	add 26.

* * *

Option 2:

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

* * *

(b) Specific Offense Characteristics

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

Loss (Apply the Greatest) Increase in Level

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

Loss Amount (Apply the Greatest) Offense Level Increase

(A) \$100 or less	no increase
(B) More than \$100	add 1

(C)	More than \$1,000	add 2
(D)	More than \$2,000	add 4
(E)	More than \$5,000	add 6
(F)	More than \$12,500	add 8
(G)	More than \$30,000	add 10
(H)	More than \$70,000	add 12
(I)	More than \$150,000	add 14
(J)	More than \$350,000	add 16
(K)	More than \$800,000	add 18
(L)	More than \$2,500,000	add 20
(M)	More than \$7,500,000	add 22
(N)	More than \$20,000,000	add 24
(O)	More than \$50,000,000	add 26
(P)	More than \$100,000,000	add 28.

* * *

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

* * *

(b) Specific Offense Characteristics

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

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

Loss Amount (Apply the Greatest) Offense Level Increase

(A)	\$2,000 or less	no increase
(B)	More than \$2,000	add 2
(C)	More than \$5,000	add 4
(D)	More than \$12,500	add 6
(E)	More than \$30,000	add 8
(F)	More than \$70,000	add 10
(G)	More than \$150,000	add 12
(H)	More than \$350,000	add 14
(I)	More than \$800,000	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 \$100,000,000	add 26.

* * *

§2T4.1. Tax Table

	<u>Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
(A)	\$1,700 or less	6
(B)	More than \$1,700	7
(C)	More than \$3,000	8
(D)	More than \$5,000	9
(E)	More than \$8,000	10
(F)	More than \$13,500	11
(G)	More than \$23,500	12
(H)	More than \$40,000	13
(I)	More than \$70,000	14
(J)	More than \$120,000	15
(K)	More than \$200,000	16
(L)	More than \$325,000	17
(M)	More than \$550,000	18
(N)	More than \$950,000	19
(O)	More than \$1,500,000	20
(P)	More than \$2,500,000	21
(Q)	More than \$5,000,000	22
(R)	More than \$10,000,000	23
(S)	More than \$20,000,000	24
(T)	More than \$40,000,000	25
(U)	More than \$80,000,000	26.

	<u>Loss Amount (Apply the Greatest)</u>	<u>Offense Level Increase</u>
(A)	\$2,000 or less	no increase
(B)	More than \$2,000	add 2
(C)	More than \$5,000	add 4
(D)	More than \$12,500	add 6

(E)	More than \$30,000	add 8
(F)	More than \$70,000	add 10
(G)	More than \$150,000	add 12
(H)	More than \$350,000	add 14
(I)	More than \$800,000	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 \$100,000,000	add 26.

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Issues for Comment: (A) *The Commission invites comment on suggested constructions of the loss tables for the theft, property damage and destruction, and fraud guidelines other than the options proposed by this amendment. Specifically, the Commission invites commentators to suggest alternative loss tables that contain different rates of increases and different increments from those set forth in the options proposed by this amendment.*

(B) *The Commission invites comment on whether, in conjunction with the above proposed amendments to build into the loss tables “more than minimal planning,” it should add an application note in §§2B1.1 (Theft), 2B1.3 (Property Damage and Destruction), and 2F1.1 (Fraud) that would prohibit a downward departure if the offense involved only minimal planning and prohibit an upward departure if the offense involved “more than minimal planning.” For a related proposal to address cases in which there is limited or insignificant planning, see Amendment 5(B), infra.*

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

The amendments are divided into Parts (A) through (G). Part (A) proposes an alternative monetary table that does not incorporate MMP. The amendments to the referring guidelines are presented in Parts (B) through (G) as follows:

(B) *Those guidelines that arguably incorporate the concept of MMP into the base offense level or a specific offense characteristic.*

(C) *Certain pornography and obscenity guidelines.*

(D) *Certain copyright infringement and structuring guidelines, for which use of the proposed loss tables for fraud is also presented as an option.*

(E) *Trespass, for which use of the proposed theft and fraud loss tables starting at \$2,000 is also presented as an option, as well as an issue for comment.*

(F) *Property destruction, which is proposed to be consolidated with the theft guideline (thereby mitigating the necessity for reference to the alternative monetary table).*

(G) *Bank gratuity, which is proposed to be consolidated with the principal gratuity guideline.*

(A) The Reference Monetary Table

Synopsis of Proposed Amendment: *This amendment proposes to add to the guidelines an alternative monetary*

table for guidelines, other than those for theft and fraud, that currently refer to either the theft or fraud loss table and arguably incorporate a MMP-type feature in either the base offense level or a specific offense characteristic. The proposed alternative monetary table does not build in MMP, but does incorporate the enhanced severity increases of the proposed fraud/theft tables (*see* Amendment 1, *supra.*) for amounts exceeding \$40,000.

The use of the proposed monetary table for these guidelines in lieu of the proposed theft/fraud tables generally would (1) maintain proportionality with the proposed fraud/theft loss tables, across the range of monetary values, (2) achieve increases in severity for larger-scale referring guideline offenses, and (3) eliminate the need for a 2-level reduction in these referring guidelines to account for the fact that MMP has been incorporated into the proposed theft/fraud tables. The two options are presented to coordinate with the two loss table options in proposed Amendment 1, *supra.* (i.e., Option 1 presented below coordinates with Option 1 in Amendment 1, and Option 2 presented below coordinates with Option 2 in Amendment 1).

Option 1:

§2X6.1. Reference Monetary Table

<u>Amount</u> (Apply the Greatest)	<u>Increase in Level</u>
[(A) \$2,000 or less] or	[no increase]
[(A) More than \$2,000]or	[add 1]
[(A) \$5,000 or less]	[no increase]
(B) More than \$5,000	add 2
(C) More than \$10,000	add 3
(D) More than \$20,000	add 4
(E) More than \$40,000	add 6
(F) More than \$80,000	add 8
(G) More than \$200,000	add 10
(H) More than \$500,000	add 12
(I) More than \$1,200,000	add 14
(J) More than \$2,500,000	add 16
(K) More than \$7,500,000	add 18
(L) More than \$20,000,000	add 20
(M) More than \$50,000,000	add 22
(N) More than \$100,000,000	add 24.

Option 2:

§2X6.1. Reference Monetary Table

<u>Amount</u> (Apply the Greatest)	<u>Increase in Level</u>
(A) \$2,000 or less	<u>no increase</u>
(B) More than \$2,000	add 1
(C) More than \$5,000	add 2
(D) More than \$12,500	add 4
(E) More than \$30,000	add 6
(F) More than \$70,000	add 8
(G) More than \$150,000	add 10
(H) More than \$350,000	add 12
(I) More than \$800,000	add 14

(J)	More than \$2,500,000	add 16
(K)	More than \$7,500,000	add 18
(L)	More than \$20,000,000	add 20
(M)	More than \$50,000,000	add 22
(N)	More than \$100,000,000	add 24.

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

Synopsis of Proposed Amendment: *With respect to these guidelines, there are two issues: (1) the loss table to be referenced, and (2) whether the initial offense level increase from the referenced table should occur at \$2,000 (the current status) or at \$5,000. To be precise, the “cutting points” in the monetary tables occur when the monetary amount is “more than \$2,000” or “more than \$5,000”, etc. For simplicity, this discussion generally will omit the “more than” modifier.*

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

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

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

- (a) Base Offense Level: 9
 - (b) Specific Offense Characteristics
 - ~~(1) If the face value of the counterfeit items exceeded \$2,000, increase by the corresponding number of levels from the table at §2F1.1 (Fraud and Deceit).~~
 - (1) If the face value of the counterfeit items exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).
- Option 1A: (1) If the face value of the counterfeit items (A) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (B) exceeded \$5,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

* * *

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

Option 1A:

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

* * *

§2F1.2. Insider Trading

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

(b) Specific Offense Characteristic

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

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

Option 1A:

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

* * *

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

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

(b) Specific Offense Characteristics

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

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

Option 1A:

- (1) If the greater of the value of the bribe or the improper benefit to be conferred (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

* * *

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

- (a) Base Offense Level: **9**
- (b) Specific Offense Characteristic
 - ~~(1) If the greater of the amount obtained or demanded exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1.~~
 - (1) If the greater of the amount obtained or demanded exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

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

* * *

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

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristics

* * *

- (3) (If more than one applies, use the greater):
 - ~~(A) If the market value of the fish, wildlife, or plants exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or~~
 - (A) If the market value of the fish, wildlife, or plants exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table), [but in no event more than **18**] levels]; or

- Option 1A:
- (A) If the market value of the fish, wildlife, or plants (i) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (ii) exceeded \$5,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table), [but in no event more than **18**] levels]; or

* * *

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

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

* * *

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

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

* * *

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

- (a) Base Offense Level: **10**
 - (b) Specific Offense Characteristic
 - (1) (If more than one applies, use the greater):
 - ~~(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or~~
 - (A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).
- Option 1A:
- (A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, (i) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (ii) exceeded \$5,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

* * *

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

* * *

- (b) Specific Offense Characteristics
 - * * *
 - ~~(2) Increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.~~
 - (2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater, exceeded [Option 1: \$5,000][Option 2: \$2,000], increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).
- Option 1A:
- (2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

* * *

(C) Pornography and Obscenity

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

Note that, with respect to §§2G2.2 and 2G3.1, the floor (i.e., an increase of not less than [5] levels) for the amount of the material has been maintained. However, two effects of maintaining the floor should be mentioned: (1) The issue of the starting point for any of the proposed tables is no longer relevant (because the starting point simply does not come into play at such levels). (2) Under the current fraud loss table, the 5-level floor presupposes a retail value of at least \$40,000; however, those values change depending on the particular table proposed to be used. For that reason, the 5-level enhancement is bracketed in the following options.

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

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

* * *

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

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

* * *

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

* * *

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

Commentary

* * *

Application Notes:

* * *

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

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

- (a) Base Offense Level: **10**
- (b) Specific Offense Characteristics
 - (1) ~~If the offense involved an act related to distribution for pecuniary gain, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels.~~

* * *

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

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

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

* * *

Commentary

Application Notes:

* * *

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

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

- (a) Base Offense Level: **12**
- (b) Specific Offense Characteristics

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

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

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

Option 3: * * *

(b) Specific Offense Characteristics

* * *

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

Commentary

* * *

Application Notes:

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

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

(D) Copyright Infringement and Structuring Transactions

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

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

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

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristic
 - ~~(1) If the retail value of the infringing items exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).~~

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

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

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

Option 3A: (1) If the retail value of the infringing items (A) exceeded \$2,000 but did not exceed \$5,000, increase by **1** level; or (B) exceeded \$5,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

* * *

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

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

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

- Option 1A: (a) Base Offense Level: **6** plus (1) **1** level, if the value of the funds exceeded \$2,000 but did not exceed \$5,000; or (2) the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table), if the value of the funds exceeded \$5,000.
- (a) Base Offense Level: **6** plus the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit), if the value of the funds exceeded [Option 3: \$5,000][Option 4: \$2,000].
- Option 3A: (a) Base Offense Level: **6** plus (1) **1** level, if the value of the funds exceeded \$2,000 but did not exceed \$5,000; or (2) the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit), if the value of the funds exceeded \$5,000.

* * *

(E) Trespass

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

Among the issues specific to this guideline to be decided are: (1) Should the Commission maintain the \$2,000 threshold for an initial increase in offense level? (2) Should the Commission treat these offenses comparably to computer offenses sentenced under the theft or fraud guidelines (which, under the proposed amendments, will be subject to a phased-in MMP enhancement)?

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

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

§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.~~

- Option 1: (3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion exceeded \$2,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).
- Option 1A: (3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion (i) exceeded \$2,000 but did not exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).
- Option 2: (3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).
- Option 3: (3) If (A) the offense involved invasion of a protected computer, and (B) the loss resulting from the invasion exceeded \$2,000, increase by the corresponding number of levels from the table in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).

* * *

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

(F) Consolidation of Property Destruction and Theft Guidelines

Synopsis of Proposed Amendment: *This amendment proposes to consolidate the property destruction guideline, §2B1.3, with the theft guideline, thereby mitigating the necessity for reference to the proposed alternative monetary table. (For a proposed amendment that consolidates the property destruction, theft, and fraud guidelines, see Amendment 3, infra.)*

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

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

* * *

- (3) If (A) undelivered United States mail was taken or destroyed, or (B) the taking or destruction of undelivered United States mail of such item was an object of the offense; or (C) the stolen property received, transported, transferred,

transmitted, or possessed was undelivered United States mail, and the offense level as determined above is less than level 6, increase to level 6.

* * *

(c) Cross References

* * *

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

Commentary

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

Application Notes:

* * *

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

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

* * *

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

* * *

Guideline Deleted:

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

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

~~(b) Specific Offense Characteristics~~

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

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

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

~~(c) Cross Reference~~

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

Commentary

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

~~*Application Notes:*~~

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

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

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

~~4. In some cases, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused. For example, the destruction of a \$500 telephone line may cause an interruption in service to thousands of people for several hours. In such instances, an upward departure would be warranted.~~

(G) Consolidation of Bank Gratuity and Principal Gratuity Guidelines

Synopsis of Proposed Amendment: *This amendment proposes to consolidate the bank gratuity guideline, §2C1.6, with the principal gratuity guideline, §2C1.2, thereby mitigating the necessity for reference to the proposed alternative monetary table.*

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

(a) Base Offense Level: 7

(b) Specific Offense Characteristic

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

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

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

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

Option 1A: (A) If the value of the unlawful payment (i) exceeded \$2,000 but did not

exceed \$5,000, increase by 1 level; or (ii) exceeded \$5,000, increase by the corresponding number of levels from the table in §2X6.1 (Reference Monetary Table).

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

(c) Special Instruction for Fines - Organizations

(1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the value of the unlawful payment.

Commentary

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

Application Notes:

* * *

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

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

Guideline Deleted:

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

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

~~(b) Specific Offense Characteristic~~

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

Commentary

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

~~Application Note:~~

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

~~Background:~~ Violations of 18 U.S.C. §§ 212 and 213 involve the offer to, or acceptance by, a bank examiner

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

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

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

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

§§2B1.1 (Theft), 2B1.3 (Property Destruction), and 2F1.1 (Fraud)

3. 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 at an October 15, 1997, Commission hearing 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 theft and fraud offenses are conceptually similar and that prosecutors' charging selection, rather than offense conduct, may determine which of the theft or fraud guideline will apply in any given case. For these and other reasons the Commission is considering and invites comment on the consolidation proposal set forth below. There are several important points to note with respect to the proposal:*

- (A) *A base offense level of level 6 has been bracketed to indicate that the Commission invites comment on alternative proposals. The current base offense level for theft and property destruction offenses is level 4, while for fraud it is level 6. The proposal provides, in subsection (b)(2), for a two-level decrease for theft and property destruction offenses in which the loss is less than \$2,000.*
- (B) *The floor of level 6 for the theft of undelivered United States mail in subsection (b)(6) will need to be deleted if the Commission decides on a base offense level of level 6 but does not include a decrease for small-scale theft and property destruction offenses.*
- (C) *The document presents two options for the current enhancement on the violation of a judicial order,*

a factor that relates to a circuit conflict under consideration by the Commission. Option 1 retains the enhancement in subsection (b)(7)(B). Option 2 deletes the enhancement and substitutes an encouraged upward departure provision in Application Note 11 (in lieu of an enhancement). The encouraged upward departure is provided as an option because of the infrequency with which the current enhancement applies. In fiscal year 1996, the charitable organization enhancement and the violation of a judicial order enhancement, combined, applied in only 153 cases (3% of all fraud cases in that fiscal year).

- (D) Place holders have been noted for the loss table, the loss definition, and a sophisticated concealment enhancement, all of which are dependent on other policy choices.
- (E) The current application note in §2B1.1 dealing with theft and embezzlement from unions and employee benefit or pension plans has been moved to §3B1.3 (Abuse of Position of Trust or Use of Special Skill) where it appears to fit more appropriately.
- (F) An additional cross reference to the bribery and gratuity guidelines has been added to address situations in which a fraud statute may be used (perhaps for jurisdictional reasons) to prosecute conduct the essence of which involves bribery. An issue for comment also has been included to serve as a placeholder, and invite comment on, the concept of a more generally applicable cross reference that would apply whenever a broadly applicable fraud statute (e.g., 18 U.S.C. § 1001) is used to reach conduct that is more specifically addressed in another Chapter Two guideline.
- (G) The enhancement in subsection (b)(9) involving conscious or reckless risk of serious bodily injury contains two proposed substantive changes. First, it proposes to insert the bracketed language "of death" prior to the term "serious bodily injury" because, as a practical matter, a risk of serious bodily injury is likely to also entail a risk of death. Second, an increase in the "floor" offense level is proposed.
- (H) The enhancement in subsection (b)(10), relating to "chop shops," contains two options. Option 1 would add a two-level enhancement for this conduct, in addition to the existing "floor" offense level of level 14. Option 2 would retain the current policy (i.e., minimum offense level of 14).

