

CHAPTER TWO - OFFENSE CONDUCT

Introductory Commentary

Chapter Two pertains to offense conduct. The chapter is organized by offenses and divided into parts and related sections that may cover one statute or many. Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward. Certain factors relevant to the offense that are not covered in specific guidelines in Chapter Two are set forth in Chapter Three, Parts A (Victim-Related Adjustments), B (Role in the Offense), and C (Obstruction); Chapter Four, Part B (Career Offenders and Criminal Livelihood); and Chapter Five, Part K (Departures).

Historical Note: Effective November 1, 1987.

[Page intentionally blank]

PART A - OFFENSES AGAINST THE PERSON

1. HOMICIDE

§2A1.1. First Degree Murder

- (a) Base Offense Level: 43

Commentary

Statutory Provisions: 18 U.S.C. § 1111; 21 U.S.C. § 848(e).

Application Notes:

1. *The Commission has concluded that in the absence of capital punishment life imprisonment is the appropriate punishment for the "willful, deliberate, malicious, and premeditated killing" to which 18 U.S.C. § 1111 applies. However, the same statute applies when death results from certain enumerated felonies -- arson, escape, murder, kidnapping, treason, espionage, sabotage, rape, burglary, or robbery. Life imprisonment is not necessarily appropriate in all such situations. For example, if in robbing a bank, the defendant merely passed a note to the teller, as a result of which she had a heart attack and died, a sentence of life imprisonment clearly would not be appropriate.*

If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. The extent of the departure should be based upon the defendant's state of mind (e.g., recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, the Commission does not envision that departure below that specified in §2A1.2 (Second Degree Murder) is likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.

2. *If the defendant is convicted under 21 U.S.C. § 848(e), a sentence of death may be imposed under the specific provisions contained in that statute. This guideline applies when a sentence of death is not imposed.*

Background: *The maximum penalty authorized by 18 U.S.C. § 1111 for first-degree murder is death or life imprisonment. Prior to the applicability of the Sentencing Reform Act of 1984, a defendant convicted under this statute and sentenced to life imprisonment could be paroled (see 18 U.S.C. § 4205(a)). Because of the abolition of parole by that Act, the language of 18 U.S.C. § 1111(b) (which was not amended by the Act) appears on its face to provide a mandatory minimum sentence of life imprisonment for this offense. Other provisions of the Act, however, classify this offense as a Class A felony (see 18 U.S.C. § 3559(a)(1)), for which a term of imprisonment of any period of time is authorized as an alternative to imprisonment for the duration of the defendant's life (see 18 U.S.C. §§ 3559(b), 3581(b)(1), as amended); hence, the relevance of the discussion in Application Note 1, supra, regarding circumstances in which a sentence less than life may be appropriate for a conviction under this statute.*

The maximum penalty authorized under 21 U.S.C. § 848(e) is death or life imprisonment. If a term of imprisonment is imposed, the statutorily required minimum term is twenty years.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 82).

§2A1.2. Second Degree Murder

- (a) Base Offense Level: 33

Commentary

Statutory Provision: 18 U.S.C. § 1111.

Background: The maximum term of imprisonment authorized by statute for second degree murder is life.

Historical Note: Effective November 1, 1987.

§2A1.3. Voluntary Manslaughter

- (a) Base Offense Level: 25

Commentary

Statutory Provision: 18 U.S.C. § 1112.

Background: The maximum term of imprisonment authorized by statute for voluntary manslaughter is ten years.

Historical Note: Effective November 1, 1987.

§2A1.4. Involuntary Manslaughter

- (a) Base Offense Level:
- (1) 10, if the conduct was criminally negligent; or
 - (2) 14, if the conduct was reckless.

Commentary

Statutory Provision: 18 U.S.C. § 1112.

Application Notes:

1. "Reckless" refers to a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard of care that a reasonable person would exercise in such a situation. The term thus includes all, or nearly all, convictions for involuntary manslaughter under 18 U.S.C. § 1112. A homicide resulting from driving, or similarly dangerous actions, while under the influence of alcohol or drugs ordinarily should be treated as reckless.

2. "Criminally negligent" refers to conduct that involves a gross deviation from the standard of care that a reasonable person would exercise under the circumstances, but which is not reckless. Offenses with this characteristic usually will be encountered as assimilative crimes.

Historical Note: Effective November 1, 1987.

* * * * *

2. ASSAULT

§2A2.1. Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder

- (a) Base Offense Level: 20
- (b) Specific Offense Characteristics
 - (1) If an assault involved more than minimal planning, increase by 2 levels.
 - (2) (A) If a firearm was discharged, increase by 5 levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) if a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by 3 levels.
 - (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>
(A) Bodily Injury	add 2
(B) Serious Bodily Injury	add 4
(C) Permanent or Life-Threatening Bodily Injury	add 6
(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.

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 113(a), 351(c), (d), 373, 1113, 1116(a), 1117, 1751(c), (d), 1952A(a).

Application Note:

1. 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).

Background: This section applies to the offenses of assault with intent to commit murder, conspiracy to commit murder, solicitation to commit murder, and attempted murder.

The maximum term of imprisonment authorized by statute for conspiracy to murder is life imprisonment (18 U.S.C. § 1117). The maximum term of imprisonment authorized by statute for solicitation to murder is twenty years (18 U.S.C. § 373). The statutes that prohibit attempted murder, or assaults with intent to commit murder, vary widely in the maximum term of imprisonment authorized. Assault with intent to commit murder (18 U.S.C. § 113(a)) carries a maximum authorized term of twenty years imprisonment. An attempted assassination of certain essential government officials (18 U.S.C. § 351(c)) carries a maximum authorized term of life imprisonment. An attempted murder of foreign officials (18 U.S.C. § 1116(a)) carries a maximum authorized term of twenty years imprisonment. An attempt to commit murder, other than an assault with intent to commit murder covered by 18 U.S.C. § 113(a), carries a maximum term of three years imprisonment (18 U.S.C. § 1113).

Enhancements are provided for planning, weapon use, injury, and commission of the crime for hire. All of the factors can apply in the case of an assault; only the last can apply in the case of a conspiracy that does not include an assault; and none can apply in the case of a mere solicitation.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 83 and 84).

§2A2.2. Aggravated Assault

- (a) Base Offense Level: 15
- (b) Specific Offense Characteristics
 - (1) If the assault involved more than minimal planning, increase by 2 levels.
 - (2) (A) If a firearm was discharged, increase by 5 levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) if a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by 3 levels.
 - (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>
(A)	Bodily Injury	add 2
(B)	Serious Bodily Injury	add 4
(C)	Permanent or Life-Threatening Bodily Injury	add 6
(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.

