

PART E - OFFENSES INVOLVING CRIMINAL ENTERPRISES AND RACKETEERING

1. RACKETEERING

Introductory Commentary

Because of the jurisdictional nature of the offenses included, this subpart covers a wide variety of criminal conduct. The offense level usually will be determined by the offense level of the underlying conduct.

§2E1.1. Unlawful Conduct Relating to Racketeer Influenced and Corrupt Organizations

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

- (1) 19; or
- (2) the offense level applicable to the underlying racketeering activity.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1962, 1963.

Application Notes:

1. For purposes of subsection (a)(2), determine the offense level for each underlying offense. Use the provisions of Chapter Three, Part D (Multiple Counts), to determine the offense level, treating each underlying offense as if contained in a separate count of conviction.
2. If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.
3. If the offense level for the underlying racketeering activity is less than the alternative minimum level specified (*i.e.*, 19), the alternative minimum base offense level is to be used.

§2E1.2. Interstate or Foreign Travel or Transportation in Aid of a Racketeering Enterprise

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

- (1) 6; or
- (2) the offense level applicable to the underlying crime of violence or other unlawful activity in respect to which the travel or transportation was undertaken.

Commentary

Statutory Provision: 18 U.S.C. § 1952.

Application Notes:

1. For purposes of subsection (a)(2), determine the offense level for each underlying offense. Use the provisions of Chapter Three, Part D (Multiple Counts), to determine the offense level, treating each underlying offense as if contained in a separate count of conviction.
2. If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.
3. If the offense level for the underlying conduct is less than the alternative minimum base offense level specified (*i.e.*, 6), the alternative minimum base offense level is to be used.

§2E1.3. Violent Crimes in Aid of Racketeering Activity

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

- (1) 12; or
- (2) the offense level applicable to the underlying crime or racketeering activity.

Commentary

Statutory Provision: 18 U.S.C. § 1952B.

Application Notes:

1. If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.
2. If the offense level for the underlying conduct is less than the alternative minimum base offense level specified (*i.e.*, 12), the alternative minimum base offense level is to be used.

Background: The conduct covered under this section ranges from threats to murder. The maximum term of imprisonment authorized by statute ranges from three years to life imprisonment.

§2E1.4. Use of Interstate Commerce Facilities in the Commission of Murder-For-Hire

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

- (1) 23; or
- (2) the offense level applicable to the underlying unlawful conduct.

Commentary

Statutory Provision: 18 U.S.C. § 1952A.

Application Notes:

1. If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.
2. If the offense level for the underlying conduct is less than the alternative minimum base offense level specified (i.e., 23), the alternative minimum base offense level is to be used.

Background: The statute does not require that a murder covered by this section has been committed. The maximum term of imprisonment authorized by statute ranges from five years to life imprisonment.

§2E1.5. Hobbs Act Extortion or Robbery

Apply the guideline provision for extortion or robbery, as applicable.

Commentary

Statutory Provision: 18 U.S.C. § 1951.

Application Note:

1. Apply the guideline most applicable to the underlying conduct, which may include §2B3.1(Robbery), §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), §2B3.3 (Blackmail and Similar Forms of Extortion), or §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe).

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2. EXTORTIONATE EXTENSION OF CREDIT

§2E2.1. Making, Financing, or Collecting an Extortionate Extension of Credit

- (a) Base Offense Level: 20
- (b) Specific Offense Characteristics
 - (1) (A) If a firearm was discharged increase by 5 levels; or
 - (B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; or

- (C) if a firearm or other dangerous weapon was brandished, displayed or possessed, increase by 3 levels.
- (2) If any 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>
(A) Bodily Injury	add 2
(B) Serious Bodily Injury	add 4
(C) Permanent or Life-Threatening Bodily Injury	add 6

Provided, however, that the combined increase from (1) and (2) shall not exceed 9 levels.

- (3) (A) If any person was abducted to facilitate the commission of the offense or an escape from the scene of the crime, increase by 4 levels;
- (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 892-894.

Application Notes:

1. Definitions of "firearm," "dangerous weapon," "otherwise used," "brandished," "bodily injury," "serious bodily injury," "permanent or life-threatening bodily injury," "abducted," and "physically restrained" are found in the Commentary to §1B1.1 (Application Instructions).
2. See also Commentary to §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) regarding the interpretation of the specific offense characteristics.

Background: This section refers to offenses involving the making or financing of extortionate extensions of credit, or the collection of loans by extortionate means. These "loan-sharking" offenses typically involve threats of violence and provide economic support for organized crime. The base offense level for these offenses is higher than the offense level for extortion because loan sharking is in most cases a continuing activity. In addition, the guideline does not include the amount of money involved because the amount of money in such cases is often difficult to determine. Other enhancements parallel those in §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

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3. GAMBLING

Introductory Commentary

This subpart covers a variety of proscribed conduct. The adjustments in Chapter Three, Part B (Role in the Offense) are particularly relevant in providing a measure of the scope of the offense and the defendant's participation.

§2E3.1. Engaging in a Gambling Business

- (a) Base Offense Level: 12

Commentary

Statutory Provision: 18 U.S.C. § 1955.

§2E3.2. Transmission of Wagering Information

- (a) Base Offense Level: 12

Commentary

Statutory Provision: 18 U.S.C. § 1084.

§2E3.3. Other Gambling Offenses

- (a) Base Offense Level: 6

- (b) Specific Offense Characteristic

- (1) If the offense is committed as part of, or to facilitate, a commercial gambling operation, increase by 6 levels.

Commentary

Statutory Provisions: 15 U.S.C. §§ 1172-1175; 18 U.S.C. §§ 1082, 1301-1304, 1306, 1511, 1953.

Background: This section includes a wide variety of conduct. A specific offense characteristic has been included to distinguish commercial from other gambling offenses.

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4. TRAFFICKING IN CONTRABAND CIGARETTES

§2E4.1. Unlawful Conduct Relating to Contraband Cigarettes

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

- (1) 9; or
- (2) the offense level from the table in §2T4.1 (Tax Table) corresponding to the amount of the tax evaded.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2342(a), 2344(a).

Application Note:

1. "Tax evaded" refers to state excise tax.

Background: The conduct covered by this section generally involves evasion of state excise taxes. At least 60,000 cigarettes must be involved. Because this offense is basically a tax matter, it is graded by use of the tax table in §2T4.1.

