



# **Volume One: Proposed Amendments to the Sentencing Guidelines**

---

**January 24, 2001**

This compilation contains unofficial text of proposed amendments to the sentencing guidelines and is provided only for the convenience of the user in the preparation of public comment. Official text of the proposed amendments was published in the Federal Register, November 7, 2000.

**INDEX TO PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES  
PUBLISHED IN THE FEDERAL REGISTER NOVEMBER 7, 2000**

<u>AMDT. NO.</u>	<u>PAGE NO.</u>	<u>ISSUE</u>
1	1	<b>Unauthorized Compensation.</b> —This proposed amendment addresses the issue of whether, and to what extent, the guideline offense levels should be increased in §2C1.4, the guideline for offenses in 18 U.S.C. § 209 involving the unlawful supplementation of the salary of various federal employees. The proposed amendment (A) adds a cross reference to the bribery and gratuity guidelines, in order to account for aggravating conduct; and (B) consolidates the unauthorized compensation guideline (§2C1.4) with the conflict of interest guideline (§2C1.3) and the guideline covering payments to obtain public office (§2C1.5), to promote ease of application.
2	5	<b>Counterfeiting Offenses.</b> —This proposed amendment (A) increases the base offense level in §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) from level 9 to level 10; (B) replaces the minimum offense level of level 15 for manufacturing offenses with a two-level enhancement; and (C) proposes to delete commentary that suggests that the manufacturing adjustment does not apply if the defendant "merely photocopies".
3	7	<b>Tax Privacy.</b> —This amendment proposes to address several offenses relating to unlawful disclosure and/or inspection of tax return information. The amendment proposes to (A) amend the Statutory Index to refer most of those offenses to the guideline covering eavesdropping and interception of communications, §2H3.1; and (B) amend §2H3.1 to add a three-level decrease in the base offense level for the least serious types of offense behavior.
4	10	<b>Circuit Conflict Concerning Stipulations.</b> — This proposed amendment addresses the circuit conflict regarding whether admissions made by the defendant during his guilty plea hearing, without more, can be considered "stipulations" for purposes of §1B1.2(a). The proposed amendment represents a narrow approach to the majority view that a factual statement made by the defendant during the plea colloquy must be made as part of the plea agreement in order to be considered a stipulation for purposes of §1B1.2(a).



**Circuit Conflict Concerning Drug Defendants Mitigating Role**.—This amendment proposes to resolve a circuit conflict regarding whether application of §3B1.2 (Mitigating Role) is precluded in the case of a single defendant drug courier if the defendant's base offense level is determined solely by the quantity personally handled by the defendant and that quantity constitutes all of the defendant's relevant conduct. The proposed amendment (A) adopts the view that such a defendant, in a single defendant case, is not precluded from receiving a mitigating role adjustment; (B) incorporates commentary from the Introduction to Chapter Three, Part B (Role in the Offense) that there must be more than one participant before application of a mitigating role adjustment may be considered; (C) incorporates the definition of "participant" found in the aggravating role guideline; (D) amends commentary to indicate that the mitigating role adjustment ordinarily is not warranted if the defendant receives a lower offense level than warranted by the actual criminal conduct because; (E) deletes commentary language that the minimal role adjustment is intended to be used infrequently; and (F) makes technical amendments to the guideline.

## 2001 PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY

### Proposed Amendment: Unauthorized Compensation

1. **Synopsis of Proposed Amendment:** *This proposed amendment addresses the issue of whether, and to what extent, the guideline offense levels should be increased in §2C1.4, the guideline for offenses in 18 U.S.C. § 209 involving the unlawful supplementation of the salary of various federal employees. The proposed amendment (A) adds a cross reference to the bribery and gratuity guidelines, in order to account for aggravating conduct; and (B) consolidates the unauthorized compensation guideline (§2C1.4) with the conflict of interest guideline (§2C1.3) and the guideline covering payments to obtain public office (§2C1.5), to promote ease of application.*

*The Commission began to focus on this issue in 1998 when it promulgated an amendment to §2C1.4 to delete outdated, erroneous background commentary. That commentary, first written in 1987, described the offenses covered by the guideline as misdemeanors punishable by imprisonment for not more than one year. In fact, however, the penalties for 18 U.S.C. § 209 offenses were changed in 1989. The applicable penalties, under 18 U.S.C. § 216, became (1) imprisonment for not more than one year; or (2) imprisonment for not more than five years, if the defendant willfully engaged in the conduct constituting the offense.*

*The increased statutory penalties under 18 U.S.C. § 216 implicate the question of whether guideline penalties under §§2C1.3 and 2C1.4 should be increased correspondingly, particularly if the current guideline penalty structure inadequately takes into account aggravating conduct associated with these offenses.*

*The guideline covering offenses in 18 U.S.C. § 209, §2C1.4, has a base offense level of level 6 and no additional enhancements that take into account aggravating conduct. From FY91 through FY99, a total of 73 cases were sentenced under §2C1.4. Because of the low offense levels associated with this guideline, all of the defendants sentenced under §2C1.4 received probation.*

*Moreover, the increased statutory penalty in 18 U.S.C. § 216 (namely, the five-year statutory maximum for willful conduct) applies not only to offenses under 18 U.S.C. § 209 but also to bribery, graft, and conflict of interest offenses under 18 U.S.C. §§ 203, 204, 205, 207, and 208, all of which are covered by the conflict of interest guideline, §2C1.3. That guideline has a base offense level of level 6 and a four-level enhancement if the offense involved actual or planned harm to the government. From FY91 through FY99, a total of 71 cases were sentenced under §2C1.3, and only 10 of those cases received the enhancement for actual or planned harm to the government.*

*Commission staff review of the cases sentenced under §§2C1.3 and 2C1.4 revealed that many of those cases actually involved a bribe or a gratuity. In other words, many of these defendants likely could have been charged under a bribery or gratuity statute (most likely 18 U.S.C. § 201) and sentenced under the more serious bribery (§2C1.1) or gratuity (§2C1.2) guideline but were convicted under the less serious statutes and sentenced under*

the less severe guidelines (i.e., §§2C1.3 and 2C1.4).