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(b),(c),(f), 114, 115(a), (b)(1), 351(e), 1751(e).

Application Notes:

1. "Aggravated assault" means a felonious assault that involved (a) a dangerous weapon with intent to do bodily harm (i.e., not merely to frighten), or (b) serious bodily injury, or (c) an intent to commit another felony.
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. Assault with intent to commit murder is covered by §2A2.1. Assault with intent to commit rape is covered by §2A3.1.

Background: This section applies to serious (aggravated) assaults where there is no intent to kill. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1.

There are a number of federal provisions that address varying degrees of assault and battery. The punishments under these statutes differ considerably, even among provisions directed to substantially similar conduct. For example, if the assault is upon certain federal officers "while engaged in or on account of . . . official duties," the maximum term of imprisonment under 18 U.S.C. § 111 is three years. If a dangerous weapon is used in the assault on a federal officer, the maximum term of imprisonment is ten years. However, if the same weapon is used to assault a person not otherwise specifically protected, the maximum term of imprisonment under 18 U.S.C. § 113(c) is five years. If the assault results in serious bodily injury, the maximum term of imprisonment under 18 U.S.C. § 113(f) is ten years, unless the injury constitutes maiming by scalding, corrosive, or caustic substances under 18 U.S.C. § 114, in which case the maximum term of imprisonment is twenty years.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 85 and 86).

§2A2.3. Minor Assault

(a) Base Offense Level:

- (1) 6, if the conduct involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened; or
- (2) 3, otherwise.

Commentary

Statutory Provisions: 18 U.S.C. §§ 112, 115(a), 115(b)(1), 351(e), 1751(e).

Application Notes:

1. "Minor assault" means a misdemeanor assault, or a felonious assault not covered by §2A2.2.
2. Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions).

Background: Minor assault and battery are covered in this section.

Historical Note: Effective November 1, 1987. Amended effective October 15, 1988 (see Appendix C, amendment 64); November 1, 1989 (see Appendix C, amendments 87 and 88).

§2A2.4. Obstructing or Impeding Officers

(a) Base Offense Level: 6

(b) Specific Offense Characteristic

- (1) If the conduct involved physical contact, or if a dangerous weapon (including a firearm) was possessed and its use was threatened, increase by 3 levels.

(c) Cross Reference

- (1) If the defendant is convicted under 18 U.S.C. § 111 and the conduct constituted aggravated assault, apply §2A2.2 (Aggravated Assault).

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 1501, 1502, 3056(d).

Application Notes:

1. The base offense level reflects the fact that the victim was a governmental officer performing official duties. Therefore, do not apply §3A1.2 (Official Victim) unless subsection (c) requires the offense level to be determined under §2A2.2 (Aggravated Assault).

2. *Definitions of "firearm" and "dangerous weapon" are found in the Commentary to §1B1.1 (Application Instructions).*
3. *The base offense level does not assume any significant disruption of governmental functions. In situations involving such disruption, an upward departure may be warranted. See §5K2.7 (Disruption of Governmental Function).*

Background: *Violations of 18 U.S.C. §§ 1501, 1502, and 3056(d) are misdemeanors; violation of 18 U.S.C. § 111 is a felony. The guideline has been drafted to provide offense levels that are identical to those otherwise provided for assaults involving an official victim; when no assault is involved, the offense level is 6.*

Historical Note: Effective October 15, 1988 (see Appendix C, amendment 64). Amended effective November 1, 1989 (see Appendix C, amendments 89 and 90).

* * * * *

3. CRIMINAL SEXUAL ABUSE

§2A3.1. Criminal Sexual Abuse; Attempt or Assault with the Intent to Commit Criminal Sexual Abuse

- (a) Base Offense Level: 27
- (b) Specific Offense Characteristics
 - (1) If the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b) (including, but not limited to, the use or display of any dangerous weapon), increase by 4 levels.
 - (2) (A) If the victim had not attained the age of twelve years, increase by 4 levels; otherwise, (B) if the victim was under the age of sixteen, increase by 2 levels.
 - (3) If the victim was in the custody, care, or supervisory control of the defendant, was a corrections employee, or a person held in the custody of a correctional facility, increase by 2 levels.
 - (4) (A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.
 - (5) If the victim was abducted, increase by 4 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2241, 2242.

Application Notes:

1. "Permanent or life-threatening bodily injury," "serious bodily injury," and "abducted" are defined in the Commentary to §1B1.1 (Application Instructions).
2. "The means set forth in 18 U.S.C. § 2241(a) or (b)" are: by using force against the victim; by threatening or placing the victim in fear that any person will be subject to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct. This provision would apply, for example, where any dangerous weapon was used, brandished, or displayed to intimidate the victim.

Background: Sexual offenses addressed in this section are crimes of violence. Because of their dangerousness, attempts are treated the same as completed acts of criminal sexual abuse. The maximum term of imprisonment authorized by statute is life imprisonment. The base offense level represents sexual abuse as set forth in 18 U.S.C. § 2242. An enhancement is provided for use of force; threat of death, serious bodily injury, or kidnapping; or certain other means as defined in 18 U.S.C. § 2241. This includes any use or threatened use of a dangerous weapon.

An enhancement is provided when the victim is less than sixteen years of age. An additional enhancement is provided where the victim is less than twelve years of age. Any criminal sexual abuse with a child less than twelve years of age, regardless of "consent," is governed by §2A3.1.

An enhancement for a custodial relationship between defendant and victim is also provided. Whether the custodial relationship is temporary or permanent, the defendant in such a case is a person the victim trusts or to whom the victim is entrusted. This represents the potential for greater and prolonged psychological damage. Also, an enhancement is provided where the victim was an inmate of, or a person employed in, a correctional facility. Finally, enhancements are provided for permanent, life-threatening, or serious bodily injury and abduction.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 91 and 92).

§2A3.2. Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts

- (a) Base Offense Level: 15
- (b) Specific Offense Characteristic
 - (1) If the victim was in the custody, care, or supervisory control of the defendant, increase by 1 level.

Commentary

Statutory Provision: 18 U.S.C. § 2243(a).

Application Note:

1. *If the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

Background: *This section applies to sexual acts that would be lawful but for the age of the victim. It is assumed that at least a four-year age difference exists between the victim and the defendant, as specified in 18 U.S.C. § 2243(a). An enhancement is provided for a defendant who victimizes a minor under his supervision or care.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 93).