It should also be noted that the order in which the enhancements under the consolidation are placed may affect the ultimate offense level in any given case, because of the multiple offense level "floors" that are involved (e.g., the enhancements in subsections (b)(3) through (5) may not have an additive effect in cases affected by one of the enhancements in (b)(7) through (12), that imposes a minimum or "floor" offense level).

In addition to combining the theft and fraud guidelines and the above-mentioned substantive changes, this amendment also reorganizes and updates the applicable commentary. Definitions of terms, other than the definition of loss, are collected under application note 1 and are presented in alphabetical order. Otherwise, application notes generally appear in the same sequential order as the relevant enhancements appear in the guideline.

Finally, this amendment makes a number of stylistic and grammatical changes in the language of the current affected guidelines to enhance clarity and consistency (e.g., in subsection (b)(3), the language is changed from "if the theft was from the person of another" to "if the offense involved theft from the person of another". These changes are intended to be non-substantive, but it is always possible that the change will produce an unintended substantive effect.

PART B - ECONOMIC OFFENSES INVOLVING PROPERTY THEFT, PROPERTY DESTRUCTION, OR FRAUD

1. **THEFT, EMBEZZLEMENT, RECEIPT OF STOLEN PROPERTY, AND PROPERTY DESTRUCTION, AND FRAUD**

Introductory Commentary

These sections address the most basic forms of property offenses: theft, embezzlement, fraud, forgery, counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States), 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.

Consolidated Guideline:

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing 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) LOSS TABLE - TO BE INSERTED
 - [(2) If (A) the offense involved theft, embezzlement, transactions in stolen property, or property damage or destruction; and (B) the total amount of the [loss] involved in the offense was less than [\$2,000], decrease by 2 levels.]
 - (3) If the offense involved theft 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 a foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.
 - [(6) If (A)(i) undelivered United States mail was taken or destroyed, or the taking or destruction of such item was an object of the offense; or (ii) the property stolen, destroyed, received, transported, transferred, transmitted, or possessed was undelivered United States mail; and (B) the offense level as determined above is less than level 6, increase to level 6.]

[Option 1 for judicial process:

- (7) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency; or (B) a violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than 10, increase to

level **10**.]

[Option 2 for judicial process:

- (7) If the offense involved ~~(A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines,~~ increase by **2** levels. If the resulting offense level is less than **10**, increase to level **10**.]
 - (8) [PLACE HOLDER FOR SOPHISTICATED CONCEALMENT ENHANCEMENT TO REPLACE FRAUD SOC ON USE OF FOREIGN BANK ACCOUNTS OR TRANSACTIONS]
 - (9) 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), increase by **2** levels. If the resulting offense level is less than level ~~[13]~~**[14]**, increase to level ~~[13]~~**[14]**.
 - (10) If (A) the offense involved an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts, [Option 1: increase by **2** levels. If the resulting offense level as determined above is less than level **14**, increase to level **14**.][Option 2: and (B) the offense level as determined above is less than level **14**, increase to level **14**.]
 - (11) 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**.
 - (12) If (A) the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense; and (B) the offense level as determined above is less than level **24**, increase to level **24**.
- (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 destruction by use of explosives, apply §2K1.4 (Arson: Property Destruction by Use of Explosives), if the resulting offense level is greater than that determined above.

[(3) If the offense involved (A) commercial bribery, or (B) bribery, gratuity, or a related offense involving a public official, apply §2B4.1 (Bribery in Procurement of Bank Loan and Other Commercial Bribery) or a guideline from Chapter Two, Part C (Offenses Involving Public Officials), as appropriate, if the resulting offense level is greater than that determined above.]

(d) Special Instruction

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

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644, 1983-1988, 1990c; 18 U.S.C. §§ 225, 285-289, 471-473, 500, 510, 511, 553(a)(1), (2), 641, 656, 657, 659, 662, 664, 1001-1008, 1010-1014, 1016-1022, 1025-1028, 1029, 1030(a)(5), 1031, 1341-1344, 1361, 1363, 1702, 1703, 1708, 1831, 1832, 2113(b), 2312-2317, 2321; 29 U.S.C. §§ 439, 461, 501(c), 1131. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline—

"Financial institution" means (A) any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014; (B) 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; (C) any health, medical or hospital insurance association; (D) brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; (E) futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and (F) any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "health, medical, or hospital insurance association," 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," "foreign agent," and "trade secret" have the meaning given those terms in 18 U.S.C. § 1839(1), (2), and (3), respectively.

"Gross receipts" means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of the offense. See 18 U.S.C. §§ 982(a)(4), 1344.

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

["Undelivered United States mail" means mail, including mail that is in the addressee's mailbox, that has not been received by the addressee or the addressee's agent.]

2. **DISCUSSION OF LOSS** *[including downstream damages discussion from property destruction guideline]- TO BE INSERTED*
3. *Subsection (b)(7)(A) applies in the case of a misrepresentation that the defendant was an employee or authorized agents of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies include (A) the mail solicitation by a group of defendants of contributions to a non-existent famine relief organization; (B) the diversion by a defendant of donations given for a religiously affiliated school as a result of telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school; and (C) the posing by a defendant as a federal collection agent in order to collect a delinquent student loan.*
4. *For purposes of subsection (b)(10), a [Option 1: two-level enhancement and a] minimum measure of loss [and/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.*
5. *For purposes of subsection (b)(11), 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 (A) became insolvent; (B) substantially reduced benefits to pensioners or insureds; (C) was unable on demand to refund fully any deposit, payment, or investment; (D) was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or (E) was placed in substantial jeopardy of experiencing any of the conditions described in subdivisions (A) through (D) of this note.*
6. *For purposes of subsection (b)(12), 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.*
7. *Subsection (b)(7)(A) applies in the case of a misrepresentation that the defendant was an employee or authorized agents of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies include (A) the mail solicitation by a group of defendants of contributions to a non-existent famine relief organization; (B) the diversion by a defendant of donations given for a religiously affiliated school as a result of telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school; and (C) the posing by a defendant as a federal collection agent in order to collect a delinquent student loan.*
8. *[Option 1 for judicial process: The enhancements in subsection (b)(7) are alternative rather than cumulative; however, if both of the enumerated factors apply in a particular case, an upward departure may be warranted.*
9. *In the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy), whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. See Application Note 4 in the Commentary to §2X1.1.*
10. *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 (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) would be more apt, and false statements to a customs officer, for which §2T3.1 (Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property) likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense in which a fraudulent insurance claim was mailed might be prosecuted as mail fraud. [In certain other cases, an offense involving fraudulent statements or documents, or failure to maintain required records, may be committed in furtherance of the commission or concealment of another offense, such as embezzlement or bribery.]

Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. If the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply §2L2.1 or §2L2.2, as appropriate, rather than this guideline. [In the case of an offense involving false identification documents or access devices, an upward departure may be warranted if the actual loss does not adequately reflect the seriousness of the conduct.]

If the indictment or information setting forth the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than this guideline. Otherwise, in such cases, this guideline is to be applied, but a departure may be warranted.

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

[Option 2 for judicial process:

12. *If the offense involved a violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, an upward departure may be warranted. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, an upward departure pursuant to this note may be warranted, even if the defendant was not a specifically named party in that prior case. For example, an upward departure may be warranted in the case of a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product. However, an upward departure based on conduct addressed elsewhere in the guidelines (e.g., a violation of a condition of release, addressed in §2J1.7 (Offense Committed While on Release), or a violation of probation, addressed in §4A1.1 (Criminal History Category)) is not authorized under this note.]*
13. *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 if the defendant sought the stolen property to further a broader criminal purpose.*

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

falsification of, documents required by the Labor Management Reporting and Disclosure Act.

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

[Note: Depending on decisions made with respect to "loss," background commentary on loss can be added.]

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

Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under §2B3.1 (Robbery).

A minimum offense level of 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of "organized scheme" is used as an alternative to "loss" in setting a minimum offense level.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Subsection (b)(9)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322. Subsection (b)(11) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101-73. Subsection (b)(12) implements the instruction to the Commission in section 2507 of Public Law 101-647. Subsection (d)(2) implements the instruction to the Commission in section 805(c) of Public Law 104-132.

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

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

~~(b) Specific Offense Characteristics~~

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

Loss (Apply the Greatest)	Increase in Level
--------------------------------------	------------------------------

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

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

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

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

~~(B) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 4 levels.~~

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

~~(6) If the offense --~~

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

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

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

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

~~(c) Cross Reference~~

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

Commentary

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

~~*Application Notes:*~~

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

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

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

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

~~Where the offense involved making a fraudulent loan or credit card application, or other unlawful conduct involving a loan or credit card, the loss is to be determined under the principles set forth in the Commentary to §2F1.1 (Fraud and Deceit).~~

~~In certain cases, an offense may involve a series of transactions without a corresponding increase in loss. For example, a defendant may embezzle \$5,000 from a bank and conceal this embezzlement by shifting this amount from one account to another in a series of nine transactions over a six-month~~

~~period. In this example, the loss is \$5,000 (the amount taken), not \$45,000 (the sum of the nine transactions), because the additional transactions did not increase the actual or potential loss.~~

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

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

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

~~3. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based upon the approximate number of victims and the average loss to each victim, or on more general factors such as the scope and duration of the offense.~~

~~4. The loss includes any unauthorized charges made with stolen credit cards, but in no event less than \$100 per card. See Commentary to §§2X1.1 (Attempt, Solicitation, or Conspiracy) and 2F1.1 (Fraud and Deceit).~~

~~5. Controlled substances should be valued at their estimated street value.~~

~~6. "Undelivered United States mail" means mail that has not actually been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mail box).~~

~~7. "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.~~

~~8. Subsection (b)(5), referring to an "organized scheme to steal vehicles or vehicle parts," provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or "chop shop." "Vehicles" refers to all forms of vehicles, including aircraft and watercraft.~~

~~9. "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.~~

- ~~10. — An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.~~
- ~~11. — "The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(6)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).~~
- ~~12. — If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise."~~
- ~~13. — If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."~~
- ~~14. — If the offense involved theft or embezzlement from an employee pension or welfare benefit plan (a violation of 18 U.S.C. § 664) and the defendant was a fiduciary of the benefit plan, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply. "Fiduciary of the benefit plan" is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.~~
- ~~— If the offense involved theft or embezzlement from a labor union (a violation of 29 U.S.C. § 501(c)) and the defendant was a union officer or occupied a position of trust in the union as set forth in 29 U.S.C. § 501(a), an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply.~~
- ~~15. — In cases where the loss determined under subsection (b)(1) does not fully capture the harmfulness of the conduct, an upward departure may be warranted. For example, the theft of personal information or writings (e.g., medical records, educational records, a diary) may involve a substantial invasion of a privacy interest that would not be addressed by the monetary loss provisions of subsection (b)(1).~~
- ~~16. — In cases involving theft of information from a "protected computer", as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), an upward departure may be warranted where the defendant sought the stolen information to further a broader criminal purpose.~~

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

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

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

~~—Theft from the person of another, such as pickpocketing or non-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.~~

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

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

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

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

~~-~~

~~(b) Specific Offense Characteristics~~

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

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

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

~~(c) Cross Reference~~

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

~~(d) Special Instruction~~

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

~~Commentary~~

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

Application Notes:

1. ~~"More than minimal planning" is defined in the Commentary to §1B1.1 (Application Instructions).~~
2. ~~Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).~~
3. ~~"Undelivered United States mail" means mail that has not been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mailbox).~~
4. ~~In some cases, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused. For example, the destruction of a \$500 telephone line or interference with a telecommunications network may cause an interruption in service to thousands of people for several hours, with attendant life-threatening delay in the delivery of emergency medical treatment or disruption of other important governmental or private services. In such cases, an upward departure may be warranted. See §§5K2.2 (Physical Injury), 5K2.7 (Disruption of Governmental Function), and 5K2.14 (Public Welfare).~~

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

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

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristics
 - (1) If the loss exceeded \$2,000, increase the offense level as follows:

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

~~(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.~~

~~(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.~~

~~(4) If the offense involved (A) the conscious or reckless risk of serious bodily injury, or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.~~

~~(5) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.~~

~~(6) If the offense --~~

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

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

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

~~(c) Special Instruction~~

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

~~*Commentary*~~

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

~~*Application Notes:*~~

~~1. The adjustments in §2F1.1(b)(3) are alternative rather than cumulative. If in a particular case, however, both of the enumerated factors applied, an upward departure might be warranted.~~

~~2. "More than minimal planning" (subsection (b)(2)(A)) is defined in the Commentary to §1B1.1 (Application Instructions).~~

3. ~~"Scheme to defraud more than one victim," as used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one person. In this context, "victim" refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.~~
 4. ~~Subsection (b)(3)(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.~~
 5. ~~Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in §2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in §4A1.1 (Criminal History Category)).~~
 6. ~~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).~~
 7. ~~Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred. Consistent with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell \$40,000 in worthless securities, or representing that a forged check for \$40,000 was genuine, the loss would be \$40,000.~~
- ~~There are, however, instances where additional factors are to be considered in determining the loss or intended loss:~~
- ~~(a) Fraud Involving Misrepresentation of the Value of an Item or Product Substitution~~
- ~~A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth \$40,000 and the stock is worth only \$10,000, the loss is the amount by which the stock was overvalued (i.e., \$30,000). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.~~

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

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

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

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

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

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

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

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

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

8. ~~For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need~~

~~only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.~~

~~9. In the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.~~

~~10. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:~~

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

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

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

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

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

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

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

~~11. Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. Where the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply §2L2.1 or §2L2.2, as appropriate, rather than §2F1.1. In the case of an offense involving false identification documents or access devices, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.~~

~~12. If the fraud exploited vulnerable victims, an enhancement will apply. See §3A1.1 (Hate Crime Motivation or Vulnerable Victim).~~

~~13. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 would be more apt, and false statements to a customs officer, for which §2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent~~

~~insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than §2F1.1. Otherwise, in such cases, §2F1.1 is to be applied, but a departure from the guidelines may be considered.~~

- ~~14. "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.~~
- ~~15. An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.~~
- ~~16. "The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(6)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).~~
- ~~17. 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."~~
- ~~18. If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."~~

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

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

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

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

~~Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm. A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.~~

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

~~Subsection (b)(4)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.~~

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

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

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

Conforming Amendment to §1B1.1

§1B1.1. Application Instructions

* * *

Commentary

Application Notes:

1. The following are definitions of terms that are used frequently in the guidelines and are of general applicability (except to the extent expressly modified in respect to a particular guideline or policy statement):

* * *

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

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

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

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

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

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

Conforming Amendment to §2K1.4:

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

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

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(4) 2 plus the offense level from ~~§2B1.3 (Property Damage or Destruction)~~ **§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft; Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property; Property Damage or Destruction; Fraud and Deceit; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States).**

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

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

* * *

Commentary

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3. *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.*

* * *

Issues for Comment: (A) The Commission invites comment on whether Application Note 10 in the proposed amendment should be alternatively stated in the guideline as an explicit cross reference to apply the most applicable guideline, if the resulting offense level is greater than the offense level obtained under the proposed guideline.

(B) The Commission invites comment on whether any of the specific offense characteristics in this proposed consolidated guideline should be eliminated because of infrequency of use or other good reason. If any such factor should be eliminated, should it be replaced with commentary encouraging departure?

§§2B1.1 (Theft) and 2F1.1 (Fraud)

4. Synopsis of Proposed Amendment: *The Sentencing Commission has identified the definition of loss in fraud and theft offenses as an issue for consideration during the 1997-98 amendment cycle. The genesis of Commission interest in many of the issues raised about the definition of loss is summarized in the Loss Issues Working Paper (10-14-97) that is part of the Commission meeting materials generated in connection with the October 15, 1997 public hearing on clarifying the definition of loss. This paper and the transcript of the public hearing on the definition of loss are available on the Commission's website (<http://www.ussc.gov/>) or from the Commission. Following are two proposed options for revising the definition of loss for fraud and theft offenses. Both options envision one definition of loss for both fraud and theft offenses.*

Option 1 provides a dramatically simplified and shortened definition of loss that has the same core principles as those found in Option 2, but without the additional rules and guidance found in Option 2. The formulation in Option 1 arguably provides maximum discretion to sentencing judges and minimal guidance as to what should be included in, or excluded from, actual loss. Option 2 attempts to provide more guidance to courts on how to resolve issues that have arisen in the case law and elsewhere about the current definition of loss.

Both options propose adoption of a general definition that loss is the greater of the actual or intended loss, and that actual loss is defined to include "reasonably foreseeable harm resulting from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct)." Adoption of this provision would provide an explicit causation standard for the determination of actual loss. Option 2 raises the possibility of limiting

the relevant harm (both actual and intended) to “economic” harm.

Both options provide that intended loss is the “harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under §1B1.3 (Relevant Conduct)”, with Option 2 raising the issue as to whether intended loss should be limited to those consequences “that realistically could have occurred.”

The balance of the language proposed in Option 1 also appears in Option 2 but, again, without additional rules or guidance. Language is proposed to be added to the background commentary that provides an operating principle for the use of the amount of loss, namely, that it “serves as a measure of the seriousness of the offense and the defendant’s relative culpability.” Additional language is proposed for the commentary in both options that emphasizes the fact-based nature of the determination of loss and the importance of giving appropriate deference to the sentencing court’s determinations, and that invites departure where loss “substantially understates or overstates the seriousness of the offense or the culpability of the defendant.”