The following proposed amendment is intended to address these issues by (A) adding a cross reference from §2C1.4 to the bribery and gratuity guidelines, in order to account for aggravating conduct; and (B) consolidating the unauthorized compensation guideline with the conflict of interest guideline and the guideline covering payments to obtain public office, to promote ease of application. First, in order to more adequately account for aggravating conduct prevalent in these cases (i.e., the presence of a bribe or a gratuity), the proposed amendment provides a cross reference to §2C1.1 (in the case of a bribe) or §2C1.2 (in the case of a gratuity), which will apply on the basis of the underlying conduct; i.e., as a sentencing factor rather than a count of conviction factor.

Second, in order to simplify overall guideline operation, the proposed amendment consolidates §§2C1.3 (Conflict of Interest), 2C1.4 (Payment or Receipt of Unauthorized Compensation), and 2C1.5 (Payments to Obtain Public Office). Although the elements of the offenses of conflict of interest (currently covered by §2C1.3) and unauthorized compensation (currently covered by §2C1.4) differ in some ways, the gravamen of the offenses is similar - unauthorized receipt of a payment in respect to an official act. The base offense levels for both guidelines are identical. However, the few cases in which these guidelines were applied usually involved a conflict of interest offense that was associated with a bribe or gratuity.

The guideline covering payments to obtain public office, §2C1.5, is also consolidated under the proposed amendment. Offenses involving payment to obtain public office generally, but not always, involve the promised use of influence to obtain public appointive office. Also, such offenses need not involve a public official (see, for example, the second paragraph of 18 U.S.C. § 211). The current offense level for all such offenses is level 8. The two statutes to which §2C1.5 applies (18 U.S.C. §§ 210 and 211) are both Class A misdemeanors. Under the proposed consolidation, the base offense level would be level 6, but the higher base offense level of §2C1.5 would be taken into account by a two-level enhancement in subsection (b)(1)(B) covering conduct under 18 U.S.C. § 210 and the first paragraph of 18 U.S.C. § 211. There is one circumstance in which a lower offense level may result and one circumstance in which a higher offense level may result. The offense level for conduct under the second paragraph of 18 U.S.C. § 211 (the prong of § 211 that does not pertain to the promise or use of influence) is reduced from level 8 to level 6. On the other hand, conduct that involves a bribe of a government official will result in an increased offense level (level 10 or greater, compared to level 8) under the proposed cross reference.

**§2C1.3. Conflict of Interest; Payment or Receipt of Unauthorized Compensation; Payments to Obtain Public Office**

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

(1) ~~If the offense involved actual or planned harm to the government, increase by 4 levels.~~

(1) (Apply the greater):

- (A) if the offense involved actual or planned harm to the government, increase by 4 levels; or
- (B) if the offense involved (i) the payment, offer, or promise of any money or thing of value in consideration for the use of, or promise to use, any influence to procure an appointive federal position for any person; or (ii) the solicitation or receipt of any money or thing or value in consideration of the promise of support, or use of influence, in obtaining an appointive federal position for any person, increase by 2 levels.

(c) Cross Reference

- (1) If the offense involved a bribe or gratuity, apply §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right) or §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), as appropriate, if the resulting offense level is greater than determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 203, 205, 207, 208, 209, 210, 211, 1909. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

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

Background: ~~This section applies to financial and non-financial conflicts of interest by present and former federal officers and employees. The maximum term of imprisonment authorized by statute is two years.~~

~~§2C1.4. — Payment or Receipt of Unauthorized Compensation~~

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

Commentary

Statutory Provisions: ~~18 U.S.C. §§ 209, 1909.~~

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. § 209 involve the unlawful supplementation of salary of various federal employees. 18 U.S.C. § 1909 prohibits bank examiners from performing any service for compensation for banks or bank officials. Both offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year.~~

~~§2C1.5. — **Payments to Obtain Public Office**~~

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

~~————— Commentary~~

~~Statutory Provisions: 18 U.S.C. §§ 210, 211.~~

~~Application Note:~~

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

~~Background: Under 18 U.S.C. § 210, it is unlawful to pay, offer, or promise anything of value to a person, firm, or corporation in consideration of procuring appointive office. Under 18 U.S.C. § 211, it is unlawful to solicit or accept anything of value in consideration of a promise of the use of influence in obtaining appointive federal office. Both offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year.~~



## **Proposed Amendment: Counterfeiting Offenses**

2. **Synopsis of Proposed Amendment:** *This proposed amendment (A) increases the base offense level in §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) from level 9 to level 10; (B) replaces the minimum offense level of level 15 for manufacturing offenses with a two-level enhancement; and (C) proposes to delete commentary that suggests that the manufacturing adjustment does not apply if the defendant "merely photocopies".*