§2A3.3. Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts

- (a) Base Offense Level: 9

Commentary

Statutory Provision: 18 U.S.C. § 2243(b).

Application Note:

1. *A ward is a person in official detention under the custodial, supervisory, or disciplinary authority of the defendant.*

Background: *The offense covered by this section is a misdemeanor. The maximum term of imprisonment authorized by statute is one year.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 94).

§2A3.4. Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact

- (a) Base Offense Level:
 - (1) 16, if the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b);
 - (2) 12, if the offense was committed by the means set forth in 18 U.S.C. § 2242;
 - (3) 10, otherwise.
- (b) Specific Offense Characteristics
 - (1) If the victim had not attained the age of twelve years, increase by 4 levels; but if the resulting offense level is less than 16, increase to level 16.

- (2) If the base offense level is determined under subsection (a)(1) or (2), and the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by 2 levels.

Commentary

Statutory Provision: 18 U.S.C. § 2244(a)(1),(2),(3).

Application Notes:

1. *"The means set forth in 18 U.S.C. § 2241(a) or (b)" are by using force against the victim; by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping; by rendering the victim unconscious; or by administering by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the victim to appraise or control conduct.*
2. *"The means set forth in 18 U.S.C. § 2242" are by threatening or placing the victim in fear (other than by threatening or placing the victim in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or by victimizing an individual who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.*

Background: *This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1-3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense. Enhancements are provided for victimizing children or minors. The enhancement under subsection (b)(2) does not apply, however, where the base offense level is determined under subsection (a)(3) because an element of the offense to which that offense level applies is that the victim had attained the age of twelve years but had not attained the age of sixteen years. For cases involving consensual sexual contact involving victims that have achieved the age of 12 but are under age 16, the offense level assumes a substantial difference in sexual experience between the defendant and the victim. If the defendant and the victim are similar in sexual experience, a downward departure may be warranted. For such cases, the Commission recommends a downward departure to the equivalent of an offense level of 6.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 95).

* * * * *

4. KIDNAPPING, ABDUCTION, OR UNLAWFUL RESTRAINT

§2A4.1. Kidnapping, Abduction, Unlawful Restraint

- (a) Base Offense Level: 24
- (b) Specific Offense Characteristics
 - (1) If a ransom demand or a demand upon government was made, increase by 6 levels.
 - (2) (A) If the victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) if the victim sustained serious bodily injury, increase by 2 levels; or (C) if the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.
 - (3) If a dangerous weapon was used, increase by 2 levels.
 - (4) (A) If the victim was not released before thirty days had elapsed, increase by 2 levels.
(B) If the victim was not released before seven days had elapsed, increase by 1 level.
(C) If the victim was released before twenty-four hours had elapsed, decrease by 1 level.
 - (5) If the victim was kidnapped, abducted, or unlawfully restrained to facilitate the commission of another offense: (A) increase by 4 levels; or (B) if the result of applying this guideline is less than that resulting from application of the guideline for such other offense, apply the guideline for such other offense.

Commentary

Statutory Provisions: 18 U.S.C. §§ 115(b)(2), 351(b), (d), 1201, 1203, 1751(b).

Application Notes:

1. Definitions of "serious bodily injury" and "permanent or life-threatening bodily injury" are found in the Commentary to §1B1.1 (Application Instructions).
2. "A dangerous weapon was used" means that a firearm was discharged, or a "firearm" or "dangerous weapon" was "otherwise used" (as defined in the Commentary to §1B1.1 (Application Instructions)).
3. For the purpose of subsection (b)(4)(C), "released" includes allowing the victim to escape or turning him over to law enforcement authorities without resistance.

Background: Federal kidnapping cases generally encompass three categories of conduct: limited duration kidnapping where the victim is released unharmed; kidnapping that occurs as part of or to

facilitate the commission of another offense (often, sexual assault); and kidnapping for ransom or political demand.

The guideline contains an adjustment for the length of time that the victim was detained. The adjustment recognizes the increased suffering involved in lengthy kidnappings and provides an incentive to release the victim.

An enhancement is provided when the offense is committed for ransom or to facilitate the commission of another offense. Should the application of this guideline result in a penalty less than the result achieved by applying the guideline for the underlying offense, apply the guideline for the underlying offense (e.g., §2A3.1, Criminal Sexual Abuse).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 96).

§2A4.2. Demanding or Receiving Ransom Money

- (a) Base Offense Level: 23

Commentary

Statutory Provisions: 18 U.S.C. §§ 876, 877, 1202.

Background: This section specifically includes conduct prohibited by 18 U.S.C. § 1202, requiring that ransom money be received, possessed, or disposed of with knowledge of its criminal origins. The actual demand for ransom under these circumstances is reflected in §2A4.1. This section additionally includes extortionate demands through the use of the United States Postal Service, behavior proscribed by 18 U.S.C. §§ 876-877.

Historical Note: Effective November 1, 1987.

* * * * *

5. AIR PIRACY

§2A5.1. Aircraft Piracy or Attempted Aircraft Piracy

- (a) Base Offense Level: 38
- (b) Specific Offense Characteristic
- (1) If death resulted, increase by 5 levels.

Commentary

Statutory Provision: 49 U.S.C. § 1472(i), (n).

Background: This section covers aircraft piracy both within the special aircraft jurisdiction of the United States, 49 U.S.C. § 1472(i), and aircraft piracy outside that jurisdiction when the defendant is later found in the United States, 49 U.S.C. § 1472(n). Seizure of control of an aircraft may be by force or violence, or threat of force or violence, or by any other form of intimidation. The presence of a weapon is assumed in the base offense level.

Historical Note: Effective November 1, 1987.

§2A5.2. Interference with Flight Crew Member or Flight Attendant

- (a) Base Offense Level (Apply the greatest):
- (1) 30, if the defendant intentionally endangered the safety of the aircraft and passengers; or
 - (2) 18, if the defendant recklessly endangered the safety of the aircraft and passengers; or
 - (3) if an assault occurred, the offense level from the most analogous assault guideline, §§2A2.1-2A2.4; or
 - (4) 9.

Commentary

Statutory Provision: 49 U.S.C. § 1472(c), (j).

Background: An adjustment is provided where the defendant intentionally or recklessly endangered the safety of the aircraft and passengers. The offense of carrying a weapon aboard an aircraft, which is proscribed by 49 U.S.C. § 1472(l), is covered in §2K1.5 (Possessing Dangerous Weapons or Materials While Boarding or Aboard an Aircraft).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 97 and 303).