In addition to the provisions summarized above, Option 2 provides added specificity in a number of areas: (A) departures; (B) estimation of loss; (C) time of measuring loss and credits against loss; (D) interest; (E) special rules.

(A) Departures: In addition to the general language inviting departure where loss “substantially understates or overstates the seriousness of the offense or the culpability of the defendant”, Option 2 lists a number of grounds for invited departures, most of which can be found in the current commentary. Option 2 also provides an option for including selected non-economic factors as specific offense characteristics instead of only as possible departure grounds.

(B) Estimation of loss: Option 2 provides a nonexclusive listing of factors (most of which are in the current commentary) that a court may use in estimating loss. Two options are provided for how gain might be fashioned as such a factor: either provide for the use of gain as any other factor, or provide that it may be used if gain exceeds loss or the loss is difficult or impossible to calculate.

(C) Time of measuring loss and credits against loss: This provision raises the issue of whether there needs to be an applicable or limiting time frame on what is to be included in loss (such as, “at the time the offense is detected”). This provision provides, in effect, that loss is a “net” concept, for both fraud and theft offenses, in contrast to the current rule that expressly uses such a concept only for certain fraud-type offenses. The determination of loss is a “net” concept under this proposed rule in the sense that the loss amount shall be reduced by the value of certain items, including money, property, or other economic benefit pledged, returned, or otherwise transferred to the victim before detection of the offense, valued as of the time of pledging or transfer (unless the defendant causes the reduction in the value of the collateral after pledging or the increase in the loss, after detection). Valuation as of the time of detection would eliminate the effect of most fluctuations in value of collateral from affecting the offense level.

(D) Interest: Option 2 provides two options for dealing with interest. One would respond to the circuit court decisions that allow use of, for example, bargained-for interest, and explicitly exclude interest from the determination of loss, except as a possible departure ground. The other would continue the exclusion of opportunity-cost interest but provide for inclusion of interest if it “was bargained for by a victim as part of a transaction which is the subject of the criminal case” or if the victim “transferred the funds lost as a result of the offense from an investment account on which interest or dividends were regularly earned.”

(E) Special rules: This provision provides rules for special cases, including retaining the current rules for stolen credit cards, diversion of government program benefits (proposed for modification or elimination), and Davis-Bacon Act cases. This provision proposes adding rules on sting operations (to respond to case law that excludes from intended loss amounts that were unlikely or impossible because informants or government agents

were the only “victims”) and Ponzi schemes (to choose from divergent precedent a rule that provides that loss in such cases shall be based on “the net loss to losing victims, i.e., the sum of the net losses to each victim who lost all or part of this principal investment as a result of the fraudulent scheme”).

Option 1

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

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Commentary

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Application Notes

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

~~Where the offense involved making a fraudulent loan or credit card application, or other unlawful conduct involving a loan or credit card, the loss is to be determined under the principles set forth in the Commentary to §2F1.1 (Fraud and Deceit).~~

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

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

“Loss” is the greater of the actual loss or the intended loss. “Actual loss” means the reasonably foreseeable harm resulting from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). “Intended loss” means the harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under §1B1.3. Loss need not be determined precisely but may be based on a reasonable estimate.

Because of the fact-based nature of the determinations, the sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. Accordingly, the district court’s determinations in this regard are entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

There may be cases in which the loss substantially understates or overstates the seriousness of the

offense or the culpability of the defendant. In such cases, a departure may be warranted.

~~3. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based upon the approximate number of victims and the average loss to each victim, or on more general factors such as the scope and duration of the offense.~~

~~4. The loss includes any unauthorized charges made with stolen credit cards, but in no event less than \$100 per card. See Commentary to §§2X1.1 (Attempt, Solicitation, or Conspiracy) and 2F1.1 (Fraud and Deceit).~~

~~5. Controlled substances should be valued at their estimated street value.~~

* * *

~~15. In cases where the loss determined under subsection (b)(1) does not fully capture the harmfulness of the conduct, an upward departure may be warranted. For example, the theft of personal information or writings (e.g., medical records, educational records, a diary) may involve a substantial invasion of a privacy interest that would not be addressed by the monetary loss provisions of subsection (b)(1).~~

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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.

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.

* * *

Option 2:

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

* * *

(b) Specific Offense Characteristics

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- (8) If the offense involved one of the following aggravating factors: (A) the primary objective of the offense was non-monetary; (B) the offense caused or risked substantial non-monetary harm; (C) the offense was committed for the purpose of facilitating another felony offense, other than an offense covered by this guideline; (D) reasonably foreseeable (i) bodily injury, or (ii) psychological harm or emotional trauma that is substantial and severe; or (E) a reasonably foreseeable risk of substantial loss in addition to the loss that actually occurred, increase by [2] levels. If the offense involved more than one of these aggravating factors, increase by [4] levels.

* * *

Commentary

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Application Notes:

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

~~Where the offense involved making a fraudulent loan or credit card application, or other unlawful conduct involving a loan or credit card, the loss is to be determined under the principles set forth in the Commentary to §2F1.1 (Fraud and Deceit).~~

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

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

2. "Loss" is the greater of the actual loss or the intended loss. "Actual loss" means the reasonably foreseeable [economic] harm resulting from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). "Intended loss" means the [economic] harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under §1B1.3 [and that realistically could have occurred].

(A) Estimation of Loss. For the purposes of subsection (b)(1), the loss need not be determined precisely. The court need only make a reasonable estimate of the loss, given the available information and considering, as appropriate under the circumstances, measuring factors such as the following:

- (1) the fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, damaged, or destroyed;
- (2) the cost to the victim of replacing property taken, damaged, or destroyed;
- (3) the cost of repairs, not to exceed the replacement cost had the property been destroyed;
- (4) the approximate number of victims and an estimate of the average loss to each victim;
- (5) the scope and duration of the offense, or revenues generated by similar operations;

[Gain, Option A:

- (6) the gain to criminally responsible participants from committing the offense.]

[Gain, Option B:

- (6) if the gain exceeds the loss or if the loss is difficult or impossible to calculate, the gain to criminally responsible participants from committing the offense.]

(B) [Time of Measuring Loss,] Credits Against Loss. [In general, loss is to be measured at the time the offense is detected (i.e., when either a victim or law enforcement first develops a reasonable suspicion that an offense has occurred, or is occurring).]

Money, property, or other economic benefit pledged, returned, or otherwise transferred to the victim(s) (including services performed) before detection of the offense shall be valued at the time of pledging, return, transfer, or performance, as the case may be, and shall be credited in determining the amount of loss.

Payments, property transfers, pledges of collateral, or services performed after detection of the offense shall not be credited. Amounts recovered, or readily recoverable, through civil processes after detection of the offense also shall not be credited.

However, if acts or omissions for which the defendant is accountable diminish the value of pledged assets after pledging, or otherwise increase the economic harm after detection of the offense, the loss shall reflect that increased net harm.

[Interest, Option A:

- [(C) Interest Not Included. For the purposes of subsection (b)(1), loss does not include interest of any kind; however, in an appropriate case (e.g., if interest was bargained for as part of a transaction that is the subject of the criminal case), an upward departure may be warranted based upon the loss of interest.]

[Interest, Option B:

- [(C) Interest. Loss shall not include interest the victim could have earned had the offense not occurred (i.e., "opportunity-cost interest"). Interest shall be included if: [(i)] interest was bargained for by a victim as part of a transaction which is the subject of the criminal case[, or (ii) the victim transferred the funds lost as a result of the offense from an investment account on which interest or dividends were regularly earned.]

- (D) Special Rules. The following special rules are to be used in determining loss in the situations indicated:

(1) Sting Operations

In cases involving the participation of an informant or undercover government agent, intended loss includes economic harms the defendant intended, even if accomplishment of the defendant's goals would have been unlikely or impossible because of the participation of an informant or undercover government agent.

(2) Ponzi Schemes

In a Ponzi-type scheme, loss is the net loss to losing victims, i.e., the sum of the net losses to each victim who lost all or part of his principal investment as a result of the fraudulent scheme.

(3) Stolen Credit Cards, Access Devices

In cases involving stolen credit cards or access devices, the loss includes any unauthorized charges made with the stolen credit cards (or purloined numbers), but in no event less than \$100 per card.

(4) Diversion of Government Program Benefits

[Option A: [In a case involving diversion of government program benefits, loss is the value of the benefits derived from intended recipients or uses.]

[Option B: [In a case involving diversion of government program benefits, use the gain to the criminally responsible participants as the loss. In the case of a grant, the loss is the amount of the grant. In the case of a loan, the minimum loss is the savings in interest over the life of the loan compared with alternative loan terms for which the defendant would have qualified.]

(5) Davis-Bacon Act Cases

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

[Non-Economic Factors, Option A:

- [(E) Departure Considerations. There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted. The following is a non-exhaustive list of types of circumstances which the court may consider in determining whether a departure may be warranted:*
- (1) the offense endangered national security or military readiness;*
 - (2) the offense caused a loss of confidence in an important institution;*
 - (3) the offense endangered the solvency or financial security of one or more victims;*
 - (4) the defendant's gain from the offense substantially exceeded the aggregate loss to the victim(s);*
 - (5) but for the exclusion above, the loss would have included a substantial amount of interest that was bargained for by a victim as part of a transaction which is the subject of the criminal case;*
 - (6) the offense involved [ten or more victims;][a large number of victims;]*
 - (7) the loss significantly exceeds the greater of the defendant's actual and intended personal gain;*
 - (8) the loss intended by the defendant significantly exceeded the amount that realistically could have occurred.]*

[Non-Economic Factors, Option B:

- [(E) Departure Considerations. There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted. The following is a non-exhaustive list of types of circumstances which the court may consider in determining whether a departure may be warranted:*
- (1) a primary objective of the offense was non-monetary;*
 - (2) the offense caused or risked substantial non-monetary harm;*
 - (3) false statements were made for the purpose of facilitating some other crime;*
 - (4) the offense caused physical or psychological harm or severe emotional trauma;*
 - (5) the offense endangered national security or military readiness;*
 - (6) the offense caused a loss of confidence in an important institution;*
 - (7) the offense endangered the solvency or financial security of one or more*

victims;

- (8) *the defendant's gain from the offense substantially exceeded the aggregate loss to the victim(s);*
- (9) *the offense created a serious risk of substantially greater economic harm than the loss that actually occurred;*
- (10) *but for the exclusion above, the loss would have included a substantial amount of interest that was bargained for by a victim as part of a transaction which is the subject of the criminal case;*
- (11) *the offense involved [ten or more victims;][a large number of victims;]*
- (12) *the loss significantly exceeds the greater of the defendant's actual and intended personal gain;*
- (13) *the loss intended by the defendant significantly exceeded the amount that realistically could have occurred.]*

(F) Appropriate Deference. *Because of the fact-based nature of the determinations, the sentencing judge is in a unique position to assess the evidence and approximate the loss based upon that evidence. Accordingly, the district court's determinations in this regard are entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).*

~~3. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based upon the approximate number of victims and the average loss to each victim, or on more general factors such as the scope and duration of the offense.~~

~~4. The loss includes any unauthorized charges made with stolen credit cards, but in no event less than \$100 per card. See Commentary to §§2X1.1 (Attempt, Solicitation, or Conspiracy) and 2F1.1 (Fraud and Deceit).~~

~~5. Controlled substances should be valued at their estimated street value.~~

* * *

~~15. In cases where the loss determined under subsection (b)(1) does not fully capture the harmfulness of the conduct, an upward departure may be warranted. For example, the theft of personal information or writings (e.g., medical records, educational records, a diary) may involve a substantial invasion of a privacy interest that would not be addressed by the monetary loss provisions of subsection (b)(1).~~

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- ~~I~~612. * * *

13. *If the defendant received an enhancement under subsection (b)(7) but that enhancement does not adequately reflect the extent or seriousness of the conduct involved, an upward departure may be warranted.*

14. *Under subsection (b)(7)(D)(ii), psychological harm or emotional trauma shall be considered to be substantial and severe if it is of prolonged duration and, as a result of such harm, the victim received medical treatment or other professional assistance.*

Under subsection (b)(7)(E), a risk of additional loss shall be considered "substantial" if the court determines that the additional risked loss would have increased the actual loss, as determined under subsection (b)(1), by at least 4 levels, had the risked loss actually occurred. If the risk of loss was greater than 4 levels, an upward departure may be warranted.

* * *

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.

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.

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Option One:

PART F - OFFENSES INVOLVING FRAUD OR DECEIT

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

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Commentary

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Application Notes:

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

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

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

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

~~A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth \$40,000 and the stock is worth only \$10,000, the loss is the amount by which the stock was overvalued (i.e., \$30,000). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.~~

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

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

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

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

~~In contrast to other types of cases, loss in a procurement fraud or product substitution case includes not only direct damages, but also consequential damages that were reasonably foreseeable. For example, in a case involving a defense product substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose, plus the government's reasonably foreseeable cost of rectifying~~

~~the actual or potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable. Inclusion of reasonably foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.~~

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

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

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

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

7. *"Loss" is the greater of the actual loss or the intended loss. "Actual loss" means the reasonably foreseeable harm resulting from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). "Intended loss" means the harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under §1B1.3. Loss need not be determined precisely but may be based on a reasonable estimate.*

Because of the fact-based nature of the determinations, the sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. Accordingly, the district court's determinations in this regard are entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted.

- ~~8. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.~~

98.

- ~~10. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:~~

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

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

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

emotional trauma;

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

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

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

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

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

* * *

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.

* * *

Option Two:

PART F - OFFENSES INVOLVING FRAUD OR DECEIT

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

* * *

(b) Specific Offense Characteristics

* * *

Non-Economic Factors, Option A:

[(7) If the offense involved one of the following aggravating factors: (A) the primary objective of the offense was non-monetary; (B) the offense caused or risked substantial non-monetary harm; (C) the offense was committed for the purpose of facilitating another felony offense, other than an offense covered by this guideline; (D) reasonably foreseeable (i) bodily injury, or (ii) psychological harm or emotional trauma that is substantial and severe; or (E) a reasonably foreseeable risk of substantial loss in addition to the loss that actually occurred, increase by [2] levels. If the offense involved more than one of these aggravating factors, increase by [4] levels.]

* * *

Commentary

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Application Notes:

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~~7. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred. Consistent with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell \$40,000 in worthless securities, or representing that a forged check for \$40,000 was genuine, the loss would be \$40,000.~~

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

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

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

~~could resell the product received.~~

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

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

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

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

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

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

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

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

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

7. “Loss” is the greater of the actual loss or the intended loss. “Actual loss” means the reasonably foreseeable [economic] harm resulting from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). “Intended loss” means the [economic] harm intended to be caused by the defendant and other persons for whose conduct the defendant is accountable under §1B1.3 [and that realistically could have occurred].

(A) Estimation of Loss. For the purposes of subsection (b)(1), the loss need not be determined precisely. The court need only make a reasonable estimate of the loss, given the available information and considering, as appropriate under the circumstances, measuring factors such as the following:

- (1) the fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, damaged, or destroyed;
- (2) the cost to the victim of replacing property taken, damaged, or destroyed;
- (3) the cost of repairs, not to exceed the replacement cost had the property been destroyed;
- (4) the approximate number of victims and an estimate of the average loss to each victim;
- (5) the scope and duration of the offense, or revenues generated by similar operations;

Gain, Option A:

[(6) the gain to criminally responsible participants from committing the offense.]

Gain, Option B:

[(6) if the gain exceeds the loss or if the loss is difficult or impossible to calculate, the gain to criminally responsible participants from committing the offense.]

(B) Time of Measuring Loss, Credits Against Loss. In general, loss is to be measured at the time the offense is detected (i.e., when either a victim or law enforcement first develops a reasonable suspicion that an offense has occurred, or is occurring).

Money, property, or other economic benefit pledged, returned, or otherwise transferred to the victim(s) (including services performed) before detection of the offense shall be valued at the time of pledging, return, transfer, or performance, as the case may be, and shall be credited in determining the amount of loss.

Payments, property transfers, pledges of collateral, or services performed after detection of the offense shall not be credited. Amounts recovered, or readily recoverable, through civil processes after detection of the offense also shall not be credited.

However, if acts or omissions for which the defendant is accountable diminish the value of pledged assets after pledging, or otherwise increase the economic harm after detection of the offense, the loss shall reflect that increased net harm.

Interest, Option A:

[(C) Interest Not Included. For the purposes of subsection (b)(1), loss does not include interest of any kind; however, in an appropriate case (e.g., if interest was bargained for as part of a

transaction that is the subject of the criminal case), an upward departure may be warranted based upon the loss of interest.]

Interest, Option B:

[(C) Interest. Loss shall not include interest the victim could have earned had the offense not occurred (i.e., “opportunity-cost interest”). Interest shall be included if: [(i)] interest was bargained for by a victim as part of a transaction which is the subject of the criminal case[, or (ii) the victim transferred the funds lost as a result of the offense from an investment account on which interest or dividends were regularly earned.”]

(D) Special Rules. The following special rules are to be used in determining loss in the situations indicated:

(1) Sting Operations

In cases involving the participation of an informant or undercover government agent, intended loss includes economic harms the defendant intended, even if accomplishment of the defendant’s goals would have been unlikely or impossible because of the participation of an informant or undercover government agent.