*First, the amendment increases the base offense level from level 9 to level 10. Setting the base offense level at level 10 for counterfeiting crimes promotes proportionality in sentencing for counterfeiting vis-a-vis other, similar economic crimes. For example, fraud crimes sentenced under §2F1.1 (Fraud and Deceit) receive a base offense level of level 6 and almost invariably (roughly 85% of the time) two additional levels for "more than minimal planning." Thus, before any "loss" enhancement is applied, fraud defendants are routinely at a minimum of level 8. Placing the base offense level for counterfeiting at level 10 recognizes that counterfeiting causes greater harm than fraud in its most basic form in that counterfeiting undermines public confidence in the currency and causes the government to spend great sums of money to build anti-counterfeiting safeguards into the currency.*

*Second, the amendment replaces the minimum offense level of level 15 for manufacturing offenses with a two-level enhancement. Replacing the minimum offense level of level 15 with a two-level enhancement has a double benefit. First, it eliminates the cliff inherent in setting a sentencing minimum. Specifically, the existing minimum of level 15 for manufacturing activity takes all defendants who engage in manufacturing to level 15 regardless of the economic harm caused. This means that the manufacturer of twenty dollars worth of counterfeit, who many would contend does not deserve to be sentenced at offense level 15, receives the same sentence as the manufacturer of seventy thousand dollars worth of counterfeit. In the context of a system which recognizes the magnitude of economic harm caused as a prime determinant of relative culpability, this disproportionate grouping of all manufacturers at level 15 is neither logical nor desirable.*

*A second benefit of this change is that, unlike the current guideline, which provides no incremental punishment for manufacturers of more than seventy thousand dollars in counterfeit, the proposed two-level enhancement provides reasonable incremental punishment for all manufacturers. Such a result also fosters the central goal of proportionate sentencing.*

*Third, the amendment proposes to delete the language in Application Note 4 that suggests, as a minority of courts have interpreted it, that the manufacturing adjustment does not apply if the defendant "merely photocopies". That application note was intended to make the minimum offense level for manufacturing offenses inapplicable to notes that are so obviously counterfeit that they are unlikely to be accepted. Particularly with the advent of digital technology, it cannot be said that photocopying necessarily produces a note so obviously counterfeit as to be impassible.*

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

- (a) Base Offense Level: **910**
- (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).
  - (2) If the defendant manufactured or produced any counterfeit obligation or security of the United States, or possessed or had custody of or control over a counterfeiting device or materials used for counterfeiting, ~~and the offense level as determined above is less than 15, increase to level 15~~ increase by **2** levels.

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

- 4. *Subsection (b)(2) does not apply to persons who ~~merely photocopy notes or otherwise~~ produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny.*

**Issue for Comment:**

*The Commission invites comment on whether it should amend §2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States) to include an enhancement (e.g., a two-level enhancement) for counterfeiting offenses that involve "sophisticated means". If so, what conduct should constitute "sophisticated means" in the context of counterfeiting offenses? For example, should the use of technology, such as digital counterfeiting, generally be considered sophisticated? Alternatively, are there particular forms of technology, such as particular forms of digital counterfeiting, that would be considered sophisticated for purposes of an enhancement?*

**Proposed Amendment: Tax Privacy**

- 3. Synopsis of Proposed Amendment:** *This amendment proposes to address several offenses relating to unlawful disclosure and/or inspection of tax return information. The amendment proposes to (A) amend the Statutory Index to refer most of those offenses to the guideline covering eavesdropping and interception of communications, §2H3.1; and (B) amend §2H3.1 to add a three-level decrease in the base offense level for the least serious types of offense behavior.*

*The pertinent offenses are:*

*(A) 26 U.S.C. § 7213(a)(1)-(3), and (5), which makes it unlawful for federal and state employees and certain other people willfully to disclose any tax return or tax return information (for a maximum term of imprisonment of five years);*

*(B) 26 U.S.C. § 7213(d), which makes it unlawful for any person willfully to divulge tax-related computer software (for a maximum term of imprisonment of five years);*

*(C) 26 U.S.C. § 7213A, which makes it unlawful for federal employees and certain other persons willfully to inspect any tax return or tax return information (for a maximum term of imprisonment of one year); and*

*(D) 26 U.S.C. § 7216, which makes it unlawful for any person engaged in the business of preparing tax returns knowingly or recklessly to disclose any information furnished to that person in connection with preparation of a return (for a maximum term of imprisonment of one year).*

*The following proposed amendment refers these offenses to §2H3.1 and provides for a three-level downward adjustment in the base offense level for the least serious types of offense behavior, i.e., the inspection (but not disclosure) of tax return information, and the reckless or knowing disclosure of information collected by a tax preparer in preparation of a tax return. The proposed amendment also (A) adds, in bracketed form, an application note to make clear that an adjustment for abuse of position of trust may apply; and (B) makes a technical change in subsection (b)(1) that is not intended to have substantive effect.*

**§2H3.1. Interception of Communications or; Eavesdropping; Disclosure of Tax Return Information**

(a) Base Offense Level:

(1) **9**; or

(2) **6**, if the offense involved only (A) inspection, but not disclosure, of a tax return or tax return information; or (B) a knowing or reckless disclosure of information furnished to a tax return preparer in connection with the preparation of a tax return.