§2A5.3. Committing Certain Crimes Aboard Aircraft

- (a) Base Offense Level: The offense level applicable to the underlying offense.

Commentary

Statutory Provision: 49 U.S.C. § 1472(k)(1).

Application Notes:

1. "Underlying offense" refers to the offense listed in 49 U.S.C. § 1472(k)(1) of which the defendant is convicted.

2. *If the conduct intentionally or recklessly endangered the safety of the aircraft or passengers, an upward departure may be warranted.*

Historical Note: Effective October 15, 1988 (see Appendix C, amendment 65); November 1, 1989 (see Appendix C, amendment 98).

* * * * *

6. THREATENING COMMUNICATIONS

§2A6.1. Threatening Communications

- (a) Base Offense Level: 12
- (b) Specific Offense Characteristics
 - (1) If the defendant engaged in any conduct evidencing an intent to carry out such threat, increase by 6 levels.
 - (2) If specific offense characteristic §2A6.1(b)(1) does not apply, and the defendant's conduct involved a single instance evidencing little or no deliberation, decrease by 4 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 871, 876, 877, 878(a), 879.

Application Note:

1. *The Commission recognizes that this offense includes a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted. See Chapter Five, Part K (Departures).*

Background: *These statutes cover a wide range of conduct, the seriousness of which depends upon the defendant's intent and the likelihood that the defendant would carry out the threat. The specific offense characteristics are intended to distinguish such cases.*

Historical Note: Effective November 1, 1987.

PART B - OFFENSES INVOLVING PROPERTY

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

Introductory Commentary

These sections address the most basic forms of property offenses: theft, embezzlement, transactions in stolen goods, and simple property damage or destruction. (Arson is dealt with separately in Part K, Offenses Involving Public Safety.) These guidelines apply to offenses prosecuted under a wide variety of federal statutes, as well as offenses that arise under the Assimilative Crimes Act.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 303).

§2B1.1. Larceny, Embezzlement, and Other Forms of Theft

(a) Base Offense Level: 4

(b) Specific Offense Characteristics

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

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

(2) If a firearm, destructive device, or controlled substance was taken, increase by 1 level; but if the resulting offense level is less than 7, increase to level 7.

- (3) If the theft was from the person of another, increase by 2 levels.
- (4) If the offense involved more than minimal planning, increase by 2 levels.
- (5) If undelivered United States mail was taken, and the offense level as determined above is less than level 6, increase to level 6.
- (6) If the offense involved an organized scheme to steal vehicles or vehicle parts, and the offense level as determined above is less than level 14, increase to level 14.

Commentary

Statutory Provisions: 18 U.S.C. §§ 641, 656, 657, 659, 1702, 1708, 2113(b), 2312, 2317.

Application Notes:

1. *"More than minimal planning" and "firearm" are defined in the Commentary to §1B1.1 (Application Instructions). "Destructive device" is defined in the Commentary to §2K1.4 (Arson; Property Damage by Use of Explosives).*
2. *"Loss" means the value of the property taken, damaged, or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim. When property is damaged, the loss is the cost of repairs, not to exceed the loss had the property been destroyed. In cases of partially completed conduct, the loss is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy). E.g., in the case of the theft of a government check or money order, loss refers to the loss that would have occurred if the check or money order had been cashed. Similarly, if a defendant is apprehended in the process of taking a vehicle, the loss refers to the value of the vehicle even if the vehicle is recovered immediately.*
3. *The loss need not be determined with precision, and may be inferred from any reasonably reliable information available, including the scope of the operation.*
4. *The loss includes any unauthorized charges made with stolen credit cards, but in no event less than \$100 per card. See Commentary to §§2X1.1 (Attempts) and 2F1.1 (Fraud).*
5. *Controlled substances should be valued at their estimated street value.*
6. *"Undelivered United States mail" means mail that has not actually been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mail box).*
7. *"From the person of another" refers to property, taken without the use of force, that was being held by another person or was within arms' reach. Examples include pick-pocketing or non-forcible purse-snatching, such as the theft of a purse from a shopping cart.*
8. *Subsection (b)(6), referring to an "organized scheme to steal vehicles or vehicle parts," provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such*

as an auto theft ring or "chop shop." "Vehicles" refers to all forms of vehicles, including aircraft and watercraft.

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

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

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

Studies show that stolen firearms are used disproportionately in the commission of crimes. The guidelines provide an enhancement for theft of a firearm to ensure that some amount of imprisonment is required. An enhancement is also provided when controlled substances are taken. Such thefts may involve a greater risk of violence, as well as a likelihood that the substance will be abused.

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

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

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (*see* Appendix C, amendment 7); November 1, 1989 (*see* Appendix C, amendments 99-101 and 303).

§2B1.2. Receiving, Transporting, Transferring, Transmitting, or Possessing Stolen Property

(a) Base Offense Level: 4

(b) Specific Offense Characteristics

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

- (2) If the property included a firearm, destructive device, or controlled substance, increase by 1 level; but if the resulting offense level is less than 7, increase to 7.
- (3) (A) If the offense was committed by a person in the business of receiving and selling stolen property, increase by 4 levels; or
 - (B) If the offense involved more than minimal planning, increase by 2 levels.
- (4) If the property included undelivered United States mail and the offense level as determined above is less than level 6, increase to level 6.
- (5) If the offense involved an organized scheme to receive stolen vehicles or vehicle parts, and the offense level as determined above is less than level 14, increase to level 14.

Commentary

Statutory Provisions: 18 U.S.C. §§ 553(a)(1), 659, 662, 1708, 2312-2317.

Application Notes:

1. "More than minimal planning" and "firearm" are defined in the Commentary to §1B1.1 (Application Instructions). "Destructive device" is defined in the Commentary to §2K1.4 (Arson; Property Damage by Use of Explosives).
2. Valuation of property is discussed in the Commentary to §2B1.1.
3. "Undelivered United States mail" means mail that has not actually been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mail box).
4. Subsection (b)(5), referring to an "organized scheme to receive stolen vehicles or vehicle parts," provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or "chop shop." "Vehicles" refers to all forms of vehicles, including aircraft and watercraft. See Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).

Background: The treatment accorded receiving stolen property parallels that given theft. Persons who receive stolen property for resale receive a sentence enhancement because the amount of property is likely to underrepresent the scope of their criminality and the extent to which they encourage or facilitate other crimes.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 8); June 15, 1988 (see Appendix C, amendment 9); November 1, 1989 (see Appendix C, amendments 102-104).