(2) Ponzi Schemes

In a Ponzi-type scheme, loss is the net loss to losing victims, i.e., the sum of the net losses to each victim who lost all or part of his principal investment as a result of the fraudulent scheme.

(3) Stolen Credit Cards, Access Devices

In cases involving stolen credit cards or access devices, the loss includes any unauthorized charges made with the stolen credit cards (or purloined numbers), but in no event less than \$100 per card.

(4) Diversion of Government Program Benefits

Option A: *In a case involving diversion of government program benefits, loss is the value of the benefits derived from intended recipients or uses.*

Option B: *In a case involving diversion of government program benefits, use the gain to the criminally responsible participants as the loss. In the case of a grant, the loss is the amount of the grant. In the case of a loan, the minimum loss is the savings in interest over the life of the loan compared with alternative loan terms for which the defendant would have qualified.*

(5) Davis-Bacon Act Cases

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

Non-Economic Factors, Option A:

[(E) Departure Considerations. There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted. The following is a non-exhaustive list of types of circumstances which the court may consider in determining whether a departure may be warranted:

- (1) the offense endangered national security or military readiness;*
- (2) the offense caused a loss of confidence in an important institution;*
- (3) the offense endangered the solvency or financial security of one or more victims;*
- (4) the defendant's gain from the offense substantially exceeded the aggregate loss to the victim(s);*
- (5) but for the exclusion above, the loss would have included a substantial amount of interest that was bargained for by a victim as part of a transaction which is the subject of the criminal case;*
- (6) the offense involved [ten or more victims][a large number of victims;]*
- (7) the loss significantly exceeds the greater of the defendant's actual and intended personal gain;*
- (8) the loss intended by the defendant significantly exceeded the amount that realistically could have occurred.]*

Non-Economic Factors, Option B:

[(E) Departure Considerations. There may be cases in which the loss substantially understates or overstates the seriousness of the offense or the culpability of the defendant. In such cases, a departure may be warranted. The following is a non-exhaustive list of types of circumstances which the court may consider in determining whether a departure may be warranted:

- (1) a primary objective of the offense was non-monetary;*
- (2) the offense caused or risked substantial non-monetary harm;*
- (3) false statements were made for the purpose of facilitating some other crime;*
- (4) the offense caused physical or psychological harm or severe emotional trauma;*
- (5) the offense endangered national security or military readiness;*
- (6) the offense caused a loss of confidence in an important institution;*
- (7) the offense endangered the solvency or financial security of one or more victims;*
- (8) the defendant's gain from the offense substantially exceeded the aggregate loss to the*

victim(s);

- (9) *the offense created a serious risk of substantially greater economic harm than the loss that actually occurred;*
- (10) *but for the exclusion above, the loss would have included a substantial amount of interest that was bargained for by a victim as part of a transaction which is the subject of the criminal case;*
- (11) *the offense involved [ten or more victims;][a large number of victims;]*
- (12) *the loss significantly exceeds the greater of the defendant's actual and intended personal gain;*
- (13) *the loss intended by the defendant significantly exceeded the amount that realistically could have occurred.]*

(F) Appropriate Deference. *Because of the fact-based nature of the determinations, the sentencing judge is in a unique position to assess the evidence and approximate the loss based upon that evidence. Accordingly, the district court's determinations in this regard are entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).*

~~8. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.~~

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~~10. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:~~

- ~~(a) a primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm;~~
- ~~(b) false statements were made for the purpose of facilitating some other crime;~~
- ~~(c) the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma;~~
- ~~(d) the offense endangered national security or military readiness;~~
- ~~(e) the offense caused a loss of confidence in an important institution;~~
- ~~(f) the offense involved the knowing endangerment of the solvency of one or more victims.~~

~~In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the~~

~~offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. In such cases, a downward departure may be warranted.~~

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Non-Economic Factors, Option A:

[17. If the defendant received an enhancement under subsection (b)(7) but that enhancement does not adequately reflect the extent or seriousness of the conduct involved, an upward departure may be warranted.]

[18. Under subsection (b)(7)(D)(ii), psychological harm or emotional trauma shall be considered to be substantial and severe if it is of prolonged duration and, as a result of such harm, the victim received medical treatment or other professional assistance.

Under subsection (b)(7)(E), a risk of additional loss shall be considered “substantial” if the court determines that the additional risked loss would have increased the actual loss, as determined under subsection (b)(1), by at least 4 levels, had the risked loss actually occurred. If the risk of loss was greater than 4 levels, an upward departure may be warranted.]

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

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.

* * *

Issues for Comment: *The following issues for comment solicit input on possible changes to the definition of loss in §§2B1.1 and 2F1.1 to clarify the Commission’s intent, resolve issues raised by case law, and aid in consistency of application.*

(A) ***Standard of causation:** The current definition of loss in §§2B1.1 and 2F1.1 does not specify any standard*

governing the causal relationship between the offense conduct and the harm caused. The proposed definition does include such a standard, using the concept of “reasonable foreseeability” as the touchstone. The Commission invites comment on whether such a standard is needed and, if so, whether the proposed “reasonable foreseeability” standard is preferable to other alternatives, such as a “but-for” causation or “proximate cause” standard.

The Commission also invites comment on what, if any, limitations should be placed on loss amounts that are included using the new causation standard, such as whether to limit the inclusion of “consequential damages.” The current loss definition provides for inclusion of such damages only in contract procurement, product substitution, and certain computer crime cases. Would the creation of a causation standard obviate the need for commentary governing consequential damages? If not, in what cases, if any, should consequential damages be included, and how should they be defined and determined? For example, should language be added that specifies whether loss includes or excludes the costs of investigation and prosecution?

(B) Fair market value: The current definition of loss in theft and fraud uses the concept of fair market value as an important factor in determining loss. The Commission invites comment on whether this concept should be clarified to specify, for example, whether retail, wholesale, or black market value is intended, depending on the nature of the offense. In addition, the Commission invites comment on what value should be used when the black market price is different from the price on the legitimate market. *See, e.g., United States v. Ellerbee*, 73 F.3d 105, 108-09 (6th Cir. 1996) (using retail price of stolen compact disks instead of lower price for which thief acquired and sold them); *United States v. Mount*, 966 F.2d 262, 265-67 (7th Cir. 1992) (using black market price of stolen postseason baseball tickets instead of lower face value).

(C) Interest: Although the definition of loss in the theft and fraud guidelines excludes interest “that could have been earned had the funds not been stolen,” some courts have interpreted the definition of loss to permit inclusion in loss of the interest that the defendant agreed to pay in connection with the offense. *Compare United States v. Hoyle*, 33 F.3d 415, 419 (4th Cir. 1994) (“[I]nterest shall not be included to determine loss for sentencing purposes.”), *cert. denied*, 513 U.S. 1133 (1995), *with United States v. Gilberg*, 75 F.3d 15, 18-19 (1st Cir. 1996) (including in loss interest on fraudulently procured mortgage loan) and *United States v. Henderson*, 19 F.3d 917, 928-29 (5th Cir.) (“Interest should be included if, as here, the victim had a reasonable expectation of receiving interest from the transaction.”), *cert. denied*, 513 U.S. 877 (1994). The Commission invites comment on whether the definition of loss should be clarified to (1) exclude all forms of interest in all cases, (2) permit inclusion of bargained-for interest and/or interest that was lost because the victim(s) removed money from an investment vehicle or instrument to provide funds to the defendant, or (3) allow consideration of interest either in all loss calculations or as a departure factor. If lost opportunity cost interest should be included, how should such interest be calculated?

(D) Credits against loss - benefit received by victims: The current loss definition instructs the courts to reduce the loss figure by the value of payments made and collateral pledged in fraudulent loan cases, and by the value of substituted products in product substitution cases. Some courts have extended this concept to other types of cases. *See, e.g., United States v. Maurello*, 76 F.3d 1304, 1311-12 (3d Cir. 1996) (calculating loss by subtracting value of satisfactory legal services from amount of fees paid to bogus lawyer); *United States v. Reddeck*, 22 F.3d 1504, 1513 (10th Cir. 1994) (reducing loss by value of education received from bogus university). The Commission invites comment on what credits should be applied in determining an appropriate loss figure where the victim was given something of value in connection with the offense, and how such a crediting principle might be articulated. For example, what payments, if any, made by a defendant should be credited against loss? The Commission further invites comment on whether the crediting principle should be used and similarly applied in both theft and fraud offenses.

Furthermore, the current commentary also credits only those payments on a loan that have been made “at the time the offense is discovered.” The Commission invites comment on whether this the most appropriate “cutoff point” for crediting such payments. Should the commentary include a definition of “at the time the offense

is discovered” that would specify, for example, discovery “by whom” (such as by the victim or law enforcement)?

The Commission invites comment on whether there should be an adjustment or an invited departure for situations in which a defendant demonstrated the intent to make additional payments but was apprehended before he could do so.

The Commission also invites comment on whether funds that a defendant has “misapplied” to an account but not withdrawn should count as loss. Compare United States v. Johnson, 993 F.2d 1358, 1358-59 (8th Cir. 1993) (no), with United States v. Strozier, 981 F.2d 281, 283-85 (7th Cir. 1992) (yes).

The current loss definition calculates the value of collateral based on the net proceeds of the sale of the collateral, or if the sale has not been accomplished prior to sentencing, based on the market value of the collateral reduced by the expected cost of the sale. The Commission invites comment on whether fluctuations in the value of collateral after it is pledged should affect the loss figure, as is the case with the current rule, or whether the Commission should change the rule to value collateral as of the time of pledging, so changes in the value of collateral do not affect the loss determination. See, e.g., United States v. Barrett, 51 F.3d 86, 90-91 (7th Cir. 1995) (including in loss the drop in value of property securing fraudulently obtained loans).

The Commission also invites comment on whether special rules are necessary to govern loss calculation for Ponzi schemes, and, if so, what those rules should be. (Note: a Ponzi scheme is defined as “a fraudulent investment scheme in which money placed by later investors pays artificially high dividends to the original investors, thereby attracting even larger investments.” Bryan A. Garner, *A Dictionary of Modern Legal Usage* 671 (2d ed. 1995)). See, e.g., United States v. Holiusa, 13 F.3d 1043, 1048 (7th Cir. 1994) (holding that loss does not include “amounts that [the defendant] both intended to and indeed did return to investors”). Compare United States v. Orton, 73 F.3d 331, 334 (11th Cir. 1996) (holding defendant accountable only for “the net losses of all victims who lost all or part of the money they invested”) with United States v. Carrozzella, 105 F. 3d 796, 805 (2d Cir. 1997)(holding that defendant should not be credited with amounts repaid to victims of a Ponzi scheme “as part of a meretricious effort to maintain [the victims’] confidences.”

(E) Diversion of government benefits: The Commission invites comment on how loss should be determined in fraud cases involving the diversion or misuse of government program benefits and kickbacks. For example, what is the loss in a case in which a doctor acquires a patient by paying a kickback in return for a referral, provides necessary medical care, and is then paid for his services using Medicare funds? Does the current or proposed commentary adequately cover such cases?

(F) Gain: Courts have disagreed about when the current loss definition allows an offender’s gain to be used in lieu of loss. Compare United States v. Kopp, 951 F.2d 521, 530 (3d Cir. 1991) (holding that gain cannot be used if loss is measurable even if loss is zero), with United States v. Haddock, 12 F.3d 950, 960 (10th Cir. 1993) (allowing gain to be used as alternative at all times). The Commission invites comment on whether and in what circumstances gain should be used in lieu of loss, whether gain should play a part in the loss calculation, and whether there should be some adjustment or departure if gain differs significantly from the loss figure. The Commission also invites comment on how gain might be calculated; e.g., should there be a “net gain” concept, or a distinction between a defendant’s personal gain and the gain resulting from all offense conduct?

(G) Intended loss: Under the current loss definition, intended loss is used when it is greater than actual loss. The proposed definition extends this concept to theft cases as well. The Commission invites comment on whether the current rules should be changed to provide that loss is to be based on actual loss, with intended loss available only as a possible ground for departure, or whether some downward adjustment for defendants whose actual loss is greater than their intended loss is warranted.

Furthermore, courts have disagreed over whether intended loss should be limited by concepts of “economic reality” or impossibility. Compare *United States v. Moored*, 38 F.3d 1419, 1425 (6th Cir. 1994) (focusing on loss that defendant “realistically intended”), with *United States v. Lorenzo*, 995 F.2d 1448, 1460 (9th Cir.) (“[T]he amount of [intended] loss . . . does not have to be realistic.”), *cert. denied*, 510 U.S. 882 (1993). The Commission invites comment on whether, if the substance of the current rule is to be retained, intended loss should be limited by concepts of “economic reality” or impossibility, such as in a government sting operation where there can be no loss, or in a false insurance claims case in which the defendant submits a claim for an amount in excess of the fair market value of the item.

(H) Risk of loss: Under the current loss definition, a defendant might obtain a loan by fraudulent means but be accountable for zero loss because of pledged collateral and payments made prior to discovery. A defendant in an investment scam might likewise be accountable for zero loss because the risky investments he made were fortuitously profitable. The Commission invites comment on whether the definition of loss should be revised to include the concept of risk of loss, or, alternatively, whether the guideline should be amended to provide a higher minimum offense level (e.g., a floor offense level of [12 to 16]) or an added enhancement (e.g., an enhancement of [2-4] levels), so as to ensure higher punishment levels for defendants who expose their victims to the possibility of a loss, although their offenses may result in low actual loss figures. If any such amendments are warranted, what role should risk of loss play in determining the offense level? See §2F1.1, comment. (n. 7(b)).

(I) Loss amounts that over- or understate the significance of the offense: The Commission invites comment on whether to provide guidance for applying the current provision allowing departure where the loss amount over- or understates the significance of the offense. See §2F1.1, comment. (n. 10). More specifically, the Commission invites comment on whether to specify that where the loss amount included through §1B1.3 (Relevant Conduct) is far in excess of the benefit personally derived (or intended) by the defendant, the court might depart down to an offense level corresponding to the loss amount that more appropriately measures the defendant’s culpability. Alternatively, the Commission invites comment on whether to provide a specific offense characteristic (e.g., calling for a reduction of [2-4] levels) or special rule in the definition of loss to reduce the offense level in such cases.

(J) Additional special rules: The Commission invites comment on whether there is any unique category of cases, other than those mentioned above, for which a special rule for determining loss is necessary or desirable. For example, the current loss definition in §2F1.1 has a special rule for Davis-Bacon Act cases. Should that rule be maintained, and, similarly, are there other types of cases for which a special loss determination is warranted?

Theft, Fraud and Tax Related Issues

5. Synopsis of Proposed Amendment: The following amendments (described in Parts (A) through (D)) address issues related and subsidiary to the revisions of the theft, fraud, and tax loss tables that increase penalties and build in the more-than-minimal planning (MMP) enhancement.

(A) Deletion of More-than-Minimal-Planning (MMP) Enhancement.

Synopsis of Proposed Amendment: Deletion of the MMP enhancement involves the following issues and guideline modifications:

- i. Removal from §1B1.1 (Application Instructions) of certain commentary describing features of MMP that are no longer applicable in view of the proposed amendments to the theft and fraud loss tables.

The language to be deleted is principally that which describes the “repeated acts” and “concealment” prongs of MMP. The definitional commentary for the “planning” prong of MMP needs to be retained

because a MMP enhancement will continue to be a specific offense characteristic under the Aggravated Assault and Burglary guidelines. The example in the last sentence of Application Note 4, which currently refers to the cumulative application of the MMP adjustment from the fraud guideline and an aggravating role adjustment, could be replaced with a similar illustration from, e.g., the Burglary guideline, or the sentence could be deleted entirely. The amendment language shown below deletes the sentence.

- ii. Removal of the MMP enhancement from the Theft and Property Destruction guidelines, with conforming commentary changes.

The two-level MMP enhancement exists in the Theft guideline (§2B1.1) as an alternative to a four-level enhancement for being in the business of receiving and selling stolen property. The latter enhancement is assumed to incorporate MMP. Hence, when the two-level MMP factor is deleted (and incorporated into the loss table), the remaining enhancement for fencing stolen property needs to be adjusted from a four-level to a two-level enhancement. This particular specific offense characteristic (SOC) was applied in 57 (1.8%) of the 1996 theft cases and 40 (1.2%) of the 1995 theft cases.

- iii. Removal of the MMP enhancement from the Fraud guideline, with conforming commentary changes in §2F1.1 and the Multiple Count guidelines.

The MMP enhancement in the Fraud guideline currently exists as an alternative to a comparable, two-level enhancement for "a scheme to defraud more than one victim." In carrying through the decision to delete a separate MMP enhancement and fold it into the loss table, the Commission conceivably could elect to retain the enhancement for multiple victims. According to the Commission's Intensive Study Sample (ISS) assessment, an estimated 10 percent of all fraud cases involve more than one victim. However, because victim information currently is not well identified in the sentencing documents the Commission customarily receives, it is likely that the actual number of multiple victim cases is substantially higher. Thus, retention of the multiple victim enhancement may effectively retain the MMP enhancement in a substantial number of cases.