(b) Specific Offense Characteristic

- (1) If the purpose of the conduct offense was to obtain direct or indirect commercial advantage or economic gain, increase by 3 levels.

(c) Cross Reference

- (1) If the purpose of the conduct was to facilitate another offense, apply the guideline applicable to an attempt to commit that offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 2511; 26 U.S.C. §§ 7213(a)(1)-(a)(3),(a)(5),(d), 7213A, 7216; 47 U.S.C. § 605. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline, "tax return" and "tax return information" have the meaning given the terms "return" and "return information" in 26 U.S.C. § 6013(b)(1) and (2), respectively.
2. Satellite Cable Transmissions.—If the offense involved interception of satellite cable transmissions for purposes of commercial advantage or private financial gain (including avoiding payment of fees), apply §2B5.3 (Criminal Infringement of Copyright) rather than this guideline.
3. Abuse of Position of Trust.—A defendant who used a special skill or abused a position of trust in the commission of the offense may be subject to an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill). For example, a federal or state employee who unlawfully disclosed a tax return or tax return information in violation of 26 U.S.C. § 7213(a) or (b) may have occupied a position of public trust, as described in Application Note 1 of §3B1.3, and may have used that position to significantly facilitate the commission of the offense.]

Background: This section refers to conduct proscribed by 47 U.S.C. § 605 and the Electronic Communications Privacy Act of 1986, which amends 18 U.S.C. § 2511 and other sections of Title 18 dealing with unlawful interception and disclosure of communications. These statutes proscribe the interception and divulging of wire, oral, radio, and electronic communications. The Electronic Communications Privacy Act of 1986 provides for a maximum term of imprisonment of five years for violations involving most types of communication.

This section also refers to conduct relating to the disclosure and inspection of tax returns and tax return information, which is proscribed by 26 U.S.C. §§ 7213(a)(1)-(3),(5), (d), 7213A, and 7216. These statutes provide for a maximum term of imprisonment of five years for most types of disclosure of tax return information.

\* \* \*

## APPENDIX A - STATUTORY INDEX

\* \* \*

26 U.S.C. § 7212(b)	2B1.1, 2B2.1, 2B3.1
26 U.S.C. § 7213(a)(1)	2H3.1
26 U.S.C. § 7213(a)(2)	2H3.1
26 U.S.C. § 7213(a)(3)	2H3.1
26 U.S.C. § 7213(a)(5)	2H3.1
26 U.S.C. § 7213(d)	2H3.1
26 U.S.C. § 7213A	2H3.1
26 U.S.C. § 7214	2C1.1, 2C1.2, 2F1.1
26 U.S.C. § 7215	2T1.7
26 U.S.C. § 7216	2H3.1

\* \* \*

## Proposed Amendment: Circuit Conflict Concerning Stipulations

4. **Synopsis of Proposed Amendment:** *This proposed amendment addresses the circuit conflict regarding whether admissions made by the defendant during his guilty plea hearing, without more, can be considered "stipulations" for purposes of §1B1.2(a). Compare, e.g., United States v. Nathan, 188 F. 3d 190, 201 (3d Cir. 1999) (statements made by defendants during the factual-basis hearing for a plea agreement do not constitute "stipulations" for the purpose of this enhancement; a statement is a stipulation only if it is part of a defendant's written plea agreement or if both the government and the defendant explicitly agree at a factual-basis hearing that the facts being placed on the record are stipulations that might subject the defendant to §1B1.2(a)), with United States v. Loos, 165 F. 3d 504, 508 (7<sup>th</sup> Cir. 1998) (the objective behind §1B1.2(a) is best answered by interpreting "stipulations" to mean any acknowledgment by the defendant that the defendant committed the acts that justify use of the more serious guideline, not in the formal agreement).*

*The proposed amendment represents a narrow approach to the majority view that a factual statement made by the defendant during the plea colloquy must be made as part of the plea agreement in order to be considered a stipulation for purposes of §1B1.2(a). This approach lessens the possibility that the plea agreement will be modified during the course of the plea proceeding without providing the parties, especially the defendant, with notice of the defendant's potential sentencing range.*

### §1B1.2. Applicable Guidelines

\* \* \*

#### Commentary

\* \* \*

#### Application Notes:

1. *This section provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct). The court is to use the Chapter Two guideline section referenced in the Statutory Index (Appendix A) for the offense of conviction. However, (A) in the case of a plea agreement (written or made orally on the record) containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the Chapter Two offense guideline section applicable to the stipulated offense is to be used; and (B) for statutory provisions not listed in the Statutory Index, the most analogous guideline, determined pursuant to §2X5.1 (Other Offenses), is to be used.*

\* \* \*

~~*However, there is a limited exception to this general rule. Where a stipulation that is set forth in a written plea agreement or made between the parties on the record during a plea proceeding specifically establishes facts that prove a more serious offense or offenses than the offense or offenses of conviction, the court is to apply the guideline most applicable to the more serious offense or offenses established. As set forth in the first paragraph of this note, an exception to this general rule is that if a plea agreement (written or made orally on the record) contains a stipulation that establishes a more serious offense than the offense of*~~

conviction, the guideline section applicable to the stipulated offense is to be used. A factual statement made by the defendant during the plea proceeding is not a stipulation for purposes of subsection (a) unless such statement was agreed to as part of the plea agreement. The sentence that ~~may~~ shall be imposed is limited, however, to the maximum authorized by the statute under which the defendant is convicted. *See* Chapter Five, Part G (Implementing the Total Sentence of Imprisonment). For example, if the defendant pleads guilty to theft, but admits the elements of robbery as part of the plea agreement, the robbery guideline is to be applied. The sentence, however, may not exceed the maximum sentence for theft. *See* H. Rep. 98-1017, 98th Cong., 2d Sess. 99 (1984).