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5. LABOR RACKETEERING

Introductory Commentary

The statutes included in this subpart protect the rights of employees under the Taft-Hartley' Act, members of labor organizations under the Labor-Management Reporting and Disclosure Act of 1959, and participants of employee pension and welfare benefit plans covered under the Employee Retirement Income Security Act.

The base offense levels for many of the offenses in this subpart have been determined by reference to analogous sections of the guidelines. Thus, the base offense levels for bribery, theft, and fraud in this subpart generally correspond to similar conduct under other parts of the guidelines. The base offense levels for bribery and graft have been set higher than the level for commercial bribery due to the particular vulnerability to exploitation of the organizations covered by this subpart.

§2E5.1. Bribery or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan

(a) Base Offense Level:

(1) 10, if a bribe; or

(2) 6, if a gratuity.

(b) Specific Offense Characteristics

(1) If the defendant was a fiduciary of the benefit plan, increase by 2 levels.

(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.

Commentary

Statutory Provision: 18 U.S.C. § 1954.

Application Notes:

1. "Bribe" refers to the offer or acceptance of an unlawful payment with the specific understanding that it will corruptly affect an official action of the recipient.
2. "Gratuity" refers to the offer or acceptance of an unlawful payment other than a bribe.
3. "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.
4. "Value of the improper benefit to the payer" is explained in the Commentary to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right).
5. If the adjustment for a fiduciary at §2E5.1(b)(1) applies, do not apply the adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: This section covers the giving or receipt of bribes and other unlawful gratuities involving employee welfare or pension benefit plans. The seriousness of the offense is determined by several factors, including the value of the bribe or gratuity and the magnitude of the loss resulting from the transaction. A more severe penalty is warranted in a bribery where the payment is the primary motivation for an action to be taken, as opposed to graft, where the prohibited payment is given because of a person's actions, duties, or decisions without a prior understanding that the recipient's performance will be directly influenced by the gift.

§2E5.2. Theft or Embezzlement from Employee Pension and Welfare Benefit Plans

- (a) Base Offense Level: 4
- (b) Specific Offense Characteristics
 - (1) If the offense involved more than minimal planning, increase by 2 levels.
 - (2) If the defendant had a fiduciary obligation under the Employee Retirement Income Security Act, increase by 2 levels.
 - (3) Increase by corresponding number of levels from the table in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) according to the value of the property stolen.

Commentary

Statutory Provision: 18 U.S.C. § 664.

Application Notes:

1. "More than minimal planning" is defined in the Commentary to §1B1.1 (Application Instructions).
2. "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.
3. If the adjustment for a fiduciary obligation at §2E5.2(b)(2) is applied, do not apply the adjustment at §3B1.3 (Abuse of a Position of Trust or Use of a Special Skill).

Background: This section covers theft or conversion from employee benefit plans by fiduciaries, or by any person, including borrowers to whom loans are disbursed based upon materially defective loan applications, service providers who are paid on inflated billings, and beneficiaries paid as the result of fraudulent claims. The base offense level corresponds to the base offense level for other forms of theft. Specific offense characteristics address whether a defendant has a fiduciary relationship to the benefit plan, the sophistication of the offense, and the scale of the offense.

§2E5.3. False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act

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

- (1) 6; or
- (2) If false records were used for criminal conversion of plan funds or a scheme involving a bribe or a gratuity relating to the operation of an employee benefit plan, apply §2E5.2 or §2E5.1, as applicable.

Commentary

Statutory Provision: 18 U.S.C. § 1027.

Application Note:

1. "Criminal conversion" means embezzlement.

Background: This section covers the falsification of documents or records relating to a benefit plan covered by ERISA. Such violations sometimes occur in connection with the criminal conversion of plan funds or schemes involving bribery or graft. Where a violation under this section occurs in connection with another offense, the offense level is determined by reference to the offense facilitated by the false statements or documents.

§2E5.4. Embezzlement or Theft from Labor Unions in the Private Sector

(a) Base Offense Level: 4

(b) Specific Offense Characteristics

- (1) If the offense involved more than minimal planning, increase by 2 levels.
- (2) If 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), increase by 2 levels.
- (3) Increase by the number of levels from the table in §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) corresponding to the value of the property stolen.

Commentary

Statutory Provision: 29 U.S.C. § 501(c).

Application Notes:

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

2. *If the adjustment for being a union officer or occupying a position of trust in a union at §2E5.4(b)(2) is applied, do not apply the adjustment at §3B1.3 (Abuse of a Position of Trust or Use of a Special Skill).*

Background: *This section includes embezzlement or theft from a labor organization. It is directed at union officers and persons employed by a union. The seriousness of this offense is determined by the amount of money taken, the sophistication of the offense, and the nature of the defendant's position in the union.*

§2E5.5. Failure to Maintain and Falsification of Records Required by the Labor Management Reporting and Disclosure Act

- (a) Base Offense Level (Apply the greater):
- (1) 6; or
 - (2) If false records were used for criminal conversion of funds or a scheme involving a bribe or gratuity, apply §2E5.4 or §2E5.6, as applicable.

Commentary

Statutory Provisions: 29 U.S.C. §§ 439, 461.

Background: *This section covers failure to maintain proper documents required by the LMRDA or falsification of such documents. This offense is a misdemeanor.*

§2E5.6. Prohibited Payments or Lending of Money by Employer or Agent to Employees, Representatives, or Labor Organizations

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

Commentary

Statutory Provision: 29 U.S.C. § 186.

Application Notes:

1. "Bribe" refers to the offer or acceptance of an unlawful payment with the specific understanding that it will corruptly affect an official action of the recipient.
2. "Gratuity" refers to the offer or acceptance of an unlawful payment other than a bribe.
3. "Value of the improper benefit to the payer" is explained in the Commentary to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right).

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PART F - OFFENSES INVOLVING FRAUD OR DECEIT

§2F1.1. Fraud and Deceit

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

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

	<u>Loss</u>	<u>Increase in Level</u>
(A)	\$2,000 or less	no increase
(B)	\$2,001 - \$5,000	add 1
(C)	\$5,001 - \$10,000	add 2
(D)	\$10,001 - \$20,000	add 3
(E)	\$20,001 - \$50,000	add 4
(F)	\$50,001 - \$100,000	add 5
(G)	\$100,001 - \$200,000	add 6
(H)	\$200,001 - \$500,000	add 7
(I)	\$500,001 - \$1,000,000	add 8
(J)	\$1,000,001 - \$2,000,000	add 9
(K)	\$2,000,001 - \$5,000,000	add 10
(L)	over \$5,000,000	add 11

(2) If the offense involved (A) more than minimal planning; (B) a scheme to defraud more than one victim; (C) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; or (D) violation of any judicial or administrative order, injunction, decree or process; increase by 2 levels, but if the result is less than level 10, increase to level 10.