§2B1.3. Property Damage or Destruction (Other than by Arson or Explosives)

- (a) Base Offense Level: **4**
- (b) Specific Offense Characteristics
 - (1) If the loss exceeded \$100, increase by the corresponding number of levels from the table in §2B1.1.
 - (2) If the offense involved more than minimal planning, increase by **2** levels.
 - (3) If undelivered United States mail was destroyed, and the offense level as determined above is less than level **6**, increase to level **6**.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail is involved). Arson is treated separately in Part K, Offenses Involving Public Order and Safety.

Application Notes:

1. "More than minimal planning" is defined in the Commentary to §1B1.1 (Application Instructions).
2. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).
3. "Undelivered United States mail" means mail that has not been received by the addressee or his agent (e.g., it includes mail that is in the addressee's mailbox).
4. In some cases, the monetary value of the property damaged or destroyed may not adequately reflect the extent of the harm caused. For example, the destruction of a \$500 telephone line may cause an interruption in service to thousands of people for several hours. In such instances, an upward departure would be warranted.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 10).

* * * * *

2. BURGLARY AND TRESPASS

§2B2.1. Burglary of a Residence

- (a) Base Offense Level: **17**
- (b) Specific Offense Characteristics
 - (1) If the offense involved more than minimal planning, increase by **2** levels.

- (2) If the loss exceeded \$2,500, increase the offense level as follows:

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$2,500 or less	no increase
(B)	More than \$2,500	add 1
(C)	More than \$10,000	add 2
(D)	More than \$50,000	add 3
(E)	More than \$250,000	add 4
(F)	More than \$800,000	add 5
(G)	More than \$1,500,000	add 6
(H)	More than \$2,500,000	add 7
(I)	More than \$5,000,000	add 8.

- (3) If obtaining a firearm, destructive device, or controlled substance was an object of the offense, increase by 1 level.
- (4) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

Commentary

Application Notes:

1. "More than minimal planning," "firearm," and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions). "Destructive device" is defined in the Commentary to §2K1.4 (Arson; Property Damage by Use of Explosives).
2. Obtaining a weapon or controlled substance is to be presumed to be an object of the offense if such an item was in fact taken.
3. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).
4. Subsection (b)(4) does not apply to possession of a dangerous weapon (including a firearm) that was stolen during the course of the offense.

Background: The base offense level for residential burglary is higher than for other forms of burglary because of the increased risk of physical and psychological injury. Weapon possession, but not use, is a specific offense characteristic because use of a weapon (including to threaten) ordinarily would make the offense robbery. Weapon use would be a ground for upward departure.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 11); June 15, 1988 (see Appendix C, amendment 12); November 1, 1989 (see Appendix C, amendments 105 and 106).

§2B2.2. Burglary of Other Structures

- (a) Base Offense Level: 12

(b) Specific Offense Characteristics

- (1) If the offense involved more than minimal planning, increase by 2 levels.
- (2) If the loss exceeded \$2,500, increase by the corresponding number of levels from the table in §2B2.1.
- (3) If obtaining a firearm, destructive device, or controlled substance was an object of the offense, increase by 1 level.
- (4) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2113(a), 2115, 2117, 2118(b).

Application Notes:

1. "More than minimal planning" and "firearm" are defined in the Commentary to §1B1.1 (Application Instructions). "Destructive device" is defined in the Commentary to §2K1.4 (Arson; Property Damage by Use of Explosives).
2. Obtaining a weapon or controlled substance is to be presumed to be an object of the offense if such an item was in fact taken.
3. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement and Other Forms of Theft).
4. Subsection (b)(4) does not apply to possession of a dangerous weapon (including a firearm) that was stolen during the course of the offense.

Background: The offense level for burglary is significantly higher than that for theft for low losses, but is approximately the same for very high losses. Weapon possession, but not use, is a specific offense characteristic because use of a weapon (including to threaten) ordinarily would make the offense robbery. Weapon use would be a ground for upward departure.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 13); November 1, 1989 (see Appendix C, amendment 107).

§2B2.3. Trespass

(a) Base Offense Level: 4

(b) Specific Offense Characteristics

- (1) If the trespass occurred at a secured government facility, a nuclear energy facility, or a residence, increase by 2 levels.
- (2) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

Commentary

Statutory Provision: 42 U.S.C. § 7270b.

Application Note:

1. "Firearm" and "dangerous weapon" are defined in the Commentary to §1B1.1 (Application Instructions).

Background: Most trespasses punishable under federal law involve federal lands or property. The trespass section provides an enhancement for offenses involving trespass on secured government installations, such as nuclear facilities, to protect a significant federal interest. Additionally, an enhancement is provided for trespass at a residence.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 108 and 109).

* * * * *

3. ROBBERY, EXTORTION, AND BLACKMAIL

§2B3.1. Robbery

- (a) Base Offense Level: 20
- (b) Specific Offense Characteristics
 - (1) If the offense involved robbery or attempted robbery of the property of a financial institution or post office, increase by 2 levels.
 - (2) (A) If a firearm was discharged, increase by 5 levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) if a dangerous weapon (including a firearm) was brandished, displayed, or possessed, increase by 3 levels; or (D) if an express threat of death was made, increase by 2 levels.
 - (3) 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
(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.

- (4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.
- (5) If obtaining a firearm, destructive device, or controlled substance was the object of the offense, increase by 1 level.
- (6) If the loss exceeded \$10,000, increase the offense level as follows:

	<u>Loss (Apply the Greatest)</u>	<u>Increase in Level</u>
(A)	\$10,000 or less	no increase
(B)	More than \$10,000	add 1
(C)	More than \$50,000	add 2
(D)	More than \$250,000	add 3
(E)	More than \$800,000	add 4
(F)	More than \$1,500,000	add 5
(G)	More than \$2,500,000	add 6
(H)	More than \$5,000,000	add 7.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1951, 2113, 2114, 2118(a).

Application Notes:

1. "Firearm," "dangerous weapon," "otherwise used," "brandished," "abducted," and "physically restrained" are defined in the Commentary to §1B1.1 (Application Instructions).
2. When an object that appeared to be a dangerous weapon was brandished, displayed, or possessed, treat the object as a dangerous weapon for the purposes of subsection (b)(2)(C).
3. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).
4. The combined adjustments for weapon involvement and injury are limited to a maximum enhancement of 9 levels.
5. Obtaining a weapon or controlled substance is to be presumed to be an object of the offense if such an item was in fact taken.
6. If the defendant actually intended to murder the victim, an upward departure may be warranted; see §2A2.1 (Assault With Intent to Commit Murder).