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

\* \* \*

## Proposed Amendment: Circuit Conflict Concerning Aggravated Assault

5. **Synopsis of Proposed Amendment:** *This proposed amendment addresses the circuit conflict regarding whether the four-level enhancement in subsection (b)(2)(B) of §2A2.2 (Aggravated Assault) for use of a dangerous weapon during an aggravated assault is impermissible double counting in a case in which the weapon that was used was a non-inherently dangerous weapon. Compare e.g., United States v. Williams, 954 F.2d 204, 205-08 (4<sup>th</sup> Cir. 1992) (applying the dangerous weapon enhancement for defendant's use of a chair did not constitute impermissible double counting even though the use of the chair increased the defendant's offense level twice: first by triggering application of the aggravated assault guideline and second as the basis for the dangerous weapon enhancement), with United States v. Hudson, 972 F.2d 504, 506-07 (2d Cir. 1992) (in a case in which the use of an automobile caused the crime to be classified as an aggravated assault, the court may not enhance the base offense level under §2A2.2(b) for use of the same non-inherently dangerous weapon).*

*This amendment presents two options. Both options address the circuit conflict by clarifying in the aggravated assault guideline that (A) both the base offense level of level 15 and the weapon use enhancement in subsection (b)(2) shall apply to aggravated assaults that involve a dangerous weapon with intent to cause bodily harm; and (B) instruments, such as a car or chair, that ordinarily are not used as weapons may qualify as a dangerous weapon for purposes of subsection (b)(2) when the defendant involves them in the offense with the intent to cause bodily harm.*

*The difference between the options is that, unlike Option One, Option Two proposes other substantive changes in the aggravated assault guideline to address additional problems with the guideline. Specifically, Option Two attempts more explicitly and thoroughly than Option One to address one of the key issues underlying the circuit conflict, i.e., what conduct is incorporated in the base offense level. The aggravated assault guideline covers three types of aggravated assault: felonious assaults that involve any one of the following: (A) serious bodily injury; (B) a dangerous weapon with intent to cause bodily harm; and (C) intent to commit another felony. See Application Note 1 of §2A2.2. Unlike the current guideline, which has one base offense level of level 15 for all types of aggravated assault, Option Two provides for each type of aggravated assault a base offense level that is intended to cover that type of assault in its most basic form, unaccompanied by further aggravated conduct. Accordingly, Option Two provides two alternative base offense levels: (A) level 19, if the offense involved serious bodily injury; and (B) level 15, otherwise (i.e., if the offense involved either an intent to commit another felony or a dangerous weapon with the intent to cause bodily injury).*

*The base offense level of level 19 for offenses under 18 U.S.C. § 113(a)(6) (assaults resulting in serious bodily injury) achieves the same offense level as should be achieved under the current guideline by application of the base offense level and the serious bodily injury enhancement in subsection (b)(3)(B). However, FY 1999 data show that 16 percent of the 63 cases that involved a conviction under 18 U.S.C. § 113(a)(6) either received no bodily injury enhancement or received an enhancement lower than the four-level enhancement required for serious bodily injury. Therefore, either there may be confusion about what conduct the base offense level incorporates for these types of aggravated assaults or application of the serious bodily injury enhancement is being avoided in cases in which it is*



warranted. Incorporating the serious bodily injury enhancement into the base offense level may help to ameliorate these concerns.

**OPTION 1:**

**§2A2.2. Aggravated Assault**

\* \* \*

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(a)(2), (3), (6), 114, 115(a), (b)91, 351(e), 1751(e). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Aggravated assault" means a felonious assault that involved (A) possession of a dangerous weapon with intent to ~~do bodily harm~~ cause bodily injury (i.e., not merely to frighten) with that weapon; (B) serious bodily injury; or (C) an intent to commit another felony.

"Brandished," "bodily injury," "firearm," "otherwise used," "permanent or life-threatening bodily injury," and "serious bodily injury," have the meaning given those terms in §1B1.1, Application Note 1.

"Dangerous weapon" has the meaning given that term in §1B1.1, Application Note 1. For purposes of this guideline, and pursuant to that application note, "dangerous weapon" includes any instrument that is not ordinarily used as a weapon (e.g., a car, a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury.

"More than minimal planning," has the meaning given that term in §1B1.1, Application Note 1.

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

~~3. This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1 (Assault With Intent to Commit Murder). Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse):~~

2. Aggravating Factors.—This guideline covers felonious assaults that are more serious than minor assaults because of the presence of certain aggravating factors, i.e., serious bodily injury, the involvement of a dangerous weapon with intent to cause bodily injury, and the intent to commit another felony.

An assault that involves the presence of a dangerous weapon is aggravated in form when the presence of the dangerous weapon is coupled with the intent to cause bodily injury. In such a case, the base offense level and the weapon enhancement in subsection (b)(2) take into account different aspects of the offense. The base offense level takes into account the presence of the dangerous weapon (regardless of the manner in which the weapon was involved) and the fact that the defendant intended to cause bodily injury. Subsection (b)(2), on the other hand, takes into account the manner in which the dangerous weapon was involved in the offense. Accordingly, in a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).