The background commentary also is modified to reflect the view that loss is a better measure of offense seriousness than whether the offense involved minimal or greater planning.

- i. Removal of MMP from §1B1.1:

§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. ~~The offense level adjustments from more than one specific offense characteristic within an offense guideline are cumulative (added together) unless the guideline specifies that only the greater (or greatest) is to be used. Within each specific offense characteristic subsection, however, the offense level adjustments are alternative; only the one that best describes the conduct is to be used. E.g., in §2A2.2(b)(3), pertaining to degree of bodily injury, the subdivision that best describes the level of bodily injury is used; the adjustments for different degrees of bodily injury (subdivisions (A)-(E)) are not added together.~~

~~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.~~

- ii. Removal of MMP from Theft & Property Destruction Guidelines:

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

- (b) Specific Offense Characteristics

* * *

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

- (B) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by ~~2~~ **4** levels.

* * *

Commentary

* * *

Application Notes:

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

* * *

- ~~13. If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved “more than minimal planning.”~~

~~14~~13.

* * *

~~15~~14.

* * *

~~16~~15.

* * *

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

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

* * *

§2B1.3. Property Damage or Destruction

* * *

- (b) Specific Offense Characteristics

* * *

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

* * *

Commentary

* * *

Application Notes:

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

~~2.1. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).~~

~~3.2. * * *~~

~~4.3. * * *~~

iii. Removal of MMP from the Fraud Guideline:

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

* * *

(b) Specific Offense Characteristics

* * *

~~(2) —If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.~~

~~(3)(2) * * *~~

~~(4)(3) * * *~~

~~(5)(4) * * *~~

~~(6)(5) * * *~~

Commentary

* * *

Application Notes:

* * *

~~2. —“More than minimal planning” (subsection (b)(2)(A)) is defined in the Commentary to §1B1.1 (Application Instructions).~~

~~3. —“Scheme to defraud more than one victim,” as used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one person. In this context, “victim” refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.~~

- ~~42.~~ * * *
- 53. * * *
- 64. * * *
- 75. * * *
- 86. * * *
- 97. * * *
- ~~108.~~ * * *
- ~~119.~~ * * *
- ~~1210.~~ * * *
- ~~1311.~~ * * *
- ~~1412.~~ * * *
- ~~1513.~~ * * *
- ~~1614.~~ * * *
- ~~1715.~~ * * *

~~18. — If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved “more than minimal planning.”~~

Background:

* * *

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

~~The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in frauds involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.~~

The Commission has determined that, ordinarily, the sentences of defendants convicted of fraud offenses should reflect the nature and magnitude of the economic harm caused by their crimes. Accordingly, the amount of loss caused by an offense is a principal factor in determining the offense level under this guideline.

* * *

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

* * *

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

The following examples, drawn from presentence reports in the Commission's files, illustrate the operation of the guidelines for multiple counts. The examples are discussed summarily; a more thorough, step-by-step approach is recommended until the user is thoroughly familiar with the guidelines.

* * *

- 2. *Defendant B was convicted on the following seven counts: (1) theft of a ~~\$2,000~~**\$3,000** check; (2) uttering the same ~~\$2,000~~**\$3,000** 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 (Theft), while Counts 2, 4, 6 and 7 involve offenses under Part F (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~~**\$5,800**. 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~~ **and [Option 1: 2 levels][Option 2: 4 levels] are 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. **[Option 1: 8][Option 2: 10].***

(B) Reduction for Cases Involving Limited or Insignificant Planning.

Synopsis of Proposed Amendment: *The Commission's Practitioners' Advisory Group has suggested the*

following two-level reduction in the theft and fraud guidelines for cases that involve only limited or insignificant planning in the event that the more than minimal planning enhancement is built into the theft and fraud loss tables. For a related proposal, see Amendment I(C), supra.

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

* * *

(b) Specific Offense Characteristics

* * *

(8) If the offense involved (A) limited or insignificant planning, or (B) simple efforts at concealment, reduce by 2 levels.

Commentary

* * *

Application Notes:

* * *

17. The term "limited or insignificant planning" means planning that is necessary for commission of the offense in a simple form.

* * *

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

* * *

(b) * * *

(7) If the offense involved (A) limited or insignificant planning, or (B) simple efforts at concealment, reduce by 2 levels.

Commentary

* * *

Application Notes:

* * *

19. The term "limited or insignificant planning" means planning that is necessary for commission of the offense in a simple form.

(C) **Sophisticated Concealment Enhancement.**

Synopsis of Proposed Amendment: *This amendment adds an enhancement in the fraud and theft guidelines similar to the existing "sophisticated means" enhancement in the tax guidelines. This amendment also entails some modification of the existing sophisticated means enhancement in the tax guidelines and the addition of a "floor" offense level of 12 to both the new and existing enhancements.*

i. *Addition of "Sophisticated Concealment" enhancement to Theft and Fraud guidelines.*

Two options are proposed to add an enhancement for sophisticated concealment to the theft and fraud guidelines. Option 1 treats "committing the offense from outside the United States" as a separate and alternative enhancement to other forms of sophisticated concealment. Option 2 treats "committing the offense from outside the United States" as one form of sophisticated concealment.

ii. *Modification of "Sophisticated Means" enhancement in tax guidelines.*

*This amendment modifies the tax guidelines' sophisticated means SOC. In April, 1997, the Commission considered modifications that were designed to provide a floor offense level of 12, enhance the precision of the language, and address a circuit conflict. The conflict involved the issue of whether the sophisticated means enhancement applies based on the personal conduct of the defendant (see *United States v. Kraig*, 99 F.3d 1361 (6th Cir. 1996)), or the overall offense conduct for which the defendant is accountable (see *United States v. Lewis*, 93 F.3d 1075 (2d Cir. 1996)). The modifications take into account the latter view because that view appears more consistent with the usual relevant conduct attribution rules.*

The sophisticated means enhancement was applied in 103 (16.6%) tax evasion (§2T1.1) cases sentenced in FY 1996 and 82 (16.1%) of such cases sentenced in FY 1995. The identical enhancement in the other two tax guidelines (§§2T1.4, 2T3.1) was not applied in FY 1995 or FY 1996.

Two options are presented. Option 1 is substantially similar to the modifications considered by the Commission in April, 1997, with minor, non-substantive modifications in the commentary. Option 2 eliminates the element of "greater planning than a routine tax-evasion case" and generally conforms the SOC to the "sophisticated concealment" language prepared for the theft and fraud guidelines. However, the definition of "sophisticated concealment" does not include "committing the offense from outside the United States" because it seems unlikely that a tax offense would be perpetrated from outside the United States to avoid detection or prosecution. Under this option, the planning concept is deleted because that element arguably would be built into the offense level if the Commission adopts one of the proposed loss table amendments, both of which propose using a tax loss table that is the same as, or substantially similar to, the fraud loss table that is amended to phase in more-than-minimal planning. Without the planning element, the "harm" that is sought to be captured is the complex scheme designed to make the offense difficult to detect. Finally, Option 2 retains the floor offense level of 12.

i. Addition of "Sophisticated Concealment" enhancement to Theft and Fraud Guidelines:

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

* * *

(b) Specific Offense Characteristics

* * *

(5) If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(5)(6) * * *

(6)(7) * * *

(7)(8) * * *

Commentary

* * *

Application Notes:

* * *

17. For purposes of subsection (b)(5), “sophisticated concealment” means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate “sophisticated concealment.”

* * *

“Sophisticated concealment” in the fraud guideline:

Option 1: “Committing the offense from outside the United States” as a separate and alternative enhancement to sophisticated concealment.

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

* * *

(b) Specific Offense Characteristics

* * *

(5) ~~If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level~~ If (A) any part of the offense was committed from outside the United States, or (B) the offense otherwise involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

* * *

Commentary

* * *

Application Notes:

* * *

19. For purposes of subsection (b)(5)(A), “United States” means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

For purposes of subsection (b)(5)(B), “sophisticated concealment” means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate “sophisticated concealment.”

* * *

Option 2: “Committing the offense from outside the United States” as a form of “sophisticated concealment.”

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

* * *

b) Specific Offense Characteristics

* * *

(5) ~~If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.~~ **If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.**

* * *

Commentary

* * *

Application Notes:

* * *

19. For purposes of subsection (b)(5), “sophisticated concealment” means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, commission of the offense from outside the United States, or the use of corporate shells, fictitious entities, foreign bank accounts, or similarly

sophisticated actions ordinarily indicate “sophisticated concealment.”

* * *

ii. Modification of "Sophisticated Means" enhancement in the tax guidelines.

Option 1:

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

* * *

(b) Specific Offense Characteristics

* * *

- (2) If sophisticated means were used to impede discovery of the ~~existence~~ offense or ~~its~~ extent of the offense, increase by 2 levels. **If the resulting offense level is less than level 12, increase to level 12.**

* * *

Commentary

* * *

Application Notes:

* * *

4. "Sophisticated means," as used in subsection (b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. ~~An~~**The** enhancement would ~~be applied~~**apply**, for example, ~~where the defendant used offshore~~ **if the offense involved the use of foreign bank accounts or foreign transactions**, or transactions through corporate shells or fictitious entities, **to conceal the offense or its extent.**

* * *

§2T1.4. **Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud**

* * *

(b) Specific Offense Characteristics

* * *

- (2) If sophisticated means were used to impede discovery of the ~~existence~~ offense or ~~its~~ extent of the offense, increase by 2 levels. **If the resulting offense level**

is less than level 12, increase to level 12.

Commentary

* * *

Application Notes:

* * *

- 3. *"Sophisticated means," as used in ~~§2T1.4(b)(2)~~ subsection (b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. ~~An~~The enhancement would ~~be applied~~apply, for example, ~~where the defendant used offshore~~ if the offense involved the use of foreign bank accounts or foreign transactions, or transactions through corporate shells or fictitious entities, to conceal the offense or its extent.*

* * *

§2T3.1. Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property

* * *

(b) Specific Offense Characteristic

- (1) If sophisticated means were used to impede discovery of the ~~nature or existence of the offense~~ offense or its extent, increase by 2 levels. **If the resulting offense level is less than level 12, increase to level 12.**

* * *

Commentary

* * *

Application Notes:

* * *

- 3. *"Sophisticated means," as used in subsection (b)(1), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine duty-evasion case. The enhancement would apply, for example, if the offense involved the use of foreign bank accounts or foreign transactions, or transactions through corporate shells or fictitious entities, to conceal the offense or its extent.*

* * *

Option 2:

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

* * *

(b) Specific Offense Characteristics

* * *

- (2) ~~If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels.~~ **If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.**

* * *

Commentary

* * *

Application Notes:

* * *

4. ~~"Sophisticated means," as used in subsection (b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.~~

For purposes of subsection (b)(2), "sophisticated concealment" means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate "sophisticated concealment."

* * *

§2T1.4. Aiding, Assisting, Procuring, Counseling, or Advising Tax Fraud

* * *

(b) Specific Offense Characteristics

* * *

- (2) ~~If sophisticated means were used to impede discovery of the existence or extent of the offense, increase by 2 levels.~~ **If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.**

Commentary

* * *

Application Notes:

* * *

3. ~~"Sophisticated means," as used in §2T1.4(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells or fictitious entities.~~

For purposes of subsection (b)(2), "sophisticated concealment" means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate "sophisticated concealment."

* * *

§2T3.1. Evading Import Duties or Restrictions (Smuggling); Receiving or Trafficking in Smuggled Property

* * *

(b) Specific Offense Characteristic

- (1) ~~If sophisticated means were used to impede discovery of the nature or existence of the offense, increase by 2 levels.~~ *If the offense involved sophisticated concealment, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.*

* * *

Commentary

* * *

Application Notes:

* * *

3. *For purposes of subsection (b)(1), "sophisticated concealment" means complex or intricate offense conduct that is designed to prevent discovery of the offense or its extent. This enhancement applies to conduct in which deliberate steps are taken to hide assets or transactions, or both, or otherwise make the offense, or its extent, difficult to detect. Thus, the use of corporate shells, fictitious entities, foreign bank accounts, or similarly sophisticated actions ordinarily indicate "sophisticated concealment."*

* * *

(D) Financial Institution, Personal Profit Enhancement.

Synopsis of Proposed Amendment: *Proposals considered by the Commission in April, 1997, would have modified an enhancement for defendants who personally and substantially profit from financial institution fraud. This enhancement is contained in the theft, commercial/bank bribery, and fraud guidelines. In view of the substantial increases in the loss table for large-scale offenses, it is proposed to adhere somewhat more closely to the minimum dictates of this congressionally-directed enhancement, which requires a minimum offense level of 24 (approximately a five-year sentence) for defendants who derive more than \$1 million in*

"gross receipts" from specified financial institution offenses. Thus, the amendment would delete the four-level increase currently required under the enhancement while retaining the minimum offense level of 24. This would avoid unwarranted double counting for offenses involving loss amounts in excess of \$2.5 million (equivalent to level 24 under the new loss table options). Although the effect of the enhancement would be moderated somewhat, it would continue to apply to a broader spectrum of cases than required under the congressional directive.

The amendment also addresses significant interpretive problems regarding the meaning of the current guideline phrase "affected a financial institution and the defendant derived more than \$1 million in gross receipts from the offense." The proper interpretation of this language has been the subject of a number of hotline calls and some litigation (although no circuit conflict has yet resulted).

The amended commentary would address the confusion about the meaning of the phrase "affected a financial institution" by deleting that problematic language. The new language would make clear that the enhancement applies when the offense is perpetrated against, and the money is derived from, one or more financial institutions.

Additionally, the definition for "gross receipts" would be amended to clarify that "gross receipts from the offense" includes property under the control of, or in the custody of, the financial institution for a second party, *e.g.*, a depositor. The background commentary would also be amended to reflect the Commission's intent to implement the congressional directive in a broader fashion than required.

Because this SOC exists in the alternative to another SOC (regarding causing or threatening the institution's solvency), it is not possible to ascertain from the monitoring data exactly how frequently it has been applied. However, the data indicate that one or the other SOC was applied in 8 (.2%) FY 1995 theft cases, and 12 (.4%) of FY 1996 theft cases; with respect to fraud cases, the SOC was applied in 38 (.6%) of FY 1995 cases and in 50 (.8%) of FY 1996 cases. The SOC was not applied in any commercial/bank bribery cases during either fiscal year.

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

* * *

(b) Specific Offense Characteristics

* * *

(6) If the offense=

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

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

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

(7) If the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense, and the offense level as determined above is less than level 24, increase to level

24.

~~(7)~~(8) * * *

Commentary

* * *

Application Notes:

* * *

- 11. *For purposes of subsection (b)(7), “gross receipts” means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of the offense. See 18 U.S.C. §§ 982(a)(4), 1344. “The defendant derived more than \$1,000,000 in gross receipts from the offense,” as used in subsection (b)(6)(B)(7), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. “Gross receipts from the offense” includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).*

* * *

Background:

* * *

Subsections (b)(6)(A) and (7) implements, in a broader form, the instructions to the Commission in Section 961(m) of Public Law 101-73 and Section 2507 of Public Law 101-647, respectively.

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

* * *

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

* * *

- (b) Specific Offense Characteristics

* * *

- (6) If the offense--

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

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

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

* * *

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

* * *

Commentary

* * *

Application Notes:

* * *

- 16. For purposes of subsection (b)(7), “gross receipts” means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of the offense. See 18 U.S.C. §§ 982(a)(4), 1344. “The defendant derived more than \$1,000,000 in gross receipts from the offense,” as used in subsection (b)(6)(B)(7), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. “Gross receipts from the offense” includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

* * *

Background:

* * *

Subsections (b)(6)(A) and (7) implements, in a broader form, the instructions to the Commission in Section 961(m) of Public Law 101-73 and Section 2507 of Public Law 101-647, respectively.

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

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

* * *

(b) Specific Offense Characteristics

* * *

(2) If the offense--

- (A) substantially jeopardized the safety and soundness of a financial institution;
- or
- (B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense;

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

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

* * *

Commentary

* * *

Application Notes:

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- 5. For purposes of subsection (b)(3), "gross receipts" means any moneys, funds, credits, assets, securities, or other real or personal property, whether tangible or intangible, owned by, or under the custody or control of, a financial institution, that are obtained directly or indirectly as a result of the offense. See 18 U.S.C. §§ 982(a)(4), 1344. "The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(2)(B)(3), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).

* * *

Background:

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Subsections (b)(2)(A) and (3) implements, in a broader form, the instructions to the Commission in Section 961(m) of Public Law 101-73 and Section 2507 of Public Law 101-647, respectively.

~~Subsection (b)(2)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647.~~

Telemarketing Fraud

6. Issues for Comment: The Commission is examining the characteristics of telemarketing fraud offenses, the statutory enhancement for telemarketing fraud at 18 U.S.C. § 2326, and whether current adjustments in §2F1.1 (Fraud), §3A1.1 (Hate Crime Motivation or Vulnerable Victim), and the policy statements in §5K2.0 - §5K2.18 (Other Grounds for Departures) provide adequate punishment for defendants convicted of telemarketing fraud offenses.