7. *If the defendant was convicted under 18 U.S.C. § 2113(e) and in committing the offense or attempting to flee or escape, a participant killed any person, apply §2A1.1 (First Degree Murder). Otherwise, if death results, see Chapter Five, Part K, Departures.*
8. *An "express threat of death," as used in subsection (b)(2)(D), may be in the form of an oral or written statement, act, gesture, or combination thereof. For example, an oral or written demand using words such as "Give me the money or I will kill you", "Give me the money or I will pull the pin on the grenade I have in my pocket", "Give me the money or I will shoot you", "Give me your money or else (where the defendant draws his hand across his throat in a slashing motion)", or "Give me the money or you are dead" would constitute an express threat of death. The court should consider that the intent of the underlying provision is to provide an increased offense level for cases in which the offender(s) engaged in conduct that would instill in a reasonable person, who is a victim of the offense, significantly greater fear than that necessary to constitute an element of the offense of robbery.*

Background: *Possession or use of a weapon, physical injury, and unlawful restraint sometimes occur during a robbery. The guideline provides for a range of enhancements where these factors are present.*

Obtaining drugs or other controlled substances is often the motive for robberies of a Veterans Administration Hospital, a pharmacy on a military base, or a similar facility. A specific offense characteristic is included for robberies where drugs or weapons were the object of the offense to take account of the dangers involved when such items are taken.

Although in current practice the amount of money taken in robbery cases affects sentence length, its importance is small compared to that of the other harm involved. Moreover, because of the relatively high base offense level for robbery, an increase of 1 or 2 levels brings about a considerable increase in sentence length in absolute terms. Accordingly, the gradations for property loss increase more slowly than for simple property offenses.

The guideline provides an enhancement for robberies where a victim was forced to accompany the defendant to another location, or was physically restrained by being tied, bound, or locked up.

Historical Note: *Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendments 14 and 15); November 1, 1989 (see Appendix C, amendments 110 and 111).*

§2B3.2. Extortion by Force or Threat of Injury or Serious Damage

- (a) Base Offense Level: 18
- (b) Specific Offense Characteristics
 - (1) If the greater of the amount obtained or demanded exceeded \$2,500, increase by the corresponding number of levels from the table in §2B3.1.
 - (2) (A) If a firearm was discharged, increase by 5 levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; (C) if a dangerous weapon (including a firearm) was brandished, displayed, or possessed, increase by 3 levels.
 - (3) 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
(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.

- (4) (A) If any person was abducted to facilitate commission of the offense or to facilitate escape, increase by 4 levels; or (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. §§ 875(b), 876, 877, 1951.

Application Notes:

1. "Firearm," "dangerous weapon," "otherwise used," "brandished," "abducted," and "physically restrained" are defined in the Commentary to §1B1.1 (Application Instructions).
2. This guideline applies if there was any threat, express or implied, that reasonably could be interpreted as one to injure a person or physically damage property, or any comparably serious threat, such as to drive an enterprise out of business. Even if the threat does not in itself imply violence, the possibility of violence or serious adverse consequences may be inferred from the circumstances of the threat or the reputation of the person making it. An ambiguous threat, such as "pay up or else," or a threat to cause labor problems, ordinarily should be treated under this section.
3. Guidelines for bribery involving public officials are found in Part C, Offenses Involving Public Officials. "Extortion under color of official right," which usually is solicitation of a bribe by a public official, is covered under §2C1.1 unless there is use of force or a threat that qualifies for treatment under this section. Certain other extortion offenses are covered under the provisions of Part E, Offenses Involving Criminal Enterprises and Racketeering.
4. The combined adjustments for weapon involvement and injury are limited to a maximum enhancement of 9 levels.
5. Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).

Background: The Hobbs Act, 18 U.S.C. § 1951, prohibits extortion, attempted extortion, and conspiracy to extort. It provides for a maximum term of imprisonment of twenty years. 18 U.S.C. §§ 875-877 prohibits communication of extortionate demands through various means. The maximum

penalty under these statutes varies from two to twenty years. Violations of 18 U.S.C. § 875 involve threats or demands transmitted by interstate commerce. Violations of 18 U.S.C. § 876 involve the use of the United States mails to communicate threats, while violations of § 877 involve mailing threatening communications from foreign countries.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 112, 113, and 303).

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

- (a) Base Offense Level: 9
- (b) Specific Offense Characteristic
 - (1) If the greater of the amount obtained or demanded exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1.

Commentary

Statutory Provisions: 18 U.S.C. §§ 873, 875-877, 1951.

Application Note:

1. This section applies only to blackmail and similar forms of extortion where there clearly is no threat of violence to person or property. "Blackmail" (18 U.S.C. § 873) is defined as a threat to disclose a violation of United States law unless money or some other item of value is given.

Background: Under 18 U.S.C. § 873, the maximum term of imprisonment authorized for blackmail is one year. Extortionate threats to injure a reputation, or other threats that are less serious than those covered by §2B3.2, may also be prosecuted under 18 U.S.C. §§ 875-877, which carry higher maximum sentences.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 114).

* * * * *

4. COMMERCIAL BRIBERY AND KICKBACKS

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

- (a) Base Offense Level: 8
- (b) Specific Offense Characteristic
 - (1) If the greater of the value of the bribe or the improper benefit to be conferred exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1.

Commentary

Statutory Provisions: 15 U.S.C. §§ 78dd-1, 78dd-2; 18 U.S.C. §§ 215, 224; 26 U.S.C., §§ 9012(e), 9042(d); 41 U.S.C. §§ 1, 53-54; 42 U.S.C. §§ 1395nn(b)(1), (2), 1396h(b)(1),(2); 49 U.S.C. §§ 11907(a), (b).

Application Notes:

1. This guideline covers commercial bribery offenses and kickbacks that do not involve officials of federal, state, or local government. See Part C, Offenses Involving Public Officials, if governmental officials are involved.
2. The "value of the improper benefit to be conferred" refers to the value of the action to be taken or effected in return for the bribe. See Commentary to §2C1.1 (Bribery).

Background: This guideline applies to violations of various federal bribery statutes that do not involve governmental officials. The base offense level is to be enhanced based upon the value of the unlawful payment or the value of the action to be taken or effected in return for the unlawful payment, whichever is greater.