3. More than Minimal Planning.—For purposes of subsection (b)(1), waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. However, luring the victim to a specific location or wearing a ski mask to prevent identification would constitute more than minimal planning.

Background: This section applies to serious (aggravated) assaults. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1. This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1 (Assault with Intent to Commit Murder). Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse).

There are a number of federal provisions that address varying degrees of assault and battery. ~~The punishments under these statutes differ considerable, even among provisions directed to substantially similar conduct.~~ For example, if the assault is upon ~~certain~~ a federal officers “while engaged in or on account of ~~the~~ the performance of official duties,” the maximum term of imprisonment ~~under~~ pursuant to 18 U.S.C. § 111(a)(2) is three years. If a deadly or dangerous weapon is used in the assault on a federal officer, or if the assault results in bodily injury, the maximum term of imprisonment is ten years. ~~However, if the same~~ If a dangerous weapon is used to assault a person ~~not otherwise specifically protected,~~ who is not a federal officer, and the weapon was used with the intent to do bodily harm, without just cause or excuse, the maximum term of imprisonment ~~under~~ pursuant to 18 U.S.C. § 113(e)(a)(3) also is ~~five~~ ten years. If an assault results in serious bodily injury, the maximum term of imprisonment ~~under~~ pursuant to 18 U.S.C. § 113(f)(a)(6) is ten years, unless the injury constitutes maiming by scalding, corrosive, or caustic substances ~~under~~ pursuant to 18 U.S.C. § 114, in which case the maximum term of imprisonment is twenty years.

## OPTION 2:

### §2A2.2. Aggravated Assault

- (a) Base Offense Level (Apply the greater): **15**
- (1) **19**, if the offense involved serious bodily injury; or
- (2) **15**, otherwise.
- (b) Specific Offense Characteristics

\* \* \*

~~(3) If the victim sustained bodily injury, increase the offense level according to the seriousness of the injury:~~

	<u>Degree of Bodily Injury</u>	<u>Increase in Level</u>
<del>(A)</del>	<del>Bodily Injury</del>	<del>add 2</del>
<del>(B)</del>	<del>Serious Bodily Injury</del>	<del>add 4</del>
<del>(C)</del>	<del>Permanent or Life-Threatening Bodily Injury</del>	<del>add 6</del>

~~(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or~~

~~(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels.~~

~~Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed 9 levels.~~

(3) (A) If subsection (a)(1) applies, and the victim sustained (i) permanent or life-threatening bodily injury, increase by 2 levels; or (ii) an injury that is between serious bodily injury and permanent or life-threatening bodily injury, increase by 1 level. However the cumulative enhancements from this subdivision and subsection (b)(2) shall not exceed 5 levels.

(B) If subsection (a)(2) applies, and the victim sustained (i) bodily injury, increase by 2 levels; or (ii) an injury between bodily injury and serious bodily injury increase by 3 levels.

(4) If the offense was motivated by a payment or offer of money or other thing of value, increase by 2 levels.

(5) If the offense involved the violation of a court protection order, increase by 2 levels.

#### Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(a)(2), (3), (6), 114, 115(a), (b)91, 351(e), 1751(e). For additional statutory provision(s), see Appendix A (Statutory Index).

#### Application Notes:

1. Definitions.—For purposes of this guideline:

"Aggravated assault" means a felonious assault that involved (A) possession of a dangerous weapon with intent to ~~do bodily harm~~ cause bodily injury (i.e., not merely to frighten) with that weapon; (B) serious bodily injury; or (C) an intent to commit another felony.

"Brandished," "bodily injury," "firearm," "otherwise used," "permanent or life-threatening bodily injury," and "serious bodily injury," have the meaning given those terms in §1B1.1, Application Note 1.

"Dangerous weapon" has the meaning given that term in §1B1.1, Application Note 1. For purposes of this guideline, and pursuant to that application note, "dangerous weapon" includes any instrument that is not ordinarily used as a weapon (e.g., a car, a chair, or an ice pick) if such an instrument is involved in the offense with the intent to commit bodily injury.

"More than minimal planning," has the meaning given that term in §1B1.1, Application Note 1.

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

3. ~~This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1 (Assault With Intent to Commit Murder). Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse).~~

2. Aggravating Factors.—This guideline covers felonious assaults that are more serious than minor assaults because of the presence of certain aggravating factors, i.e., serious bodily injury, the involvement of a dangerous weapon with intent to cause bodily injury, and/or the intent to commit another felony.

An assault that involves the presence of a dangerous weapon is aggravated in form when the presence of the dangerous weapon is coupled with the intent to cause bodily injury. In such a case, the base offense level and the weapon enhancement in subsection (b)(2) take into account different aspects of the offense. The base offense level takes into account the presence of the dangerous weapon (regardless of the manner in which the weapon was involved) and the fact that the defendant intended to cause bodily injury. Subsection (b)(2), on the other hand, takes into account the manner in which the dangerous weapon was involved in the offense. Accordingly, in a case involving a dangerous weapon with intent to cause bodily injury, the court shall apply both the base offense level and subsection (b)(2).

3. More than Minimal Planning.—For purposes of subsection (b)(1), waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. However, luring the victim to a specific location or wearing a ski mask to prevent identification would constitute more than minimal planning.