In conjunction with its examination, the Commission invites comment on the following issues:

(A) Telemarketing fraud generally. Should telemarketing fraud offenses be treated differently from other types of fraud offenses involving comparable numbers and nature of victims and comparable monetary loss? What types of harms unique to telemarketing fraud are not adequately addressed by the guidelines? Should §2F1.1 be amended to provide an increase of [2-8] levels to correspond to the application of the statutory enhancement in 18 U.S.C. § 2326?

(B) Multiple victims. Do the guidelines adequately address fraud offenses that impact multiple victims? If not, how should they be amended to address this concern? Should, for example, the fraud guideline include a table providing tiered offense level increases that correspond to the number of victims involved in the offense? If so, what are the appropriate offense level increases and corresponding ranges of number of victims? Should such an enhancement be based on the total number of victims or the number of vulnerable victims? If the enhancement is based on vulnerability, is it more appropriate to amend §3A1.1 to reflect multiple victims?

(C) Revictimization. Commission analysis indicates that telemarketing fraud often involves repeat victimization of persons previously victimized, typically through “reloading” (a process in which a telemarketing offender targets victims whose names are included on lists of individuals previously contacted and victimized) or “recovery services” schemes (a process in which an offender poses as a government agent or other individual in a position to help the victim recover, for a fee, the losses incurred as a result of the initial telemarketing scheme). Commission analysis further indicates that district courts often enhance the sentence under §3A1.1 (Vulnerable Victim) in these cases. Does §3A1.1 adequately address revictimization concerns? To ensure consistent application of this enhancement, should the Commission amend the guideline or commentary to ensure that §3A1.1 is applicable when the offense involves an individual susceptible to the offense because of prior victimization? Alternatively, should the Commission promulgate additional specific offense characteristics addressing this aspect of telemarketing fraud?

(D) Departures. Currently, Application Note 10 of §2F1.1 encourages upward departures when monetary loss inadequately measures the harm and seriousness of fraudulent conduct. Should some of the listed departure factors be converted into specific offense characteristics? For example, should the fact that “the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma” (subsection (c)), or “the offense involved the knowing endangerment of the solvency of one or more victims” (subsection (f)), or other factors be made into specific enhancements under the fraud guideline? Is so, what offense level weight should be assigned to these factors? In addition, should the Commission promulgate any currently specified grounds for departure listed in Chapter 5K as specific offense characteristics? If so, what weight should be given these factors?

(E) Sophisticated means. Elsewhere in these proposed amendments, the Commission has (1) included, on a phased-in basis, an enhancement for more-than-minimal planning in proposed revisions of the loss table applicable for fraud offenses, and (2) proposed a new enhancement for “sophisticated concealment” conduct (defined to include perpetrating an offense from outside U.S. borders). In this regard, the Senate-passed version of a telemarketing fraud bill (H.R. 1847, 105th Cong., 1st Sess.) directs the Commission to “provide an additional appropriate sentencing enhancement if [sic] offense involved sophisticated means, including but not limited to sophisticated concealment efforts, such as perpetrating the offense from outside the United States.” The Commission invites comment on whether the proposed amendments adequately address concerns expressed in the congressional directive. If not, how should the enhancement be augmented to most effectively implement such a potential directive?

(F) Other factors. Are there additional factors that the Commission should address, either by specific offense characteristics, guideline commentary, or departure provisions, to provide appropriate punishment for telemarketing offenses?

Circuit Conflicts

7. Synopsis of Proposed Amendment: The Commission has identified the resolution of several circuit conflicts for consideration this year. Parts (A) through (J) present particular circuit conflicts under

consideration.

(A) Aberrant Behavior

Synopsis of Proposed Amendment: *The amendment addresses the circuit conflict regarding whether the aberrant behavior departure is limited to only spontaneous and thoughtless acts. Compare United States v. Marcello, 13 F.3d 752 (3d Cir. 1994); United States v. Glick, 946 F.2d 335 (4th Cir. 1991); United States v. Williams 974 F.2d 25 (5th Cir. 1991), *cert. denied*, 507 U.S. 934 (1993); United States v. Carey, 895 F.2d 318 (7th Cir. 1990) with United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996); United States v. Takai, 941 F.2d 738 (9th Cir. 1991). The proposal removes the departure from Chapter One and creates a guideline in Chapter Five that limits the departure to a spontaneous and thoughtless act.*

**CHAPTER ONE - INTRODUCTION
AND GENERAL APPLICATION PRINCIPLES**

PART A - INTRODUCTION

* * *

4. The Guidelines' Resolution of Major Issues (Policy Statement)

* * *

(d) Probation and Split Sentences.

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More specifically, the guidelines work as follows in respect to a first offender. For offense levels one through eight, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels nine and ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement, intermittent confinement, or home detention). For offense levels eleven and twelve, the court must impose at least one half the minimum confinement sentence in the form of prison confinement, the remainder to be served on supervised release with a condition of community confinement or home detention. ~~The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.~~

§5K2.19 Single Act of Aberrant Behavior (Policy Statement)

If the offense consisted of a single act of aberrant behavior, a downward departure may be warranted. A "single act of aberrant behavior" means a spontaneous and thoughtless act. This definition does not include a course of conduct composed of multiple planned criminal acts, even if the defendant is a first-time offender.

(B) Misrepresentation with respect to Charitable Organizations.

Synopsis of Proposed Amendment: *The amendment addresses the circuit conflict regarding whether an employee of a charity or governmental agency who misapplies or embezzles funds misrepresents that he was acting "on behalf of the agency" within the meaning of the two-level enhancement under §2F1.1(b)(3)(A). Compare United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995) with United States v. Marcum, 16 F.3d 599*

(4th Cir.) *cert. denied*, 513 U.S. 845 (1994). The proposed amendment provides enhancements for both (1) the legitimate employee of a charitable, educational, religious or political organization, or government agency who commits a fraud by misrepresenting to an individual outside the organization or agency that the defendant is acting on behalf of the employer organization or agency; and (2) the defendant who commits a fraud by pretending to be an employee or authorized agent of a charitable, educational, religious or political organization, or government agency.

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

- (a) Base Offense Level: **6**
- (b) Specific Offense Characteristics

* * *

- (3) ~~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,~~(A)(i) the defendant is an employee or authorized agent of a charitable, educational, religious or political organization, or a government agency, who used that employment or position as an authorized agent under false pretenses to victimize an individual who is not an employee of that organization or agency; (ii) the offense involved a misrepresentation that the defendant was an employee or authorized agent of a charitable, educational, religious or political organization, or a government agency; or (B) the offense involved a violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

* * *

Commentary

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Application Notes:

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- 4. ~~Subsection (b)(3)(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.~~ Subsection (b)(3)(A) provides enhancements for a defendant's use of false pretenses to take advantage of a victim's charitable motives, or trust in government agencies. The enhancement in (b)(3)(A)(i) applies if (a) the defendant is a legitimate employee of a charitable, educational, religious or political organization, or a government agency, (b) the

false pretense was that the defendant was acting for the interest or benefit of the organization or agency when, in fact, the defendant was acting for personal gain; and (c) the offense victimizes an individual who is not an employee of that organization or agency. For example, this enhancement would apply in a case in which the president of a charitable organization skims proceeds from a public bingo game which the president conducts under the false pretenses of raising money solely for the charitable organization. [If this enhancement applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).]

The enhancement in (b)(3)(A)(ii) applies if (a) the defendant is not a legitimate employee of a charitable, education, religious or political organization or a government agency, and (b) the misrepresentation was that the defendant was an employee or authorized agent of an organization or agency referred to in (a).

Because the enhancements in (b)(3)(A) apply in the case in which a defendant uses false pretenses to take advantage of charitable motives or trust in government agencies, clauses (i) and (ii) do not apply if the defendant simply embezzles money from the employer organization or agency or otherwise commits a fraud directed at the organization or agency. However, such a defendant who holds a position of public or private trust will be subject to an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

* * *

Background:

* * *

~~*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. A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.*~~

(C) Violation of Judicial Process

Synopsis of Proposed Amendment: *This amendment addresses the circuit conflict regarding whether filing fraudulent forms with bankruptcy and probate courts violates a judicial order or process within the meaning of the two-level enhancement under §2F1.1(b)(3)(B). Two options are presented. Option One adopts the majority view and defines the scope of the enhancement to include fraudulent court filings. See United States v. Michalek, 54 F.3d 325 (7th Cir. 1995); United States v. Lloyd, 947 F.2d 339 (8th Cir. 1991)(per curiam); United States v. Welch, 103 F.3d 906 (9th Cir. 1996)(per curiam); United States v. Messner, 107 F.3d 1448 (10th Cir. 1997); United States v. Bellew, 35 F.3d 518 (11th Cir. 1994)(per curiam). In Option One, "violation of a judicial order" is interpreted broadly to mean an abuse of judicial proceedings (presented as both an enhancement and an upward departure provision in coordination with the consolidation of theft and fraud proposal, see Proposed Amendment 3, supra.) Option Two adopts the minority view and defines the scope of the enhancement to exclude fraudulent court filings. See United States v. Shadduck, 112 F.3d 523 (1st Cir. 1997); United States v. Carrozella, 105 F.3d 796 (2d Cir. 1997). In this option, "violation of a judicial order" is interpreted narrowly to mean a violation of a command or order issued to a specific person or party (presented as both an enhancement and an upward departure provision in coordination with the consolidation of theft and fraud proposal, see Proposed Amendment 3, supra.)*

a) Enhancement provision:

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

* * *

(b) Specific Offense Characteristics

* * *

(3) 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, or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

* * *

Commentary

* * *

Application Notes:

* * *

5. *Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in §2J1.7 (Offense Committed While on Release)) or a violation of probation (addressed in §4A1.1 (Criminal History Category)).*

This enhancement also applies if the offense involves a violation of a special judicial process, such as a bankruptcy or probate proceeding. A violation of a special judicial process occurs when the offense conduct for which the defendant is accountable involves a misuse of a judicial proceeding to gain an undeserved advantage. For example, a defendant who files a false document with a bankruptcy court to conceal an asset violates the bankruptcy process because concealing the asset from creditors misuses the debtor’s protection from creditors and gives the defendant an undeserved advantage in the proceeding.

This enhancement does not apply to conduct addressed 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)).

* * *

Background:

* * *

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, the defendants who exploit victim's charitable impulses or trust in government create particular social harm. A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies. *Similarly, a defendant who violates a special judicial process deserves additional punishment because the defendant is taking advantage of a judicial proceeding to gain an undeserved advantage.*

b) Upward departure provision:

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

* * *

(b) Specific Offense Characteristics

* * *

(3) 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, or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines; increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

* * *

Commentary

* * *

Application Notes:

* * *

5. *Subsection (b)(3)(B) provides an adjustment for* ***If the defendant committed a violation of any judicial or administrative order, injunction, decree, or process, an upward departure may be warranted.*** *If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of* ~~*the*~~ ***that*** ~~*this provision applies*~~ ***an upward departure pursuant to this note may be warranted,*** *even if the defendant was not a specifically named party in that prior case. For example, an upward departure may be warranted in the case of a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to* ~~*However, an upward departure based on*~~ ***conduct addressed elsewhere in the guidelines; (e.g., a violation of a condition of release (addressed in §2J1.7 (Offense Committed*** ~~*Commission of Offense While on Release)*~~ ***or a violation of probation (addressed in §4A1.1 (Criminal History Category)) is not authorized under this note.***

An upward departure pursuant to this note also may be warranted if the offense involves a

violation of a special judicial process, such as a bankruptcy or probate proceeding. A violation of a special judicial process occurs when the offense conduct for which the defendant is accountable involves a misuse of a judicial proceeding to gain an undeserved advantage. For example, a defendant who files a false document with a bankruptcy court to conceal an asset violates the bankruptcy process because concealing the asset from creditors misuses the debtor's protection from creditors and gives the defendant an undeserved advantage in the proceeding.

* * *

Background:

* * *

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, the defendants who exploit victim's charitable impulses or trust in government create particular social harm. A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Option 2: Minority appellate view -“violation of judicial process” is interpreted narrowly to mean a violation of a command or order issued to a specific person or party (presented as both an enhancement and an upward departure provision in coordination with the consolidation proposal).

a) Enhancement provision:

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

* * *

(b) Specific Offense Characteristics

* * *

(3) 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, or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

* * *

Commentary

* * *

Application Notes:

* * *

5. ~~Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process.~~ *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 an 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 warning,~~ and the defendant had knowledge of ~~the~~that prior decree or order, this ~~provision~~*enhancement* applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, ~~would be~~*is* subject to this ~~provision~~*enhancement*. This ~~subsection~~*enhancement* does not apply to conduct addressed elsewhere in the guidelines; (*e.g.*, a violation of a condition of release (addressed in §2J1.7 (~~Offense Committed~~*Commission of Offense While on Release*)) or a violation of probation (addressed in §4A1.1 (Criminal History Category))).

* * *

Background:

* * *

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, the defendants who exploit victim's charitable impulses or trust in government create particular social harm. A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

b) Upward departure provision:

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

* * *

(b) Specific Offense Characteristics

* * *

- (3) 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, ~~or (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines,~~ increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

* * *

Commentary

* * *

Application Notes:

* * *

5. ~~Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative~~**An upward departure may be warranted 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. The failure to comply with such a warning demonstrates aggravated criminal intent that may deserve a sentence outside the guideline range. If it is established that an entity the defendant controlled was a party to the prior proceeding and the defendant had knowledge of the prior decree or order, this provision applies**~~an upward departure pursuant to this note may be warranted, even if the defendant was not a specifically named party in that prior case. For example, an upward departure may be warranted in the case of a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to~~**However, an upward departure based on** conduct addressed elsewhere in the guidelines;~~(e.g., a violation of a condition of release (addressed in §2J1.7 (Offense Committed~~**Commission of Offense** While on Release)~~) or a violation of probation (addressed in §4A1.1 (Criminal History Category))~~ **is not authorized under this note.**

* * *

Background:

* * *

~~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, the defendants who exploit victim's charitable impulses or trust in government create particular social harm. A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.~~

(D) Grouping Failure to Appear Count with Underlying Offense

Synopsis of Proposed Amendment: *This amendment addresses the circuit conflict regarding whether the guideline procedure of grouping the failure to appear count of conviction with the underlying offense violates the statutory mandate of imposing a consecutive sentence. Compare United States v. Agoro, 996 F.2d 1288 (1st Cir. 1993); United States v. Flores, 23 F.3d 408 (6th Cir. 1994)(unpublished) with United States v. Packer, 70 F.3d 357 (5th Cir. 1995), cert. denied, 117 S.Ct. 75 (1996). The proposal maintains the current grouping rules for failure to appear and obstruction of justice, but addresses internal inconsistencies in the guidelines. Specifically, the proposal (1) more clearly distinguishes between statutes that require imposition of a consecutive term of imprisonment only if imprisonment is imposed (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear) and statutes that require both a minimum term of imprisonment and a consecutive sentence (e.g., 18 U.S.C. § 924(c) (Use of a firearm in relation to crime of violence or drug trafficking offense)); (2) adds a paragraph stating that the method outlined for determining sentence for failure to appear and similar statutes ensures an incremental, consecutive*

punishment; and (3) adds departure provision if offense conduct involves multiple obstructive behavior.

§2J1.6. Failure to Appear by Defendant

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Commentary

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Application Notes:

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- 3. In the case of a failure to appear for service of sentence, any term of imprisonment imposed on the failure to appear count is to be imposed consecutively to any term of imprisonment imposed for the underlying offense. See §5G1.3(a). The guideline range for the failure to appear count is to be determined independently and the grouping rules of §§3D1.2-3D1.5 do not apply.

Otherwise, in the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense; and the failure to appear count and the count(s) for the underlying offense are grouped together under §3D1.2(c). (Note that although 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, although if a it does require that any sentence of imprisonment on the failure to appear count be is imposed, the statute requires that the sentence be imposed to run consecutively to any other sentence of imprisonment. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1-3D1.5 apply. See §3D1.1(b), comment. (n.1), and §3D1.2, comment. (n.1).) Therefore, in such cases, the combined sentence must will then be constructed to provide a "total punishment" that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, where if the combined applicable guideline range for both counts is 30-37 months and the court determines a "total punishment" of 36 months is appropriate, a sentence of thirty months for the underlying offense plus a consecutive six months sentence for the failure to appear count would satisfy these requirements. (Note that the combination of this instruction and increasing the offense level for the obstructive, failure to appear conduct has the effect of ensuring an incremental, consecutive punishment for the failure to appear count, as required by 18 U.S.C. § 3146(b)(2).)

- 4. If a defendant is convicted of both the underlying offense and the failure to appear count, and the defendant committed additional acts of obstructive behavior (e.g., perjury) during the investigation, prosecution, or sentencing of the instant offense, an upward departure may be warranted. The upward departure will ensure an enhanced sentence for obstructive conduct for which no adjustment under §3C1.1 (Obstruction of Justice) is made because of the operation of the rules set out in Application Note 3.