(3) 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.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78d, 78j, 78ff, 80b-6, 1644; 18 U.S.C. §§ 285-291, 659, 1001-1008, 1010-1014, 1016-1022, 1025-1026, 1028-1029, 1341 - 1344.

Application Notes:

1. *The adjustments in §2F1.1(b)(2) are alternative rather than cumulative. If in a particular case, however, several of the enumerated factors applied, 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)(2)(C) 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)(2)(D) 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.
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. In keeping with the Commission's policy on attempts, if a probable or intended loss that the defendant was attempting to inflict can be determined, that figure would be used if it was larger than the actual loss. For example, if the fraud consisted of attempting to sell \$40,000 in worthless securities, or representing that a forged check for \$40,000 was genuine, the "loss" would be treated as \$40,000 for purposes of this guideline.
8. The amount of loss need not be precise. The court is not expected to identify each victim and the loss he suffered to arrive at an exact figure. The court need only make a reasonable estimate of the range of loss, given the available information. The estimate 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. Estimates based upon aggregate "market loss" (e.g., the aggregate decline in market value of a stock resulting from disclosure of information that was wrongfully withheld or misrepresented) are especially appropriate for securities cases. The offender's gross gain from committing the fraud is an alternative estimate that ordinarily will understate the loss.

9. *Dollar loss often does not fully capture the harmfulness and seriousness of the conduct. In such instances, an upward departure may be warranted. Examples may include the following:*
- (a) the primary objective of the fraud was non-monetary;*
 - (b) false statements were made for the purpose of facilitating some other crime;*
 - (c) the offense caused or risked physical or psychological harm;*
 - (d) the offense endangered national security or military readiness;*
 - (e) the offense caused a loss of confidence in an important institution;*
 - (f) completion of the offense was prevented, or the offense was interrupted before it caused serious harm.*
10. *The adjustments for loss do not distinguish frauds involving losses greater than \$5,000,000. Departure above the applicable guideline may be warranted if the loss substantially exceeds that amount.*
11. *In a few instances, the total dollar loss that results from the offense may overstate its seriousness. Such situations typically occur when a misrepresentation is of limited materiality or is not the sole cause of the loss. Examples would include understating debts to a limited degree in order to obtain a substantial loan which the defendant genuinely expected to repay; attempting to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it; and making a misrepresentation in a securities offering that enabled the securities to be sold at inflated prices, but where the value of the securities subsequently declined in substantial part for other reasons. In such instances, a downward departure may be warranted.*
12. *Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. The statutes provide for increased maximum terms of imprisonment for the use or possession of device-making equipment and the production or transfer of more than five identification documents or fifteen access devices. The court may find it appropriate to enhance the sentence for violations of these statutes in a manner similar to the treatment of analogous counterfeiting offenses under Part B.*
13. *If the fraud exploited vulnerable victims, an enhancement will apply. See §3A1.1 (Vulnerable Victim).*
14. *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, in which §2T3.1 likely would be more apt. In such instances, although §2F1.1 applies, a departure may be warranted.*
15. *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 law arson where a fraudulent insurance claim was mailed might be*

prosecuted as mail fraud. In such cases the most analogous guideline (in the above case, §2K1.4) is to be applied.

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 current practices show that the most important factors that determine sentence length are the amount of loss and whether the offense is an isolated crime of opportunity or is 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 is indicative of an intention and potential to do considerable harm. In current practice, this factor has a significant impact, especially in frauds involving small losses. Accordingly, the guideline not only specifies a 2-level enhancement when this factor is present, but also specifies that the minimum offense level in such cases shall be 10. A number of special cases are specifically broken out under subdivision (b)(2) to ensure that defendants in such cases are adequately punished.

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.

§2F1.2. Insider Trading

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

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

Commentary

Statutory Provisions: 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5.

Application Note:

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

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

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

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**PART G - OFFENSES INVOLVING PROSTITUTION,
SEXUAL EXPLOITATION OF MINORS, AND OBSCENITY**

1. PROSTITUTION

§2G1.1. Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct

- (a) Base Offense Level: 14
- (b) Specific Offense Characteristic
 - (1) If the defendant used physical force, or coercion by drugs or otherwise, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1328; 18 U.S.C. §§ 2421, 2422.

Application Notes:

1. *The base offense level assumes that the offense was committed for profit. In the infrequent case where the defendant did not commit the offense for profit and the offense did not involve physical force or coercion, the Commission recommends a downward departure of 8 levels.*
2. *The enhancement for physical force, or coercion by drugs or otherwise, anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures).*
3. *"Coercion," as used in this guideline, includes any form of conduct that negates the voluntariness of the behavior of the person transported.*
4. *For the purposes of §3B1.1 (Aggravating Role), the persons transported are considered participants only if they assisted in the unlawful transportation of others.*
5. *For the purposes of Chapter Three, Part D (Multiple Counts), each person transported is to be treated as a separate, distinct offense, even if several persons are transported in a single act.*

§2G1.2. Transportation of a Minor for the Purpose of Prostitution or Prohibited Sexual Conduct

- (a) Base Offense Level: 16
- (b) Specific Offense Characteristics
 - (1) If the offense involved the use of physical force, or coercion by drugs or otherwise, increase by 4 levels.

- (2) If the conduct involved the transportation of a minor under the age of twelve years, increase by 4 levels.
- (3) If the conduct involved the transportation of a minor at least twelve years of age but under the age of sixteen years, increase by 2 levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1328; 18 U.S.C. § 2423.

Application Note:

1. For the purposes of Chapter Three, Part D (Multiple Counts), each person transported is to be treated as a separate, distinct offense, even if several persons are transported in a single act.
2. The enhancement for physical force, or coercion by drugs or otherwise, anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures).
3. "Coercion," as used in this guideline, includes any form of conduct that negates the voluntariness of the behavior of the person transported.

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2. SEXUAL EXPLOITATION OF A MINOR

§2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material

- (a) Base Offense Level: 25
- (b) Specific Offense Characteristic
 - (1) If the minor was under the age of twelve years, increase by 2 levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1328; 18 U.S.C. § 2251.

Application Note:

1. For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate, distinct offense, even if several are exploited simultaneously.