One of the more commonly prosecuted offenses to which this guideline applies is offering or accepting a fee in connection with procurement of a loan from a financial institution in violation of 18 U.S.C. § 215. As is the case for most other offenses covered by this guideline, the maximum term of imprisonment authorized is five years.

As with non-commercial bribery, this guideline considers not only the amount of the bribe but also the value of the action received in return. Thus, for example, if a bank officer agreed to the offer of a \$25,000 bribe to approve a \$250,000 loan under terms for which the applicant would not otherwise qualify, the court, in increasing the offense level, would use the greater of the \$25,000 bribe, and the savings in interest over the life of the loan compared with alternative loan terms. If a gambler paid a player \$5,000 to shave points in a nationally televised basketball game, the value of the action to the gambler would be the amount that he and his confederates won or stood to gain. If that amount could not be estimated, the amount of the bribe would be used to determine the appropriate increase in offense level.

This guideline also applies to making prohibited payments to induce the award of subcontracts on federal projects for which the maximum term of imprisonment authorized was recently increased from two to ten years. 41 U.S.C. §§ 51, 53-54. Violations of 42 U.S.C. §§ 1395nn(b)(1) and (b)(2), involve the offer or acceptance of a payment to refer an individual for services or items paid for under the Medicare program. Similar provisions in 42 U.S.C. §§ 1396h(b)(1) and (b)(2) cover the offer or acceptance of a payment for referral to the Medicaid program.

This guideline also applies to violations of law involving bribes and kickbacks in expenses incurred for a presidential nominating convention or presidential election campaign. These offenses are prohibited under 26 U.S.C. §§ 9012(e) and 9042(d), which apply to candidates for President and Vice President whose campaigns are eligible for federal matching funds.

This guideline also applies to violations of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 77d-1 and 77d-2, and to violations of 18 U.S.C. § 224, sports bribery, as well as certain violations of the Interstate Commerce Act.

Historical Note: Effective November 1, 1987.

* * * * *

5. COUNTERFEITING, FORGERY, AND INFRINGEMENT OF COPYRIGHT OR TRADEMARK

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

- (a) Base Offense Level: 9
- (b) Specific Offense Characteristics
 - (1) If the face value of the counterfeit items exceeded \$2,000, increase by the corresponding number of levels from the table at §2F1.1 (Fraud and Deceit).
 - (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 15.

Commentary

Statutory Provisions: 18 U.S.C. §§ 471-474, 476, 477, 500, 501, 1003.

Application Notes:

1. *This guideline applies to counterfeiting of United States currency and coins, food stamps, postage stamps, treasury bills, bearer bonds and other items that generally could be described as bearer obligations of the United States, i.e., that are not made out to a specific payee.*
2. *"Counterfeit," as used in this section, means an instrument that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety. Offenses involving genuine instruments that have been altered are covered under §2B5.2.*
3. *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.*

Background: *Possession of counterfeiting devices to copy obligations (including securities) of the United States is treated as an aggravated form of counterfeiting because of the sophistication and planning involved in manufacturing counterfeit obligations and the public policy interest in protecting the integrity of government obligations. Similarly, an enhancement is provided for a defendant who produces, rather than merely passes, the counterfeit items.*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 16); November 1, 1989 (see Appendix C, amendment 115).

§2B5.2. Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

Apply §2F1.1 (Fraud and Deceit).

Commentary

Statutory Provisions: 18 U.S.C. §§ 471-473, 500, 510, 1003, 2314, 2315.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 17); November 1, 1989 (see Appendix C, amendment 116).

§2B5.3. Criminal Infringement of Copyright

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

Commentary

Statutory Provisions: 17 U.S.C. § 506(a); 18 U.S.C. §§ 2319, 2511.

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

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

Historical Note: Effective November 1, 1987.

§2B5.4. Criminal Infringement of Trademark

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 2318, 2320.

Background: The Commission concluded that trademark infringement is roughly comparable to copyright infringement.

Historical Note: Effective November 1, 1987.

* * * * *

6. MOTOR VEHICLE IDENTIFICATION NUMBERS

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

- (a) Base Offense Level: 8
- (b) Specific Offense Characteristics
 - (1) If the retail value of the motor vehicles or parts involved exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).
 - (2) If the defendant was in the business of receiving and selling stolen property, increase by 2 levels.
 - (3) If the offense involved an organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts, and the offense level as determined above is less than level 14, increase to level 14.

Commentary

Statutory Provisions: 18 U.S.C. §§ 511, 553(a)(2), 2321.

Application Note:

1. Subsection (b)(3), referring to an "organized scheme to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts," provides an alternative minimum measure of loss in the case of an ongoing, sophisticated operation such as an auto theft ring or "chop shop." "Vehicles" refers to all forms of vehicles, including aircraft and watercraft. See Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft).

Background: The statutes covered in this guideline prohibit altering or removing motor vehicle identification numbers, importing or exporting, or trafficking in motor vehicles or parts knowing that the identification numbers have been removed, altered, tampered with, or obliterated. Violations of 18 U.S.C. §§ 511 and 553(a)(2) carry a maximum of five years imprisonment. Violations of 18 U.S.C. § 2321 carry a maximum of ten years imprisonment.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 117-119).

PART C - OFFENSES INVOLVING PUBLIC OFFICIALS

Introductory Commentary

The Commission believes that current sentencing practices do not adequately reflect the seriousness of public corruption offenses. Therefore, these guidelines provide for sentences that are considerably higher than average current practice.

Historical Note: Effective November 1, 1987.

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

- (a) Base Offense Level: 10
- (b) Specific Offense Characteristics
 - (1) If the offense involved more than one bribe, increase by 2 levels.
 - (2) (If more than one applies, use the greater):
 - (A) If the value of the bribe or the benefit received, or to be received, in return for the bribe exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).
 - (B) If the offense involved a bribe for the purpose of influencing an elected official or any official holding a high level decision-making or sensitive position, increase by 8 levels.
- (c) Cross References
 - (1) If the bribe was for the purpose of concealing or facilitating another criminal offense, or for obstructing justice in respect to another criminal offense, apply §2X3.1 (Accessory After the Fact) in respect to such other criminal offense if the resulting offense level is greater than that determined above.
 - (2) If the offense involved a threat of physical injury or property destruction, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 201(b)(1), (2), 872, 1951.