Background: This section applies to serious (aggravated) assaults. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1. This

guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1 (Assault with Intent to Commit Murder). Assault with intent to commit rape is covered by §2A3.1 (Criminal Sexual Abuse).

There are a number of federal provisions that address varying degrees of assault and battery. ~~The punishments under these statutes differ considerable, even among provisions directed to substantially similar conduct.~~ For example, if the assault is upon ~~certain~~ a federal officers "while engaged in or on account of ~~the~~ the performance of official duties," the maximum term of imprisonment ~~under~~ pursuant to 18 U.S.C. § 111(a)(2) is three years. If a deadly or dangerous weapon is used in the assault on a federal officer, or if the assault results in bodily injury, the maximum term of imprisonment is ten years. ~~However, if the same~~ If a dangerous weapon is used to assault a person ~~not otherwise specifically protected,~~ who is not a federal officer, and the weapon was used with the intent to do bodily harm, without just cause or excuse, the maximum term of imprisonment ~~under~~ pursuant to 18 U.S.C. § 113(c)(a)(3) also is ~~five~~ ten years. If an assault results in serious bodily injury, the maximum term of imprisonment ~~under~~ pursuant to 18 U.S.C. § 113(f)(a)(6) is ten years, unless the injury constitutes maiming by scalding, corrosive, or caustic substances ~~under~~ pursuant to 18 U.S.C. § 114, in which case the maximum term of imprisonment is twenty years.

**Proposed Amendment: Circuit Conflict Concerning Certain Fraudulent Misrepresentations**

**6. Synopsis of Proposed Amendment:** *This proposed amendment resolves a circuit conflict regarding the scope of the enhancement in subsection (b)(4)(A) of §2F1.1 (Fraud and Deceit) for misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency. Specifically, the conflict concerns whether the misrepresentation applies only in cases in which the defendant does not have any authority to act on behalf of the covered organization or government agency or if it applies more broadly (i.e., to cases in which the defendant, who has a legitimate connection to the covered organization or government agency, misrepresents that the defendant was acting solely on behalf of the organization or agency). Compare e.g., United States v. Marcum 16 F.3d 599 (4<sup>th</sup> Cir. 1994) (enhancement appropriate even though defendant did not misrepresent his authority to act on behalf of the organization but rather only misrepresented that he was conducting an activity wholly on behalf of the organization), with United States v. Frazier, 53 F.3d 1105 (10<sup>th</sup> Cir. 1995) (application of the enhancement is limited to cases in which the defendant exploits his victim by claiming to have authority which in fact does not exist).*

*The proposed amendment provides for application of the enhancement if (A) the defendant falsely represented that the defendant was an employee of a covered organization or a government agency; or (B) the defendant was an employee of a covered organization or a government agency who represented that the defendant was acting solely for the benefit of the organization or agency when, in fact, the defendant intended to divert all or part of that benefit (for example, for the defendant’s personal gain). Under either scenario, it is the representation that enables the defendant to commit the offense. To avoid double counting in the case of an employee described in clause (B) who also holds a position of trust, the proposed amendment provides an application note instructing the court not to apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill) if the same conduct forms the basis both for the enhancement in §2F1.1(b)(4)(A) and the adjustment in §3B1.3.*

*The proposed amendment also addresses the issue of the embezzler who works for a covered organization or government agency. The proposed amendment provides that embezzlement of funds by an employee of a covered organization or government agency, without more, is not sufficient to trigger application of the enhancement. However, such an employee who also holds a position of trust may be subject to an adjustment pursuant to §3B1.3.*

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

\* \* \*

Commentary

\* \* \*

Application Notes:

\* \* \*

5. ~~Subsection (b)(4)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.~~ Misrepresentation.—Subsection (b)(4)(A) applies in any case in which (A) the defendant represented that the defendant was a employee or authorized agent of a charitable, educational, religious, or political organization, or government agency when, in fact, the defendant was not such an employee or agent; or (B) the defendant was a employee or agent of the organization or agency and represented that the defendant was acting solely to obtain a benefit for the organization or agency, when in fact, the defendant intended to divert all or part of that benefit (e.g., for the defendant's personal gain). Subsection (b)(4)(A) would apply, for example, to the following:

- (A) A defendant who solicits contributions for a non-existent famine relief organization.
- (B) A defendant who solicits donations from church members by falsely claiming to be a fund raiser for a religiously affiliated school.
- (C) A defendant, chief of a local fire department, who conducts a public fund raiser representing that the purpose of the fund raiser is to procure sufficient funds for a new fire engine when, in fact, the defendant diverts some of the funds for the defendant's personal benefit.

If the conduct that forms the basis for an enhancement under subsection (b)(4)(A) is the only conduct that forms the basis for an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) do not apply an adjustment under §3B1.3.

The embezzlement of funds alone is not sufficient to warrant application of subsection (b)(4)(A). The embezzled funds must have been solicited pursuant to a misrepresentation that the defendant was acting to obtain a benefit for the organization or agency. However, if a defendant who embezzles funds holds a position of public or private trust, §3B1.3 (Abuse of Position of Trust or Use of Special Skill) may apply.