Background: This offense commonly involves the production source of a child pornography enterprise. Because the offense directly involves the exploitation of minors, the base offense level is higher than for the distribution of the sexually explicit material after production. An enhancement is provided when the conduct involves the exploitation of a minor under age twelve to reflect the more serious nature of exploiting young children.

§2G2.2. Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor

- (a) Base Offense Level: 13
- (b) Specific Offense Characteristics
 - (1) If the material involved a minor under the age of twelve years, increase by 2 levels.
 - (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 less than 5 levels.

Commentary

Statutory Provision: 18 U.S.C. § 2252.

Application Note:

- 1. "Distribution," as used in this guideline, includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute.

* * * * *

3. OBSCENITY

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

- (a) Base Offense Level: 6
- (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.
 - (2) If the offense involved material that portrays sadomasochistic conduct or other depictions of violence, increase by 4 levels.

(c) Cross Reference

- (1) If the offense involved a criminal enterprise, apply the appropriate guideline from Chapter Two, Part E (Offenses Involving Criminal Enterprises and Racketeering) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1461-1465.

Application Note:

1. "Act related to distribution" as used in this guideline is to be construed broadly and includes production, transportation, and possession with intent to distribute.

Background: Most federal prosecutions for offenses covered in this guideline are directed to offenses involving distribution for pecuniary gain. Consequently, the offense level under this section generally will be at least 11.

§2G3.2. Obscene or Indecent Telephone Communications

- (a) Base Offense Level: 6

Commentary

Statutory Provision: 47 U.S.C. § 223.

Background: This offense is a misdemeanor for which the maximum term of imprisonment authorized by statute is six months.

PART H - OFFENSES INVOLVING INDIVIDUAL RIGHTS

1. CIVIL RIGHTS

Introductory Commentary

This subpart covers violations of civil rights statutes that typically penalize conduct involving death or bodily injury more severely than discriminatory or intimidating conduct not involving such injury.

The addition of two levels to the offense level applicable to the underlying offense in this subpart reflects the fact that the harm involved both the underlying conduct and activity intended to deprive a person of his civil rights. An added penalty is imposed on an offender who was a public official at the time of the offense to reflect the likely damage to public confidence in the integrity and fairness of government, and the added likely force of the threat because of the official's involvement.

§2H1.1. Going in Disguise to Deprive of Rights

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

(1) 15; or

(2) 2 plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristic

(1) If the defendant was a public official at the time of the offense, increase by 4 levels.

Commentary

Statutory Provision: 18 U.S.C. § 241.

Application Notes:

1. "2 plus the offense level applicable to any underlying offense" means 2 levels above the offense level (base offense level plus any applicable specific offense characteristics contained in the particular guideline in Chapter Two) for any underlying criminal conduct. For example, if the underlying offense was second-degree murder, which under §2A1.2 has an offense level of 33, "2 plus the offense level applicable to any underlying offense" would be $33 + 2 = 35$. If the underlying offense was assault, criminal sexual conduct, kidnapping, abduction or unlawful restraint, the offense level from the guideline for the most comparable offense in §§2A2.1-2A4.2 (Assault, Criminal Sexual Abuse, and Kidnapping, Abduction, or Unlawful Restraint) would first be determined, and 2 levels then would be added. If the underlying offense was damage to property by means of arson or an explosive device, the offense level from §2K1.4 (Arson; Property Damage By Use of Explosives) would first be determined and 2 levels would be added. If the offense was property damage by other means, the offense level from §2B1.3 (Property Damage or

Destruction (Other than by Arson or Explosives)) would first be determined and 2 levels would be added. If the offense was a conspiracy or attempt to commit an offense, "2 plus the offense level for any underlying offense" would be the offense level from the guideline applicable to a conspiracy or attempt to commit that offense plus 2 levels.

2. *Where the adjustment in §2H1.1(b)(1) is applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

Background: *This section applies to intimidating activity by various groups, including formally and informally organized groups as well as hate groups. The maximum term of imprisonment authorized by statute is ten years, except where death results the maximum term of imprisonment authorized by statute is life imprisonment. The base offense level for this guideline assumes threatening or otherwise serious conduct.*

§2H1.2. Conspiracy to Interfere with Civil Rights

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

- (1) 13; or

- (2) 2 plus the offense level applicable to any underlying offense.

- (b) Specific Offense Characteristic

- (1) If the defendant was a public official at the time of the offense, increase by 4 levels.

Commentary

Statutory Provision: 18 U.S.C. § 241.

Application Notes:

1. *"2 plus the offense level applicable to any underlying offense" is explained in the Commentary to §2H1.1.*
2. *Where the adjustment in §2H1.2(b)(1) is applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

Background: *This section applies to conspiracies to interfere with civil rights. The maximum term of imprisonment authorized by statute is ten years, except where death results, in which case the maximum term of imprisonment authorized by statute is life imprisonment. The base offense level for this guideline assumes threatening or otherwise serious conduct.*

§2H1.3. Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination

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

- (1) 10, if no injury occurred; or
- (2) 15, if injury occurred; or
- (3) 2 plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristic

- (1) If the defendant was a public official at the time of the offense, increase by 4 levels.

Commentary

Statutory Provisions: 18 U.S.C. § 245; 42 U.S.C. § 3631.

Application Notes:

1. "2 plus the offense level applicable to any underlying offense" is defined in the Commentary to §2H1.1.
2. "Injury" means "bodily injury," "serious bodily injury," or "permanent or life threatening bodily injury" as defined in the Commentary to §1B1.1 (Application Instructions).
3. Where the adjustment in §2H1.3(b)(1) is applied, do not apply the adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
4. In the case of a violation of 42 U.S.C. § 3631, apply this guideline where the offense involved the threat or use of force. Otherwise, apply §2H1.5.

Background: The statutes covered by this guideline provide federal protection for the exercise of civil rights in a variety of contexts (e.g., voting, employment, public accommodations, etc.). The base offense level in §2H1.3(a) reflects that the threat or use of force is inherent in the offense. The maximum term of imprisonment authorized by statute is one year if no injury occurs, ten years if injury occurs, and life imprisonment if death results.

§2H1.4. Interference with Civil Rights Under Color of Law

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

- (1) 10; or
- (2) 2 plus the offense level applicable to any underlying offense.

Commentary

Statutory Provision: 18 U.S.C. § 242.