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§3C1.1. Obstructing or Impeding the Administration of Justice

* * *

Commentary

Application Notes:

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6. ~~Where~~**If** the defendant is convicted of an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), §2J1.5 (Failure to Appear by Material Witness), §2J1.6 (Failure to Appear by Defendant), §2J1.9 (Payment to Witness), §2X3.1 (Accessory After the Fact), or §2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except ~~where~~**if** a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., ~~where~~**if** the defendant threatened a witness during the course of the prosecution for the obstruction offense).
7. ~~Where~~**If** the defendant is convicted both of ~~the~~**an** obstruction offense (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1621 (Perjury generally)) and ~~the~~**an** underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

* * *

§3D1.1. Procedure for Determining Offense Level on Multiple Counts

* * *

- (b) ~~Any count for which the statute mandates imposition of a consecutive sentence is excluded from the operation of §§3D1.2-3D1.5. Exclude from the application of §§3D1.2-3D1.5 any count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of §5G1.2(a).~~

Commentary

Application Note:

1. ~~Counts for which a statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. Subsection (b) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory term of five years to run consecutively). Convictions on such counts are not used in the determination of a combined offense level under this Part. The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b). but However, a count covered by subsection (b) may affect the offense level determination for other counts. A conviction for 18 U.S.C. § 924(c) (use of firearm in commission of a crime of violence) provides a common example. In the case of a conviction under 18 U.S.C. § 924(c), the specific offense characteristic for weapon use in the primary offense is to be disregarded to avoid double counting. See: Commentary to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes). Example: The For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime~~

of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under USSG §2B3.1 is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. § 924(c), ~~The~~ the mandatory five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count, ~~as required by law.~~ See §5G1.2(a).

Unless specifically instructed, subsection (b) does not apply when imposing a sentence under a statute that requires the imposition of a consecutive term of imprisonment only if a term of imprisonment is imposed (i.e., the statute does not otherwise require a term of imprisonment to be imposed). See, e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 924(a)(4) (regarding penalty for 18 U.S.C. § 922(q) (possession or discharge of a firearm in a school zone)). Accordingly, the multiple count rules set out under this Part do apply to a count of conviction under this type of statute.

* * *

§3D1.2. Groups of Closely Related Counts

* * *

Commentary

Application Notes:

1. Subsections (a)-(d) set forth circumstances in which counts are to be grouped together into a single Group. Counts are to be grouped together into a single Group if any one or more of the subsections provide for such grouping. Counts for which the statute ~~mandates imposition of a consecutive sentence~~ (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment are excepted from application of the multiple count rules. See §3D1.1(b); *id.*, comment.(n.1).

* * *

§5G1.2. Sentencing on Multiple Counts of Conviction

- (a) The sentence to be imposed on a count for which the statute ~~mandates a consecutive sentence~~ (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment shall be determined by the statute and imposed independently.

* * *

Commentary

* * *

~~Counts for which a statute mandates a consecutive sentence, such as counts charging the use of a firearm in a violent crime (18 U.S.C. § 924(c)) are treated separately. The sentence imposed on such a count is the sentence indicated for the particular offense of conviction. That sentence then runs consecutively to the sentences imposed on the other counts. Subsection (a) applies if a statute (a) specifies a term of imprisonment to be imposed; and (b) requires that such term of imprisonment be imposed to run~~

consecutively to any other term of imprisonment. *See, e.g., 18 U.S.C. § 924(c) (requiring mandatory term of five years to run consecutively to any other term of imprisonment). The term of years to be imposed consecutively is determined by the statute of conviction, and is independent of a guideline sentence on any other count. See, e.g., Commentary to §§2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes) and 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) regarding determination of the offense levels for related counts when a conviction under 18 U.S.C. § 924(c) is involved. Note, however, that even in the case of a consecutive term of imprisonment imposed under subsection (a), any term of supervised release imposed is to run concurrently with any other term of supervised release imposed. See 18 U.S.C. § 3624(e). Subsection (a) also applies in certain other instances in which an independently determined and consecutive sentence is required. See, e.g., Application Note 3 of the Commentary to §2J1.6 (Failure to Appear by Defendant), relating to failure to appear for service of sentence.*

(E) Imposters and the Abuse of Trust Adjustment

Synopsis of Proposed Amendment: *This amendment addresses the circuit conflict regarding whether the abuse of position of trust adjustment in §3B1.3 applies to imposters. The majority view defines the scope of the adjustment to include imposters. See United States v. Gill, 99 F.3d 484 (1st Cir. 1996); United States v. Queen, 4 F.3d 925 (10th Cir. 1993), *cert denied*, 510 U.S. 1182 (1994). The minority view defines the scope of the enhancement to exclude imposters. See United States v. Echevarria, 33 F.3d 175 (2d Cir. 1994). The proposed amendment provides that the abuse of position of trust adjustment applies to the imposter who indicates that he legitimately holds a position of trust when in fact he does not and gives two examples of such circumstances.*

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

* * *

Commentary

Application Notes:

1. "Public or private trust" refers to a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference). Persons holding such positions ordinarily are subject to significantly less supervision than employees whose responsibilities are primarily non-discretionary in nature. For this enhancement to apply, the position of **public or private** trust must have contributed in some significant way to facilitating the commission or concealment of the offense (*e.g.*, by making the detection of the offense or the defendant's responsibility for the offense more difficult). This adjustment, for example, ~~would apply~~ **applies** in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination. This adjustment ~~would~~ **does** not apply in the case of an embezzlement or theft by an ordinary bank teller or hotel clerk because such positions are not characterized by the above-described factors.

Notwithstanding the preceding paragraph, because of the special nature of the United States mail an adjustment for an abuse of a position of trust will apply to any employee of the U.S. Postal Service who engages in the theft or destruction of undelivered United States mail.

2. *This enhancement also applies in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not. For example, the enhancement applies in the case of a defendant who (A)*

perpetrates a financial fraud by leading an investor to believe the defendant is a legitimate investment broker; or (B) perpetrates a fraud by representing falsely to a patient or employer that the defendant is a licensed physician. In making the misrepresentation, the defendant assumes a position of trust, relative to the victim, that provides the defendant with the same opportunity to commit a difficult-to-detect crime that the defendant would have had if the position were held legitimately.

23. "Special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.

Background: This adjustment applies to persons who abuse their positions of trust or their special skills to facilitate significantly the commission or concealment of a crime. *The enhancement also applies to persons who provide sufficient indicia to the victim that they legitimately hold a position of public or private trust when, in fact, they do not. Such persons generally are viewed as more culpable.*

Issue for Comment: The Commission invites comment on whether, in reference to the above proposed amendment, it should amend §3B1.3 to provide that the adjustment does not apply to an imposter (*i.e.*, an individual who poses as an individual in a position of public or private trust).

(F) Instant Offense and Obstruction of Justice

Synopsis of Proposed Amendment: This amendment addresses the circuit conflict regarding whether the term "instant offense", as used in the obstruction of justice guideline, §3C1.1, includes obstructions that occur in cases closely related to the defendant's case or only those specifically related to the "offense of conviction". Three options are presented. Option One (a), the majority view, defines the scope of the adjustment broadly to apply to obstructions of justice in closely related cases. *See United States v. Powell*, 113 F.3d 464 (3d Cir.), *cert. denied*, 118 S.Ct. 454 (1997); *United States v. Walker*, 119 F.3d 403 (6th Cir.), *cert. denied*, ___ S. Ct. ___, 1997 WL 739733, (U.S., Dec. 15, 1997); *United States v. Acuna*, 9 F.3d 1442 (9th Cir. 1993); *United States v. Bernaugh*, 969 F.2d 858 (10th Cir. 1992). Option One (b) is a variation of the majority view, which (1) clarifies the temporal element of the obstruction guideline (that the obstructive conduct must occur during the investigation, prosecution, or sentencing of the defendant's offense of conviction); and (2) instructs that the obstruction must relate to either the defendant's offense of conviction or to a closely related case, such as that of a co-defendant. Option Two, the minority view, defines the scope of the adjustment narrowly to apply only to obstructions of justice directly connected to the offense of conviction. *See United States v. Perdomo*, 927 F.2d 111 (2d Cir. 1991); *United States v. Partee*, 31 F.3d 529 (7th Cir. 1994).

Option 1(a): Majority Appellate View

§3C1.1. Obstructing or Impeding the Administration of Justice

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

Commentary

Application Notes:

1. *For purposes of this guideline—*

“Instant offense” means the offense of which the defendant is convicted and any state or federal offense committed by the defendant or another person that is closely related to the offense of conviction.

~~1.2.~~ * * *

~~2.3.~~ * * *

~~3.4.~~ *The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:*

(a) *threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;*

(b) *committing, suborning, or attempting to suborn perjury during the investigation, prosecution, or sentencing of the defendant’s instant offense (see definition in Application Note 1);*

* * *

~~4.5.~~ * * *

~~5.6.~~ * * *

~~6.7.~~ * * *

~~7.8.~~ * * *

~~8.9.~~ * * *

Option 1(b): Variation of majority appellate view - (1) clarifies the temporal element of the obstruction guideline (that the obstructive conduct must occur during the investigation, prosecution, or sentencing of the defendant’s offense of conviction); and (2) instructs that the obstruction must relate to either the defendant’s offense of conviction or to a closely related case, such as that of a co-defendant.

§3C1.1. Obstructing or Impeding the Administration of Justice

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice (A) during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to the defendant’s offense of conviction or a closely related offense, increase the offense level by 2 levels.

Commentary

Application Notes:

- 1. This adjustment applies if the defendant’s obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant’s instant offense of conviction, and*

(B) related to the defendant's offense of conviction or a closely related case, such as that of a co-defendant.

- ~~1.2.~~ * * *
- ~~2.3.~~ * * *
- ~~3.4.~~ * * *
- ~~4.5.~~ * * *
- ~~5.6.~~ * * *
- ~~6.7.~~ * * *
- ~~7.8.~~ * * *
- ~~8.9.~~ * * *

Option 2: Minority appellate view - "instant offense" means offense of conviction; also clarifies the temporal element.

§3C1.1. Obstructing or Impeding the Administration of Justice

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense **of conviction**, increase the offense level by **2** levels.

Commentary

Application Notes:

1. This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related solely to the defendant's instant offense of conviction.

~~1.2.~~ * * *

~~2.3.~~ * * *

~~3.4.~~ *The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:*

* * *

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense of conviction if ~~where~~ there is a separate count of conviction for such conduct.

~~4.5.~~ *Some types of conduct ordinarily do not warrant application of this enhancement but may warrant a greater sentence within the otherwise applicable guideline range. However, if the defendant is*

convicted of a separate count for such conduct, this enhancement will apply and increase the offense level for the underlying offense (*i.e.*, the offense with respect to which the obstructive conduct occurred). *See* Application Note 7, below.

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:

- (a) providing a false name or identification document at arrest, except ~~where~~*if* such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense *of conviction*;

* * *

5.6.

* * *

6.7.

* * *

7.8.

* * *

8.9.

* * *

(G) Failure to Admit Drug Use While on Pretrial Release

Synopsis of Proposed Amendment: *This amendment addresses the circuit conflict regarding whether lying to a probation officer about drug use while out on bail warrants the obstruction of justice adjustment. Compare United States v. Belletiere, 971 F.2d 961 (3d Cir. 1992); United States v. Thompson, 944 F.2d 1331 (7th Cir. 1994), *cert. denied*, 502 U.S. 1097 (1992) with United States v. Garcia, 20 F.3d 670 (6th Cir. 1994), *cert. denied*, 513 U.S. 1159 (1995). The amendment adopts the majority view and excludes from application of §3C1.1 a defendant’s denial of drug use while on pre-trial release.*

§3C1.1. Obstructing or Impeding the Administration of Justice

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

Commentary

* * *

Application Notes:

* * *

- 4. Some types of conduct ordinarily do not warrant application of this ~~enhancement~~*adjustment* but may warrant a greater sentence within the otherwise applicable guideline range *or affect the determination of whether other guideline adjustments apply (e.g., §3E1.1 (Acceptance of Responsibility))*. However, if the defendant is convicted of a separate count for such conduct, this ~~enhancement~~*adjustment* will apply and increase the offense level for the underlying offense (*i.e.*, the offense with respect to which the obstructive conduct occurred). *See* Application Note 7,

below.

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:

- (a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;
- (b) making false statements, not under oath, to law enforcement officers, unless Application Note 3(g) above applies;
- (c) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;
- (d) avoiding or fleeing from arrest (*see, however*, §3C1.2 (Reckless Endangerment During Flight)).
- (e) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under §3E1.1 (Acceptance of Responsibility).

* * *

(H) Meaning of "Incarceration" for Computing Criminal History

Synopsis of Proposed Amendment: This amendment addresses the circuit conflict regarding whether confinement in a community treatment center or halfway house following revocation of parole, probation, or supervised release qualifies as "incarceration" in determining the defendant's subsequent criminal history score. Two options are presented. Option One (the Sixth Circuit view) includes confinement in a community treatment center, halfway house, or home detention following revocation of parole, probation, or supervised release in the definition of incarceration in determining the defendant's subsequent criminal history score. *See United States v. Rasco*, 963 F.2d 132 (6th Cir.), *cert denied*, 506 U.S. 883 (1992). Option Two (the Ninth Circuit view) excludes confinement in a community treatment center, halfway house, or home detention following revocation of parole, probation, or supervised release from the definition of incarceration in determining the defendant's subsequent criminal history score. *See United States v. Latimer*, 991 F.2d 1509 (9th Cir. 1992).

Option 1:

§4A1.2. Definitions and Instructions for Computing Criminal History

* * *

Commentary

Application Notes:

* * *

8. Applicable Time Period. Sections 4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted. As used in §4A1.2(d)(2) and (e), the term "commencement of the

instant offense" includes *the offense of conviction and any relevant conduct.* ~~See~~ *within the scope of §1B1.3 (Relevant Conduct).* If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Adequacy of Criminal History Category).

Consistent with subsection (k) and Application Note 11 of this guideline, a term of imprisonment imposed upon revocation of probation, parole, or supervised release is considered part of the original sentence of imprisonment, even if the term of imprisonment imposed upon revocation was served in home detention, a community treatment center, or a halfway house. For example, for purposes of determining the applicable time period under §4A1.2(e)(1), a prior sentence of imprisonment that is not within the 15-year time period nevertheless will be countable if the defendant (A) was placed on probation, parole, or supervised release for that offense and (B) was sentenced to a term of imprisonment for revocation of the probation, parole, or supervised release within 15 years of the defendant's commencement of the instant offense.

Option 2:

§4A1.2. Definitions and Instructions for Computing Criminal History

* * *

(e) Applicable Time Period

- (1) Any prior sentence of imprisonment exceeding one year and one month that was imposed within fifteen years of the defendant's commencement of the instant offense is counted. Also count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.

* * *

Commentary

Application Notes:

* * *

8. Applicable Time Period. ~~Section~~**Sections** 4A1.2(d)(2) and (e) establishes the time period within which prior sentences are counted. As used in §4A1.2(d)(2) and (e), the term "commencement of the instant offense" includes any relevant conduct. *See* §1B1.3 (Relevant Conduct). If the court finds that a sentence imposed outside this time period is evidence of similar, or serious dissimilar, criminal conduct, the court may consider this information in determining whether an upward departure is warranted under §4A1.3 (Adequacy of Criminal History Category).

For purposes of subsection (d)(2), home detention and confinement in a halfway house or community treatment center, when imposed upon revocation of probation, parole, or supervised release, are not within the meaning of "sentence to confinement."

For purposes of subsection (e), home detention and confinement in a halfway house or

community treatment center, when imposed upon revocation or probation, parole, or supervised release, are not with the meaning of “sentence of imprisonment.”

(I) Diminished Capacity

Synopsis of Proposed Amendment: *This amendment addresses the circuit conflict regarding whether a diminished capacity departure is precluded if the defendant committed a "crime of violence" as that term is defined in the career offender guideline. Four options are presented. Option One (the majority view) defines the scope of the departure narrowly to exclude all offenses that would be crimes of violence under the career offender guideline. See United States v. Poff, 926 F.2d 588 (7th Cir.)(en banc), cert. denied, 502 U.S. 827 (1991); United States v. Maddelena, 893 F.2d 815 (6th Cir. 1989), cert. denied, 502 U.S. 882 (1991); United States v. Mayotte, 76 F.3d 887 (8th Cir. 1996); United States v. Borravo, 898 F.2d 91 (9th Cir. 1989); United States v. Rosen, 896 F.2d 789 (3d Cir. 1990); United States v. Dailey, 24 F.3d 1323 (11th Cir. 1994). Option Two (the minority view) defines the scope of the departure broadly to allow consideration of the facts and circumstances surrounding the commission of the crime in determining whether a defendant is dangerous. See United States v. Chatman, 986 F.2d 1446 (D.C. Cir. 1993); United States v. Weddle, 30 F.3d 532 (4th Cir. 1994). Option Three (a variation of the minority view) defines the scope of the departure to exclude cases that involve actual violence or a serious threat of violence. Option Four defines the scope of the departure broadly by removing the "nonviolent offense" limitation.*

Option 1: Majority appellate view:

§5K2.13 Diminished Capacity (Policy Statement)

If the defendant committed ~~a non-violent offense~~ **an offense other than a crime of violence** while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a ~~lower~~ **lower** sentence **below the applicable guideline range** may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant’s criminal history does not indicate a need for incarceration to protect the public.