\* \* \*

## Proposed Amendment: Circuit Conflict Concerning Certain Drug Defendants and Mitigating Role

7. **Synopsis of Proposed Amendment:** *This amendment proposes to resolve a circuit conflict regarding whether application of §3B1.2 (Mitigating Role) is precluded (i.e., without the necessity of applying the guideline to the facts) in the case of a single defendant drug courier if the defendant's base offense level is determined solely by the quantity personally handled by the defendant and that quantity constitutes all of the defendant's relevant conduct. Compare e.g., United States v. Isaza-Zapata, 148 F.3d 236, 241 (3d. Cir. 1998) (defendant who pleaded guilty to importing heroin was sentenced based on amounts in his personal possession, but if he can meet the requirements of §3B1.2 he is entitled to the reduction upon appropriate proof) with United States v. Isienyi, 207 F.3d 390 (7<sup>th</sup> Cir. 2000) (defendant pleaded guilty to one count of importing a specified quantity of heroin; held defendant ineligible for a mitigating role adjustment when his offense level consisted only of amounts he personally handled).*

*The proposed amendment adopts the view that such a defendant, in a single defendant case, is not precluded from receiving a mitigating role adjustment.*

*In addition to resolving the circuit conflict, the proposed amendment (A) incorporates commentary from the Introduction to Chapter Three, Part B (Role in the Offense) that there must be more than one participant before application of a mitigating role adjustment may be considered; (B) incorporates the definition of "participant" found in the aggravating role guideline; (C) amends commentary to indicate that the mitigating role adjustment ordinarily is not warranted if the defendant receives a lower offense level than warranted by the actual criminal conduct because, for example, the defendant was convicted of a less serious offense or otherwise was held accountable under a plea for a lesser quantity of drugs than warranted by the defendant's actual conduct; (D) deletes commentary language that the minimal role adjustment is intended to be used infrequently; and (E) makes technical amendments to the guideline (such as the addition of headings for, and the reordering of, application notes in the commentary) that are intended to have no substantive impact on the guideline.*

### §3B1.2. **Mitigating Role**

\* \* \*

#### Commentary

#### Application Notes:

1. Definition.—*For purposes of this guideline, "participant" has the meaning given that term in Application Note 1 of §3B1.1 (Aggravating Role).*
2. Requirement of Multiple Participants.—*This guideline is not applicable unless more than one participant was involved in the offense. See the Introductory Commentary to this Part (Role in the Offense). Accordingly, an adjustment under this guideline may not apply to a defendant who is the only defendant convicted of an offense unless that offense involved*



other participants in addition to the defendant and the defendant otherwise qualifies for such an adjustment.

3. Applicability of Adjustment.—

(A) Substantially Less Culpable than Average Participant.—This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant.

However, a reduction for a mitigating role under this section ordinarily is not warranted in the case of a defendant who has received an offense level lower than the offense level warranted by the defendant's actual criminal conduct (because, for example, the defendant was convicted of a less serious offense or was held accountable for a quantity of drugs less than what the defendant otherwise would have been accountable under §1B1.3(Relevant Conduct)). In such a case, the defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of level 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of level 6 under §2D2.1), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.

(B) Fact-Based Determination.—The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case. As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

(C) Applicability to Certain Defendants.—A defendant who is convicted of a drug trafficking offense, whose role in that offense was limited to transporting or storing drugs and who, based on the defendant's criminal conduct, is accountable under §1B1.3 (Relevant Conduct) only for the quantity of drugs the defendant personally transported or stored is not precluded from receiving an adjustment under this guideline.

4. Minimal Participant.—Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant. [It is intended that the downward adjustment for a minimal participant will be used infrequently.]

2. —It is intended that the downward adjustment for a minimal participant will be used

~~infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marijuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.~~

35. Minor Participant.—~~For purposes of §3B1.2(b), a minor participant means any participant~~ Subsection (b) applies to a defendant described in Application Note 3(A) who is less culpable than most other participants, but whose role could not be described as minimal.

4. ~~If a defendant has received a lower offense level by virtue of being convicted of an offense significantly less serious than warranted by his actual criminal conduct, a reduction for a mitigating role under this section ordinarily is not warranted because such defendant is not substantially less culpable than a defendant whose only conduct involved the less serious offense. For example, if a defendant whose actual conduct involved a minimal role in the distribution of 25 grams of cocaine (an offense having a Chapter Two offense level of 14 under §2D1.1) is convicted of simple possession of cocaine (an offense having a Chapter Two offense level of 6 under §2D2.1), no reduction for a mitigating role is warranted because the defendant is not substantially less culpable than a defendant whose only conduct involved the simple possession of cocaine.~~

~~Background. This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant. The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.~~

#### Issues for Comment:

1. With respect to a defendant whose role in a drug offense is limited to transporting or storing drugs, should the Commission, as an alternative to the proposed amendment, preclude such a defendant from receiving any mitigating role adjustment under §3B1.2? Alternatively, should the Commission provide that such a defendant may qualify only for a minor role adjustment, but not a minimal role adjustment?
2. Should the example in proposed Application Note 3(C) (i.e., that a defendant whose role in a drug trafficking offense is limited to transporting or storing drugs and who is accountable under §1B1.3 (Relevant Conduct) only for the quantity of drugs the defendant personally transported or stored is not precluded from receiving a mitigating role adjustment) be broadened to make clear that the rule is intended to cover defendants convicted of offenses other than drug trafficking offenses who have a similarly limited role in the offense? Specifically, should the example be expanded to make clear that the rule is intended to apply to a defendant who has a similarly limited role in any offense and who is accountable under §1B1.3 only for that portion of the offense for which the defendant was personally involved?