Application Notes:

1. "2 plus the offense level applicable to any underlying offense" is defined in the Commentary to §2H1.1.
2. Do not apply the adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

Background: This maximum term of imprisonment authorized by 18 U.S.C. § 242 is one year, except where death results, in which case the maximum term of imprisonment authorized is life imprisonment. Given this one-year statutory maximum, a base offense level of 10 is prescribed at §2H1.4(a)(1) providing a guideline sentence near the statutory maximum for cases not resulting in death because of the compelling public interest in deterring and adequately punishing those who violate civil rights under color of law. The Commission intends to recommend that this one year statutory maximum penalty be increased. An alternative base offense level is provided at §2H1.4(a)(2).

Enhancement under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) is inappropriate because the base offense level in §2H1.4(a) reflects that the abuse of actual or purported legal authority is inherent in the offense.

§2H1.5. Other Deprivations of Rights or Benefits in Furtherance of Discrimination

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

- (1) 6; or
- (2) 2 plus the offense level applicable to any underlying offense.

(b) Specific Offense Characteristic

- (1) If the defendant was a public official at the time of the offense, increase by 4 levels.

Commentary

Statutory Provisions: 18 U.S.C. § 246; 42 U.S.C. § 3631.

Application Notes:

1. "2 plus the offense level applicable to any underlying offense" is explained in the Commentary to §2H1.1.
2. Where the adjustment in §2H1.4(b)(1) is applied, do not apply the adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

3. *In the case of a violation of 42 U.S.C. § 3631, apply this guideline where the offense did not involve the threat or use of force. If the offense involved the threat or use of force, apply §2H1.3.*

Background: Violations of the statutes covered by this provision do not necessarily involve the use of force or threatening conduct or violations by public officials. Accordingly, the minimum base offense level (level 6) provided is lower than that of the other guidelines in this subpart.

* * * * *

2. POLITICAL RIGHTS

§2H2.1. Obstructing an Election or Registration

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

- (1) 18, if the obstruction occurred by use of force or threat of force against persons or property; or
- (2) 12, if the obstruction occurred by forgery, fraud, theft, bribery, deceit, or other means, except as provided in (3) below; or
- (3) 6, if the defendant (A) solicited, demanded, accepted, or agreed to accept anything of value to vote, refrain from voting, vote for or against a particular candidate, or register to vote, (B) gave false information to establish eligibility to vote, or (C) voted more than once in a federal election.

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 242, 245(b)(1)(A), 592, 593, 594, 597; 42 U.S.C. §§ 1973i, 1973j.

Application Note:

1. *If the offense resulted in bodily injury or significant property damage, or involved corrupting a public official, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

Background: Specific offense characteristics cover three major ways of obstructing an election: by force, by deceptive or dishonest conduct, or by bribery. A defendant who is a public official or who directs others to engage in criminal conduct is subject to an enhancement from Chapter Three, Part B (Role in the Offense).

* * * * *

3. PRIVACY AND EAVESDROPPING

§2H3.1. Interception of Communications or Eavesdropping

- (a) Base Offense Level (Apply the greater):
 - (1) 9; or
 - (2) If the purpose of the conduct was to facilitate another offense, apply the guideline applicable to an attempt to commit that offense.
- (b) Specific Offense Characteristic
 - (1) If the purpose of the conduct was to obtain direct or indirect commercial advantage or economic gain not covered by §2H3.1(a)(2) above, increase by 3 levels.

Commentary

Statutory Provisions: 18 U.S.C. § 2511; 47 U.S.C. § 605.

Application Note:

1. 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.

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.

§2H3.2. Manufacturing, Distributing, Advertising, or Possessing an Eavesdropping Device

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic
 - (1) If the offense was committed for pecuniary gain, increase by 3 levels.

Commentary

Statutory Provision: 18 U.S.C. § 2512.

§2H3.3. Obstructing Correspondence

(a) Base Offense Level:

- (1) 6; or
- (2) if the conduct was theft of mail, apply §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft);
- (3) if the conduct was destruction of mail, apply §2B1.3 (Property Damage or Destruction (Other than by Arson or Explosives))

Commentary

Statutory Provision: 18 U.S.C. § 1702.

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

* * * * *

4. PEONAGE, INVOLUNTARY SERVITUDE, AND SLAVE TRADE

§2H4.1. Peonage, Involuntary Servitude, and Slave Trade

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

- (1) 15; or
- (2) 2 plus the offense level applicable to any underlying offense.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1581-1588.

Application Note:

1. "2 plus the offense level applicable to the underlying offense" is explained in the Commentary to §2H1.1.

Background: This section covers statutes that prohibit peonage, involuntary servitude, and slave trade. For purposes of deterrence and just punishment, the minimum base offense level is 15. However, these offenses frequently involve other serious offenses. In such cases, the offense level will be increased under §2H4.1(a)(2).

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PART J - OFFENSES INVOLVING THE ADMINISTRATION OF JUSTICE

§2J1.1. Contempt

If the defendant was adjudged guilty of contempt, the court shall impose a sentence based on stated reasons and the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

Commentary

Statutory Provisions: 18 U.S.C. §§ 401, 402.

Application Note:

1. *Because misconduct constituting contempt varies significantly and the nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are highly context-dependent, the Commission has not provided a specific guideline for this offense. See, however, §2X5.1 (Other Offenses).*

§2J1.2. Obstruction of Justice

- (a) Base Offense Level: 12
- (b) Specific Offense Characteristics
 - (1) If the defendant obstructed or attempted to obstruct the administration of justice by causing or threatening to cause physical injury to a person or property, increase by 8 levels.
 - (2) If the defendant substantially interfered with the administration of justice, increase by 3 levels.
- (c) Cross Reference
 - (1) If the conduct was obstructing the investigation or prosecution of a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to such criminal offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1503-1513.

Application Notes:

1. "Substantially interfered with the administration of justice" includes offense conduct resulting in a premature or improper termination of a felony investigation, an indictment or verdict based upon perjury, false testimony, or other false evidence, or the unnecessary expenditure of substantial governmental or court resources.
2. For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation or trial of the obstruction of justice count.
3. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense that is the object of the obstruction), see the Commentary to Chapter Three, Part C (Obstruction), and to §3D1.2(c) (Groups of Closely Related Counts).
4. If a weapon was used, or bodily injury or significant property damage resulted, a departure may be warranted. See Chapter Five, Part K (Departures).