Application Notes:

1. "Official holding a high level decision-making or sensitive position" includes, for example, prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility.
2. "Value of the bribe or the benefit received, or to be received, in return for the bribe" means the greater of the value of the bribe or the value of the benefit received, or to be received, in return for the bribe. The "value of the benefit received or to be received" means the net value of such benefit. For example, if a \$150,000 contract on which \$20,000 profit was made was awarded in return for a bribe, the value of the benefit received in return is \$20,000.
3. Do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill) except where the offense level is determined under §2C1.1(c)(1) or (2).
4. In some cases the monetary value of the bribe may not be known or may not adequately reflect the seriousness of the offense. For example, a small payment may be made in exchange for the falsification of inspection records for a shipment of defective parachutes or the destruction of evidence in a major narcotics case. In part, this issue is addressed by the adjustments in §2C1.1(b)(2), and §2C1.1(c)(1) and (2). However, in cases in which the seriousness of the offense is still not adequately reflected, an upward departure is warranted. See Chapter Five, Part K (Departures).
5. Where the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. See Chapter Five, Part K (Departures).
6. Related payments that, in essence, constitute a single bribe (e.g., a number of installment payments for a single action) are to be treated as a single bribe, even if charged in separate counts.

Background: This section applies to a person who offers or gives a bribe for a corrupt purpose, such as inducing a public official to participate in a fraud or to influence his official actions, or to a public official who solicits or accepts such a bribe. The maximum term of imprisonment authorized by statute for these offenses is fifteen years under 18 U.S.C. § 201(b) and (c), twenty years under 18 U.S.C. § 1951, and three years under 18 U.S.C. § 872.

The object and nature of a bribe may vary widely from case to case. In some cases, the object may be commercial advantage (e.g., preferential treatment in the award of a government contract). In others, the object may be issuance of a license to which the recipient is not entitled. In still others, the object may be the obstruction of justice. Consequently, a guideline for the offense must be designed to cover diverse situations.

The amount of the bribe is used as a factor in the guideline not because it directly measures harm to society, but because it is improbable that a large bribe would be given for a favor of little consequence. Moreover, for deterrence purposes, the punishment should be commensurate with the gain.

Under §2C1.1(b)(2), if the bribe is for the purpose of influencing an official act by certain officials, the offense level is increased by 8 levels if this increase is greater than that provided under §2C1.1(b)(1).

Under §2C1.1(c)(1), if the purpose of the bribe involved the facilitation of another criminal offense or the obstruction of justice in respect to another criminal offense, the guideline for §2X3.1 (Accessory After the Fact) in respect to that criminal offense will be applied, if the result is greater than that determined above. For example, if a bribe was given for the purpose of facilitating or covering up the offense of espionage, the guideline for accessory after the fact to espionage would be applied.

Under §2C1.1(c)(2), if the offense involved forcible extortion, the guideline from §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) will apply if the result is greater than that determined above.

Note that, when applying 2C1.1(c)(1) or (2), an adjustment from Chapter Three, Part B (Role in the Offense) will also apply. This normally will result in an increase of at least 2 levels.

Section 2C1.1 also applies to extortion by officers or employees of the United States in violation of 18 U.S.C. § 872, and Hobbs Act extortion, or attempted extortion, under color of official right, in violation of 18 U.S.C. § 1951. The Hobbs Act, 18 U.S.C. § 1951(b)(2), applies in part to any person who acts "under color of official right." This statute applies to extortionate conduct by, among others, officials and employees of state and local governments. The panoply of conduct that may be prosecuted under the Hobbs Act varies from a city building inspector who demands a small amount of money from the owner of an apartment building to ignore code violations to a state court judge who extracts substantial interest-free loans from attorneys who have cases pending in his court.

Offenses involving attempted bribery are frequently not completed because the victim reports the offense to authorities or is acting in an undercover capacity. Failure to complete the offense does not lessen the defendant's culpability in attempting to use public position for personal gain. Therefore, solicitations and attempts are treated as equivalent to the underlying offense.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 18); November 1, 1989 (see Appendix C, amendments 120-122).

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

- (a) Base Offense Level: 7
- (b) Specific Offense Characteristics
 - (1) If the offense involved more than one gratuity, increase by 2 levels.
 - (2) (If more than one applies, use the greater):
 - (A) If the value of the gratuity exceeded \$2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).
 - (B) If the gratuity was given, or to be given, to an elected official or any official holding a high level decision-making or sensitive position, increase by 8 levels.

Commentary

Statutory Provision: 18 U.S.C. § 201(c)(1).

Application Notes:

1. "Official holding a high level decision-making or sensitive position" includes, for example, prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other governmental officials with similar levels of responsibility.
2. Do not apply the adjustment in §3B1.3 (Abuse of Position or Trust or Use of Special Skill).
3. In some cases, the public official is the instigator of the offense. In others, a private citizen who is attempting to ingratiate himself or his business with the public official may be the initiator. This factor may appropriately be considered in determining the placement of the sentence within the applicable guideline range.
4. Related payments that, in essence, constitute a single gratuity (e.g., separate payments for airfare and hotel for a single vacation trip) are to be treated as a single gratuity, even if charged in separate counts.

Background: This section applies to the offering, giving, soliciting, or receiving of a gratuity to a public official in respect to an official act. A corrupt purpose is not an element of this offense. The maximum term of imprisonment authorized by statute for these offenses is two years. An adjustment is provided where the value of the gratuity exceeded \$2,000, or where the public official was an elected official or held a high level decision-making or sensitive position.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 121).

§2C1.3. Conflict of Interest

- (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.

Commentary

Statutory Provisions: 18 U.S.C. §§ 203, 205, 207-208.

Application Note:

1. Do not apply the adjustment in §3B1.3 (Abuse of Position or 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.

Historical Note: Effective November 1, 1987.

§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.

Historical Note: Effective November 1, 1987.

§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.

Historical Note: Effective November 1, 1987.

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

- (a) Base Offense Level: 7

- (b) Specific Offense Characteristic

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

Commentary

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

Application Note:

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

Background: Violations of 18 U.S.C. §§ 212 and 213 involve the offer to, or acceptance by, a bank examiner of a loan or gratuity. Violations of 18 U.S.C. § 214 involve the offer or receipt of anything of value for procuring a loan or discount of commercial paper from a Federal Reserve bank. Violations of 18 U.S.C. § 217 involve the acceptance of a fee or other consideration by a federal employee for adjusting or cancelling a farm debt. These offenses are misdemeanors for which the maximum term of imprisonment authorized by statute is one year.

Historical Note: Effective November 1, 1987.