Commentary

Application Note:

- 1. “Crime of violence” is defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1).*

Option 2: Minority appellate view - district court should consider totality of circumstances to determine whether the offense was non-violent:

§5K2.13 Diminished Capacity (Policy Statement)

If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a ~~lower~~ **lower** sentence **below the applicable guideline range** may be warranted. ~~to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant’s criminal history does not indicate a need to protect the public.~~ **In determining whether an offense is non-violent, the court should consider the totality of the facts and circumstances of the offense. If the facts and circumstances of the offense or the defendant’s criminal history indicate the defendant is dangerous such that there is a need for**

incarceration to protect the public, a departure under this policy statement is not warranted. If a departure is warranted, the departure should reflect the extent to which reduced mental capacity contributed to the commission of the offense.

Option 3: “Compromise” version with McBroom volitional element:

§5K2.13. Diminished Capacity (Policy Statement)

~~If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant’s criminal history does not indicate a need for incarceration to protect the public.~~

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant’s offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant’s criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

Commentary

Application Note:

1. For purposes of this policy statement—

“Significantly reduced mental capacity” means the defendant is unable to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.

Option 4: Eliminate “non-violent offense” element.

§5K2.13. Diminished Capacity (Policy Statement)

If the defendant committed ~~a non-violent~~the offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence **below the applicable guideline range** may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, ~~provided that the defendant’s criminal history does not~~ **unless the nature and circumstances of the offense or the defendant’s criminal history** indicate a need for incarceration to protect the public.

7(A). Issue for Comment: *The Commission invites comment on whether Policy Statement 5K2.0 (Grounds for Departure) should be amended to incorporate the analysis and holding of the United States Supreme Court decision in Koon v. United States, 116 S.Ct. 2035 (1996). If so, how should the policy statement be amended to accomplish this objective?*

Homicide
Chapter Two, Part A

8. Issue for Comment (Homicide): *In 1997, the Commission undertook an in-depth examination of the manslaughter guidelines, §2A1.3 (Voluntary Manslaughter), and §2A1.4 (Involuntary Manslaughter), and the statutory penalties for these offenses, to determine whether the guideline and/or statutory penalties need to be adjusted. The Commission formed a staff working group to analyze data on manslaughter cases sentenced under the guidelines, to review how states have sentenced manslaughter cases, and to assess the appropriate relationship (particularly with respect to offense levels) of the manslaughter guidelines to the other homicide guidelines; i.e., those for first and second degree murder, §§2A1.1 and 2A1.2. The Commission also held a public hearing on November 12, 1997, to address the issue of appropriate sentences for manslaughter offenses. As a consequence of that hearing and the preliminary analyses of the Working Group, the Commission has expanded the investigation to include the sentencing guidelines applicable to other forms of homicide.*

In connection with its further review and possible amendment of the homicide guidelines, the Commission requests comment on the following issues:

(A) Second Degree Murder (§2A1.2):

(1) Are the guideline penalties for this offense appropriate relative to those for voluntary manslaughter, assault, and other violent offenses? Specifically, should the base offense level under §2A1.2 be increased from level 33 and, if so, by what amount?

(2) Should §2A1.2 be amended to add specific offense characteristics for any aggravating or mitigating factors and, if so, what factors? Alternatively, should an application note encouraging departure be added for any such factors?

(B) Voluntary Manslaughter (§2A1.3):

(1) Are the guideline penalties for this offense appropriate relative to those for second degree murder, aggravated assault, assault with intent to kill, and other violent offenses? Specifically, should the base offense level under §2A1.3 be increased and, if so, by what amount? For example, one option would be to increase the base offense level from level 25 (i.e., a guideline range of 57-71 months for a defendant in criminal history category I with no adjustments) to level 28 (i.e., a guideline range of 78-97 months for such a defendant).

(2) Should a specific offense characteristic, or an application note encouraging an upward departure, be added to account for prior violent conduct, such as a pattern of domestic abuse?

(3) Should an application note be added requiring a minimum period of supervised release and a condition of participation in a substance abuse program in a case in which alcohol or drug abuse was involved in the offense?

(C) Involuntary Manslaughter (§2A1.4):

(1) The Commission's examination of sentencing data indicate that the heartland of involuntary manslaughter is alcohol-related vehicular homicide. Currently under the guideline, a base offense level of level 14 (i.e., 15-21 months for a defendant in criminal history category I with no adjustments) applies to

such reckless conduct. The Commission invites comment on whether the guideline penalties for this and other forms of involuntary manslaughter are appropriate relative to those for other offenses. Specifically, should the base offense level applicable to reckless conduct or, alternatively, vehicular homicides, be increased and, if so, by what amount? For example, one option would be to increase the base offense level for reckless conduct to level 17 (*i.e.*, 24-30 months for a defendant in criminal history category I with no adjustments).

(2) Should specific offense characteristics be added for (i) prior offenses for driving under the influence of alcohol that are not counted in criminal history; (ii) driving without a license (in a jurisdiction where a license is required), or driving with a revoked or suspended license; (iii) multiple deaths; (iv) causing a substantial risk of harm to innocent "bystanders"; or (v) "road rage" that proximately resulted in the vehicular homicide? Alternatively, should an application note be added encouraging upward departure for any of these factors?

(3) Should an application note be added requiring a minimum period of supervised release and a condition of participation in a substance abuse program in a case in which alcohol or drug abuse was involved in the offense?

(4) In addition to, or in lieu of, proposed amendments to the Involuntary Manslaughter guideline, the Commission invites comment on alternative approaches that, arguably, may be more effective in preventing vehicular homicide offenses. For example, should steps be taken to punish more severely and/or uniformly the underlying conduct of driving under the influence of alcohol or drugs (DUI)? What actions might the Commission take that would most effectively address these contributing problems?

(D) Closely Related Guidelines:

If the Commission amends any of the guidelines referenced above in the manner indicated, should it also amend other homicide or closely related guidelines (*e.g.*, §2A1.5 (Conspiracy or Solicitation to Commit Murder), §2A2.1 (Assault With Intent to Commit Murder; Attempted Murder)) in order to maintain proportionality among penalties for the offenses covered by these guidelines? If so, how should such guidelines be amended?

Legislative Amendments

Electronic Copyright Infringement

9. Issue for Comment: The No Electronic Theft Act, Pub. L. 105-147, was recently enacted to provide a statutory basis to prosecute and punish persons who, without authorization and without realizing financial gain or commercial advantage, electronically access copyrighted materials or encourage others to do so. The Act includes a directive to the Commission to (A) ensure that the applicable guideline range for a crime committed against intellectual property (including offenses set forth at section 506(a) of title 17, United States Code, and sections 2319, 2319A, and 2320 of title 18, United States Code) is sufficiently stringent to deter such a crime; and (B) ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the crime against intellectual property was committed.

Each of the statutes mentioned in the congressional directive currently are referenced to §2B5.3 (Criminal Infringement of Copyright or Trademark). That guideline provides for incrementally greater punishment when the retail value of the infringing items exceeded \$2,000. However, when copyrighted materials are

infringed upon by electronic means, there is no "infringing item", as would be the case with counterfeited goods. Therefore, the Commission must determine how to value the infringed upon items in order to implement the congressional directive to take into account the retail value and quantity of the items with respect to which the offense was committed. The Commission invites comment on how §2B5.3 (Criminal Infringement of Copyright or Trademark) should be amended to best effectuate the congressional directives.

An approach suggested by the Department of Justice is set forth below. The Commission invites comment on this and alternative proposals.

Department of Justice Proposed Amendments to §2B5.3:

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

- (a) Base Offense Level: [6]
- (b) Specific Offense Characteristic
 - (1) If the ~~retail value of the infringing items~~ **loss to the copyright or trademark** exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

Commentary

Statutory Provisions: 17 U.S.C. § 506(a); 18 U.S.C. §§ 2318-2320, 2511. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"Infringing items" means the items that violate the copyright or trademark laws (not the legitimate items that are infringed upon). A court may calculate the "loss to the copyright or trademark owner" in any reasonable manner. In determining "loss to the copyright or trademark owner," the court may consider lost profits, the value of the infringed upon items, the value of the infringing items, the injury to the copyright or trademark owner's reputation, and other associated harms.*
2. *In some cases, the calculable loss to the victim understates the true harm caused by the offense. For example, a defendant may post copyrighted material to an electronic bulletin board or similar online facility, making it easy for others to illegally obtain and further distribute the material. In such an instance, it may not be possible to determine or even estimate how many copies were downloaded, or how much damage the defendant's conduct ultimately caused. In such cases, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

Background: This guideline treats copyright and trademark violations much like fraud. Note that the enhancement is based on the ~~value of the infringing items~~ **loss to the copyright or trademark owner**, which will generally exceed the ~~loss~~ or gain due to the offense.

The Electronic Communications Act of 1986 prohibits the interception of satellite transmission for purposes of direct or indirect commercial advantage or private financial gain. Such violations are similar to copyright offenses and are therefore covered by this guideline.

Offenses Against Property of National Cemetery

10. Synopsis of Proposed Amendment: *This amendment implements the directive to the Commission in the Veteran’s Cemetery Protection Act of 1997. That Act directs the Commission to provide a sentence enhancement of not less than two levels for any offense against the property of a national cemetery.*

Proposed Amendment:

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

* * *

(b) Specific Offense Characteristics

* * *

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

* * *

Commentary

Application Notes:

1. * * *

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

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

* * *

Background:

* * *

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

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

§2B1.3 Property Damage or Destruction

- (a) Base Offense Level: **4**
- (b) Specific Offense Characteristics
 - (1) If the loss exceeded \$100, increase by the corresponding number of levels from the table in §2B1.1.
 - * * *
 - (3) If property of a national cemetery was damaged or destroyed, increase by **[2]** levels.
 - ~~(3)~~(4)
 - * * *

Commentary

* * *

Application Notes:

- 1.
 - * * *

“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.

* * *

Background: *Subsection (b)(3) implements the instruction to the Commission in Section 2 of Pub. L. 105-101.*

Subsection 9(d) implements the instruction to the Commission in section 805(c) of Public Law 104-132.

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

- (a) Base Offense Level (Apply the Greatest):
 - * * *
 - (2) **20**, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than a dwelling; or (C) endangered a dwelling, or a structure other than a dwelling;
 - * * *
 - (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)(4), and the offense occurred on a national cemetery, increase by [2] levels.

* * *

Commentary

* * *

Application Notes:

* * *

4. "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.

Background: Subsection (b)(2) implements the directive to the Commission in Section 2, Pub. L. 105-101.

Issue for Comment: The Commission invites comment on whether, in addition to the increases provided in the proposed amendments to guidelines §§2B1.1, 2B1.3, and 2K1.4, these guidelines also should be amended to provide a minimum or "floor" offense level for a crime that involves theft, vandalism, or destruction of property of a national cemetery.

Expansion of Prohibited Person in Firearm Guideline

11. Synopsis of Proposed Amendment: This is a two-part amendment. First, this amendment addresses section 658 of the Treasury, Postal Service, and General Government Appropriations Act, 1997 (contained in the Omnibus Consolidated Appropriations Act for Fiscal Year 1997). Section 658 amended 18 U.S.C. § 922(d) to prohibit the sale of a firearm or ammunition to a person who has been convicted in any court of a misdemeanor crime of domestic violence. It also amended 18 U.S.C. § 922(g) to prohibit a person who has been convicted in any court of a misdemeanor crime of domestic violence from transporting or receiving a firearm or ammunition. Section 922(s)(3)(B)(i), which lists what a person not licensed under 18 U.S.C. § 923 must include in a statement to the handgun importer, manufacturer, or dealer, is amended to require certification that the person to whom the gun is transferred was not convicted in any court of a misdemeanor crime of domestic violence. Section 658 also amended 18 U.S.C. § 921(a) to define "misdemeanor crime of domestic violence".

Violations of 18 U.S.C. § 922(d) and (g) are covered by the firearms guideline, §2K2.1. The new provisions at § 922(d) (sale of a firearm to a "prohibited person") and § 922(g) (transporting, possession, and receipt of a firearm by a "prohibited person") affect Application Note 6 of §2K2.1, which defines "prohibited person". The proposed amendment amends Application Note 6 to include a person convicted of a misdemeanor crime of domestic violence within the scope of "prohibited person". It also defines "misdemeanor crime of domestic violence" by reference to the new statutory definition of that term.

Second, this amendment increases the base offense level for a defendant who knowingly sells to a prohibited person. This proposal is presented in response to a proposed directive contained in juvenile

justice legislation approved by the Senate Judiciary Committee early in 1997. That legislation is likely to be considered by the Senate early in 1998. The House of Representatives passed two juvenile justice bills in 1997; however, no House passed bill includes this specific proposal, which originated with the Department of Justice. The legislative provision would require the Commission to increase the base offense level for offenses subject to the firearms guideline, §2K2.1, to assure that a person who transferred a firearm and who knew that the transferee was a prohibited person is subject to the same base offense level as the transferee.

This proposal amends the two alternative base offense levels that pertain to prohibited persons in the firearms guideline to carry out the legislative provision described above. The pertinent base offense level structure under the current firearms guideline is as follows:

- (1) A base offense level of 14 applies if the defendant is a prohibited person.
- (2) A base offense level of 12 applies to a defendant who transferred a firearm to a prohibited person (and to a variety of other firearms offenses).
- (3) A base offense level of 20 applies if the defendant is a prohibited person and the offense involved certain modified shotguns, other unusual weapons, or semiautomatic assault weapons.
- (4) A base offense level of 18 applies to a defendant who transferred such a weapon to a prohibited person.

The proposed amendment makes level 14 (instead of level 12) applicable to a defendant who knowingly transfers a firearm to a prohibited person and makes level 20 (instead of level 18) applicable to a defendant who transfers a weapon described in paragraph (3) above to a prohibited person.

Note that the pending legislative directive would require the specified offense level increases only in those cases in which the defendant transferor knew that the transferee was a prohibited person. The draft amendment presented below also raises the policy option, shown in brackets, of whether the same, heightened offense levels should apply if the transferor lacked actual knowledge but did have "reasonable cause to believe" that the transferee was a prohibited person. The latter, less demanding mental state suffices for conviction under the relevant statute (18 U.S.C. 922(d)).

(A) Proposed Amendment:

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

* * *

Commentary

* * *

Application Notes:

* * *

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

bodily injury to the partner or child as defined in 18 U.S.C. § 922(d)(8); or (vii) has been convicted in any court of a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33).

(B) Proposed Amendment:

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

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

* * *

(4) **20**, if ~~the defendant~~ --

(A) **the defendant** had one prior felony conviction of either a crime of violence or a controlled substance offense; or

(B) ~~is a prohibited person, and the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); and the defendant (i) is a prohibited person; or (ii) transferred the firearm to a prohibited person and knew [or had reasonable cause to believe] that the transferee was a prohibited person;~~ or

(5) **18**, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); or

(6) **14**, if the defendant (A) is a prohibited person; or (B) transferred the firearm to a prohibited person and knew [or had reasonable cause to believe] that the transferee was a prohibited person; or

* * *

Conditions of Probation and Supervised Release

12. Synopsis of Proposed Amendment: *This is a three-part amendment that corrects a number of omissions arising out of the 1996-97 reworking of the guidelines related to conditions of probation, §5B1.3, and supervised release, §5D1.3.*

First, the amendment adds to §5B1.3 a condition of probation regarding deportation, in response to §374 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. That section amended 18 U.S.C. § 3563(b) to add a new discretionary condition of probation, reflected in the amendment below, with respect to deportation.

Second, this amendment deletes the reference in the supervised release guideline to "just punishment" as a reason for the imposition of curfew as a condition of supervised release. The need to provide "just punishment" is not included in 18 U.S.C. § 3583(c) as a factor to be considered in imposing a term of supervised release.

Third, this amendment amends the guidelines pertaining to conditions of probation and supervised release to indicate that discretionary (as opposed to mandatory) conditions are policy statements of the

Commission, not binding guidelines.

(A) Proposed Amendment:

§5B1.3. Conditions of Probation

* * *

- (d) The following "special" conditions of probation are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

* * *

(6) Deportation

A condition ordering deportation by a United States district court or a United States magistrate judge if (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(d)(5) of the Immigration and Nationality Act; or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable.

* * *

§5D1.3. Conditions of Supervised Release

* * *

- (d) The following "special" conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

* * *

(6) Deportation

A condition ordering deportation by a United States district court or a United States magistrate judge if (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(d)(5) of the Immigration and Nationality Act; or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable.

(B) Proposed Amendment:

§5D1.3. Conditions of Supervised Release

* * *

- (e) Additional Conditions

The following "special conditions" may be appropriate on a case-by-case basis:

* * *

(5) Curfew

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(C) Proposed Amendment:

§5B1.3. Conditions of Probation

* * *

- (c) **(Policy Statement)** The following "standard" conditions are recommended for probation. Several of the conditions are expansions of the conditions required by statute:

* * *

- (d) **(Policy Statement)** The following "special" conditions of probation are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

* * *

- (e) Additional Conditions **(Policy Statement)**

The following "special conditions" may be appropriate on a case-by-case basis:

* * *

§5D1.3. Conditions of Supervised Release

* * *

- (c) **(Policy Statement)** The following "standard" conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:

* * *

- (d) **(Policy Statement)** The following "special" conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

* * *

(e) Additional Conditions (Policy Statement)

The following "special conditions" may be appropriate on a case-by-case basis:

* * *