Background: This section addresses offenses involving the obstruction of justice generally prosecuted under the above-referenced statutory provisions. Numerous offenses of varying seriousness may constitute obstruction of justice: using threats or force to intimidate or influence a juror or federal officer; obstructing a civil or administrative proceeding; stealing or altering court records; unlawfully intercepting grand jury deliberations; obstructing a criminal investigation; obstructing a state or local investigation of illegal gambling; using intimidation or force to influence testimony, alter evidence, evade legal process, or obstruct the communication of a judge or law enforcement officer; or causing a witness bodily injury or property damage in retaliation for providing testimony, information or evidence in a federal proceeding. The conduct that gives rise to the violation may, therefore, range from a mere threat to an act of extreme violence.

The specific offense characteristics reflect the more serious forms of obstruction. Because the conduct covered by this guideline is frequently part of an effort to assist another person to escape punishment for a crime he has committed, an alternative reference to the guideline for accessory after the fact is made.

§2J1.3. Perjury

- (a) Base Offense Level: 12
- (b) Specific Offense Characteristics
 - (1) If the defendant suborned perjury by causing or threatening to cause physical injury to a person or property, increase by 8 levels.
 - (2) If the defendant's perjury or subornation of perjury substantially interfered with the administration of justice, increase by 3 levels.

(c) Cross Reference

- (1) If the conduct was perjury in respect to a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to such criminal offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1621-1623.

Application Notes:

1. "Substantially interfered with the administration of justice" includes offense conduct resulting in a premature or improper termination of a felony investigation, an indictment or verdict based upon perjury, false testimony, or other false evidence, or the unnecessary expenditure of substantial governmental or court resources.
2. For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation or trial of the perjury count.
3. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which he committed perjury), see the Commentary to Chapter Three, Part C (Obstruction), and to §3D1.2(c) (Groups of Closely Related Counts).
4. If a weapon was used, or bodily injury or significant property damage resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

Background: This section applies to perjury and subornation of perjury, generally prosecuted under the referenced statutes. The guidelines provide a higher penalty for perjury than the current practice estimate of ten months imprisonment. The Commission believes that perjury should be treated similarly to obstruction of justice. Therefore, the same considerations for enhancing a sentence are applied in the specific offense characteristics, and an alternative reference to the guideline for accessory after the fact is made.

§2J1.4. Impersonation

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

- (1) If the defendant falsely represented himself as a federal officer, agent or employee to demand or obtain any money, paper, document, or other thing of value or to conduct an unlawful arrest or search, increase by 6 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 912, 913.

Background: This section applies to impersonation of a federal officer, agent, or employee; and impersonation to conduct an unlawful search or arrest.

§2J1.5. Failure to Appear by Material Witness

(a) Base Offense Level:

- (1) 6, if in respect to a felony; or
- (2) 4, if in respect to a misdemeanor.

(b) Specific Offense Characteristic

- (1) If the offense substantially interfered with the administration of justice, increase by 3 levels.

Commentary

Statutory Provision: 18 U.S.C. § 3146(b)(2).

Application Note:

1. "Substantially interfered with the administration of justice" includes offense conduct resulting in a premature or improper termination of a felony investigation, an indictment or verdict based upon perjury, false testimony, or other false evidence, or the unnecessary expenditure of substantial governmental or court resources.
2. By statute, a term of imprisonment imposed for this offense runs consecutively to any other term of imprisonment imposed. 18 U.S.C. § 3146(b)(2).

Background: This section applies to a failure to appear by a material witness. The base offense level incorporates a distinction as to whether the failure to appear was in respect to a felony or misdemeanor prosecution. This offense covered by this section is a misdemeanor for which the maximum period of imprisonment authorized by statute is one year.

§2J1.6. Failure to Appear by Defendant

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

- (1) If the underlying offense is punishable by death or imprisonment for a term of fifteen years or more, increase by 9 levels.
- (2) If the underlying offense is punishable by a term of imprisonment of five or more years, but less than fifteen years, increase by 6 levels.
- (3) If the underlying offense is a felony punishable by a maximum term of less than five years, increase by 3 levels.

Commentary

Statutory Provision: 18 U.S.C. § 3146(b)(1).

Application Note:

1. "Underlying offense" means the offense in respect to which the defendant failed to appear.
2. By statute, a term of imprisonment imposed for this offense runs consecutively to any other term of imprisonment imposed. 18 U.S.C. § 3146(b)(1).
3. For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation or trial of the failure to appear count.

Background: This section applies to a failure to appear by a defendant who was released pending trial, sentencing, appeal, or surrender for service of sentence. The offense level for this offense increases in relation to the statutory maximum of the underlying offense.

§2J1.7. Commission of Offense While on Release

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristics
 - (1) If the offense committed while on release is punishable by death or imprisonment for a term of fifteen years or more, increase by 6 levels.
 - (2) If the offense committed while on release is punishable by a term of imprisonment of five or more years, but less than fifteen years, increase by 4 levels.
 - (3) If the offense committed while on release is a felony punishable by a maximum term of less than five years, increase by 2 levels.

Commentary

Statutory Provision: 18 U.S.C. § 3147.

Application Notes:

1. This guideline applies whenever a sentence pursuant to 18 U.S.C. § 3147 is imposed.
2. By statute, a term of imprisonment imposed for a violation of 18 U.S.C. § 3147 runs consecutively to any other term of imprisonment. Consequently, a sentence for such a violation is exempt from grouping under the multiple count rules. See §3D1.2.

Background: Because defendants convicted under this section will generally have a prior criminal history, the guideline sentences provided are greater than they otherwise might appear.

§2J1.8. Bribery of Witness

- (a) Base Offense Level: 12
- (b) Specific Offense Characteristic
 - (1) If the offense substantially interfered with the administration of justice, increase by 3 levels.
- (c) Cross Reference
 - (1) If the conduct was bribery of a witness in respect to a criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to such criminal offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 201(b)(3), (4).

Application Notes:

1. "Substantially interfered with the administration of justice" includes offense conduct resulting in a premature or improper termination of a felony investigation, an indictment or verdict based upon perjury, false testimony, or other false evidence, or the unnecessary expenditure of substantial governmental or court resources.
2. This section applies only in the case of a conviction for the above referenced (or equivalent) statute. For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply, unless the defendant obstructed the investigation or trial of the witness bribery count.
3. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which the bribery occurred), see the Commentary to Chapter Three, Part C (Obstruction), and to §3D1.2(c) (Groups of Closely Related Counts).

Background: This section applies to witness bribery. The offense levels correspond to those for perjury (§2J1.3).

§2J1.9. Payment to Witness

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic
 - (1) If the payment was for refusing to testify, increase by 4 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 201(c)(2), (3).

Application Notes:

1. "Refusing to testify" includes absenting oneself for the purpose of avoiding testifying.
2. This section applies only in the case of a conviction under the above-referenced (or equivalent) statute. For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply unless the defendant obstructed the investigation or trial of the payment to witness count.
3. In the event that the defendant is convicted under this section as well as for the underlying offense (*i.e.*, the offense with respect to which the payment was made), see the Commentary to Chapter Three, Part C (Obstruction), and to §3D1.2(c) (Groups of Closely Related Counts).

Background: This section applies to witness gratuities in federal proceedings.

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PART K - OFFENSES INVOLVING PUBLIC SAFETY

1. EXPLOSIVES AND ARSON

§2K1.1. Failure to Report Theft of Explosives

- (a) Base Offense Level: 6

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(k), 844(b).

Background: The above-referenced provisions are misdemeanors. The maximum term of imprisonment authorized by statute is one year.

§2K1.2. Improper Storage of Explosives

- (a) Base Offense Level: 6

Commentary

Statutory Provision: 18 U.S.C. § 842(j).

Background: The above-referenced provision is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.

§2K1.3. Unlawfully Trafficking In, Receiving, or Transporting Explosives

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

If any of the following applies, use the greatest:

- (1) If the defendant's conduct involved any written or oral false or fictitious statement, false record, or misrepresented identification, increase by 4 levels.
- (2) If the offense involved explosives that the defendant knew or had reason to believe were stolen, increase by 6 levels.
- (3) If the defendant knowingly distributed explosives to a person under twenty-one years of age, to a person prohibited by state law or ordinance from receiving such explosives at the place of distribution, or to a person the defendant had reason to believe intended to transport such materials into a state in violation of the law of that state, increase by 4 levels.

- (4) If the defendant was a person prohibited from receiving explosives under 18 U.S.C. § 842(i), or if the defendant knowingly distributed explosives to a person prohibited from receiving explosives under 18 U.S.C. § 842(i), increase by 10 levels.
- (5) If a recordkeeping offense reflected an effort to conceal a substantive firearm offense, apply the guideline for the substantive offense.

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(a), (h), (i), 844(b).

Application Notes:

1. "A person prohibited from receiving explosives under 18 U.S.C. § 842(i)" is anyone who is under indictment for or has been convicted of a crime punishable by imprisonment for more than one year; who is a fugitive from justice; who is an unlawful user of or addicted to marijuana, any depressant or stimulant or narcotic drug; or who has been adjudicated as a mental defective or has been committed to a mental institution.

Background: This section applies to conduct ranging from violations of a regulatory nature pertaining to licensees or persons otherwise lawfully involved in explosives commerce to more serious violations that involve substantial danger to public safety.

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

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

If any of the following applies, use the greatest:

- (1) If the defendant knowingly created a substantial risk of death or serious bodily injury, increase by 18 levels.
- (2) If the defendant recklessly endangered the safety of another, increase by 14 levels.
- (3) If the offense involved destruction or attempted destruction of a residence, increase by 12 levels.
- (4) If the defendant used fire or an explosive to commit another offense that is a felony under federal law, or carried explosives during the commission of any offense that is a felony under federal law (*i.e.*, the defendant is convicted under 18 U.S.C. § 844(h)), increase by 7 levels.
- (5) If the defendant endangered the safety of another person, increase by 4 levels.
- (6) If a destructive device was used, increase by 2 levels.

(c) Cross References

- (1) If the defendant caused death, or intended to cause bodily injury, apply the most analogous guideline from Chapter Two, Part A, Offenses Against the Person, if the resulting offense level is higher than that determined above.
- (2) Apply §2B1.3 (Property Damage or Destruction) if the resulting offense level is higher than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32, 33, 81, 844(f), (h), (i), 1153, 1855, 2275.

Application Notes:

1. "Destructive device" means any article described in 18 U.S.C. § 921(a)(4) (for example, explosive, incendiary, or poison gas bombs, grenades, mines, and similar devices and certain rockets, missiles, and large bore weapons).
2. If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

Background: Review of presentence reports indicates that many arson cases involve "malicious mischief," *i.e.*, minor property damage under circumstances that do not present an appreciable danger. A low base offense level is provided for these cases. However, aggravating factors are provided for instances where a defendant knowingly or recklessly endangered others, destroyed or attempted to destroy a residence, used fire or an explosive in the commission of a felony, used a destructive device, or otherwise endangered others.

§2K1.5. Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft

- (a) Base Offense Level: 9
- (b) Specific Offense Characteristics

If any of the following applies, use the greatest:

- (1) If the defendant acted willfully and without regard for the safety of human life, or with reckless disregard for the safety of human life (*i.e.*, the defendant is convicted under 49 U.S.C. § 1472(l)(2)), increase by 15 levels.
- (2) If the defendant was prohibited by another federal law from possessing the weapon or material, increase by 2 levels.
- (3) If the defendant's possession of the weapon or material would have been lawful but for 49 U.S.C. § 1472(l) and he acted with mere negligence, decrease by 3 levels.

(c) Cross Reference

- (1) If the defendant used the weapon or material in committing or attempting another offense, apply the guideline for such other offense, or §2X1.1 (Attempt or Conspiracy) if the resulting offense level is higher than that determined above.

Commentary

Statutory Provision: 49 U.S.C. § 1472(l).

Background: Except under the circumstances specified in 49 U.S.C. § 1472(l)(2), the offense covered by this section is a misdemeanor for which the maximum term of imprisonment authorized by statute is one year. An enhancement is provided where the defendant was a person prohibited by federal law from possession of the weapon or material. A decrease is provided in a case of mere negligence where the defendant was otherwise authorized to possess the weapon or material.

§2K1.6. Shipping, Transporting, or Receiving Explosives with Felonious Intent or Knowledge; Using or Carrying Explosives in Certain Crimes

- (a) Base Offense Level (Apply the greater):
 - (1) 18; or
 - (2) If the defendant committed the offense with intent to commit another offense against a person or property, apply §2X1.1 (Attempt or Conspiracy) in respect to such other offense.

Commentary

Statutory Provisions: 18 U.S.C. § 844(d); 26 U.S.C. § 5685.

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2. FIREARMS

§2K2.1. Receipt, Possession, or Transportation of Firearms and Other Weapons by Prohibited Persons

- (a) Base Offense Level: 9
- (b) Specific Offense Characteristics
 - (1) If the firearm was stolen or had an altered or obliterated serial number, increase by 1 level.

- (2) If the defendant obtained or possessed the firearm solely for sport or recreation, decrease by 4 levels.

(c) Cross Reference

- (1) If the defendant used the firearm in committing or attempting another offense, apply the guideline in respect to such other offense, or §2X1.1 (Attempt or Conspiracy) if the resulting offense level is higher than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)(6), (g), (h).

Application Note:

1. Under §2K2.1(b)(2), intended lawful use, as determined by the surrounding circumstances, provides a decrease in offense level. Relevant circumstances include, among others, the number and type of firearms (sawed-off shotguns, for example, have few legitimate uses) and ammunition, the location and circumstances of possession, the nature of the defendant's criminal history (e.g., whether involving firearms), and the extent to which possession is restricted by local law.

Background: Under current sentencing practices, there is substantial sentencing variation for these crimes. From the Commission's investigations, it appears that the variation is attributable primarily to the wide variety of circumstances under which these offenses occur. Apart from the nature of the defendant's criminal history, his actual or intended use of the firearm is probably the most important factor in determining the sentence.

Statistics show that sentences average two to three months lower if the firearm involved is a rifle or an unaltered shotgun. This may reflect the fact that these weapons tend to be more suitable than others for recreational activities. However, some rifles or shotguns may be possessed for criminal purposes, while some handguns may be suitable primarily for recreation. Therefore, the guideline is not based upon the type of firearm. Intended lawful use, as determined by the surrounding circumstances, is a mitigating factor.

Available data are not sufficient to determine the effect a stolen firearm has on the average sentence. However, reviews of actual cases suggest that this is a factor that tends to result in more severe sentences. Independent studies show that stolen firearms are used disproportionately in the commission of crimes.

The firearm statutes often are used as a device to enable the federal court to exercise jurisdiction over offenses that otherwise could be prosecuted only under state law. For example, a convicted felon may be prosecuted for possessing a firearm if he used the firearm to rob a gasoline station. Such prosecutions result in high sentences because of the true nature of the underlying conduct. The cross reference at §2K2.1(c) deals with such cases.

§2K2.2. Receipt, Possession, or Transportation of Firearms and Other Weapons in Violation of National Firearms Act

- (a) Base Offense Level: 12
- (b) Specific Offense Characteristics
 - (1) If the firearm was stolen or had an altered or obliterated serial number, increase by 1 level.
 - (2) If the firearm was a silencer, increase by 4 levels.
 - (3) If the defendant obtained or possessed the firearm solely for sport, recreation or collection, decrease by 6 levels.
- (c) Cross Reference
 - (1) If the defendant used the firearm in committing or attempting another offense, apply the guideline for such other offense or §2X1.1 (Attempt or Conspiracy), if the resulting offense level is higher than that determined above.

Commentary

Statutory Provisions: 26 U.S.C. §§ 5861(b) through (l).

Application Notes:

1. Under §2K2.2(b)(3), intended lawful use, as determined by the surrounding circumstances, provides a decrease in offense level. Relevant circumstances include, among others, the number and type of firearms (sawed-off shotguns, for example, have few legitimate uses) and ammunition, the location and circumstances of possession, the nature of the defendant's criminal history (e.g., whether involving firearms), and the extent to which possession is restricted by local law.
2. Subsection (c)(1) refers to any situation in which the defendant possessed a firearm to facilitate another offense that he committed or attempted.

Background: 26 U.S.C. § 5861 prohibits the unlicensed receipt, possession, transportation, or manufacture of certain firearms, such as machine guns, silencers, rifles and shotguns with shortened barrels, and destructive devices. As with §2K2.1, there is considerable variation in the conduct included under this statutory provision and some violations may be relatively technical.

§2K2.3. Prohibited Transactions in or Shipment of Firearms and Other Weapons

- (a) Base Offense Level:
 - (1) 12, if convicted under 26 U.S.C. § 5861; or
 - (2) 6, otherwise.

(b) Specific Offense Characteristics

- (1) If the number of firearms unlawfully dealt in exceeded 5, increase as follows:

	<u>Number of Firearms</u>	<u>Increase in Level</u>
(A)	6 - 10	add 1
(B)	11 - 20	add 2
(C)	21 - 50	add 3
(D)	51 - 100	add 4
(E)	101 - 200	add 5
(F)	more than 200	add 6

- (2) If any of the following applies, use the greatest:

- (A) If the defendant knew or had reason to believe that a purchaser was a person prohibited by federal law from owning the firearm, increase by 2 levels.
- (B) If the defendant knew or had reason to believe that a purchaser resided in another state in which he was prohibited from owning the firearm, increase by 1 level.
- (C) If the defendant knew or had reason to believe that a firearm was stolen or had an altered or obliterated serial number, increase by 1 level.

(c) Cross Reference

- (1) If the defendant provided the firearm to another for the purpose of committing another offense, or knowing that he planned to use it in committing another offense, apply §2X1.1 (Attempt or Conspiracy) in respect to such other offense, if the resulting offense level is higher.

Commentary

Statutory Provisions: 18 U.S.C. § 922 (a)(1), (a)(5), (b)(2), (b)(3), (d), (i), (j), (k), (l); 26 U.S.C. § 5861(a).

Background: This section applies to a variety of offenses involving prohibited transactions in or transportation of firearms and certain other weapons.

§2K2.4. Use of Firearms or Armor-Piercing Ammunition During or in Relation to Certain Crimes

If the defendant, whether or not convicted of another crime, was convicted under 18 U.S.C. § 924(c) or § 929(a), the penalties are those required by statute.

Commentary

Statutory Provisions: 18 U.S.C. §§ 924(c), 929(a).

Application Notes:

1. In each case, the statute requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.
2. Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use, or discharge of a firearm (e.g., §2B3.1(b)(2) (Robbery)), is not to be applied in respect to the guideline for the underlying offense.

Background: 18 U.S.C. §§ 924(c) and 929(a) provide mandatory minimum penalties for the conduct proscribed. To avoid double counting, when a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for firearm discharge, use, or possession is not applied in respect to such underlying offense.

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3. TRANSPORTATION OF HAZARDOUS MATERIALS

§2K2.1. Unlawfully Transporting Hazardous Materials in Commerce

Apply the guideline provision for §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification).

Commentary

Statutory Provision: 49 U.S.C. § 1809(b).

Background: This conduct involves the same risks as the conduct covered under §2Q1.2 (Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification). Accordingly, that guideline applies.