

**PART L - OFFENSES INVOLVING IMMIGRATION, NATURALIZATION,
AND PASSPORTS**

1. IMMIGRATION

§2L1.1. Smuggling, Transporting, or Harboring an Unlawful Alien

- (a) Base Offense Level: **9**
- (b) Specific Offense Characteristics
 - (1) If the defendant committed the offense other than for profit, and without knowledge that the alien was excludable under 8 U.S.C. §§ 1182(a)(27), (28), (29), decrease by 3 levels.
 - (2) If the defendant previously has been convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense, increase by 2 levels.
 - (3) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, and the offense level determined above is less than level 8, increase to level 8.

Commentary

Statutory Provisions: 8 U.S.C. §§ 1324(a), 1327.

Application Notes:

1. "For profit" means for financial gain or commercial advantage, but this definition does not include a defendant who commits the offense solely in return for his own entry or transportation.
2. "Convicted of smuggling, transporting, or harboring an unlawful alien, or a related offense" includes any conviction for smuggling, transporting, or harboring an unlawful alien, and any conviction for aiding and abetting, conspiring or attempting to commit such offense.
3. If the defendant was convicted under 8 U.S.C. § 1328, apply the applicable guideline from Part G (see Statutory Index) rather than this guideline.
4. The adjustment under §2L1.1(b)(2) for a previous conviction is in addition to any points added to the criminal history score for such conviction in Chapter Four, Part A (Criminal History). This adjustment is to be applied only if the previous conviction occurred prior to the last overt act of the instant offense.

5. *For the purposes of §3B1.1 (Aggravating Role), the aliens smuggled, transported, or harbored are not considered participants unless they actively assisted in the smuggling, transporting, or harboring of others.*
6. *For the purposes of §3B1.2 (Mitigating Role), a defendant who commits the offense solely in return for his own entry or transportation is not entitled to a reduction for a minor or minimal role. This is because the reduction at §2L1.1(b)(1) applies to such a defendant.*
7. *8 U.S.C. §§ 1182(a)(27), (a)(28), and (a)(29) concern certain aliens who are excludable because they are subversives.*
8. *The Commission has not considered offenses involving large numbers of aliens or dangerous or inhumane treatment. An upward departure should be considered in those circumstances.*

Background: This section includes the most serious immigration offenses covered under the Immigration Reform and Control Act of 1986. A specific offense characteristic provides a reduction if the defendant did not commit the offense for profit and did not know that the alien was excludable as a subversive. A second specific offense characteristic provides an enhancement if the defendant was previously convicted of a similar offense.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendments 35, 36, and 37); November 1, 1989 (see Appendix C, amendment 192).

§2L1.2. Unlawfully Entering or Remaining in the United States

- (a) Base Offense Level: 8
- (b) Specific Offense Characteristic
 - (1) If the defendant previously was deported after sustaining a conviction for a felony, other than a felony involving violation of the immigration laws, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325 (second or subsequent offense only), 8 U.S.C. § 1326.

Application Notes:

1. *This guideline applies only to felonies. First offenses under 8 U.S.C. § 1325 are petty offenses for which no guideline has been promulgated.*
2. *In the case of a defendant with repeated prior instances of deportation without criminal conviction, a sentence at or near the maximum of the applicable guideline range may be warranted.*
3. *A 4-level increase is provided under subsection (b)(1) in the case of a defendant who was previously deported after sustaining a conviction for a felony, other than a felony involving a violation of the immigration laws. In the case of a defendant previously deported after sustaining a conviction for an aggravated felony as defined in 8 U.S.C. § 1101(a), or for any other violent felony, an upward departure may be warranted.*

4. *The adjustment under §2L1.2(b)(1) is in addition to any criminal history points added for such conviction in Chapter 4, Part A (Criminal History).*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 38); November 1, 1989 (see Appendix C, amendment 193).

§2L1.3. [Deleted]

Historical Note: Section 2L1.3 (Engaging in a Pattern of Unlawful Employment of Aliens), effective November 1, 1987, was deleted effective November 1, 1989 (see Appendix C, amendment 194).

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2. NATURALIZATION AND PASSPORTS

§2L2.1. Trafficking in Evidence of Citizenship or Documents Authorizing Entry

- (a) Base Offense Level: 9
- (b) Specific Offense Characteristic
 - (1) If the defendant committed the offense other than for profit, decrease by 3 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1425-1427, 1546.

Application Note:

1. "For profit" means for financial gain or commercial advantage.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 195).

§2L2.2. Fraudulently Acquiring Evidence of Citizenship or Documents Authorizing Entry for Own Use

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic
 - (1) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1423, 1425, 1546.

Application Note:

1. *For the purposes of Chapter Three, Part D (Multiple Counts), a conviction for unlawfully entering or remaining in the United States (§2L1.2) arising from the same course of conduct is treated as a closely related count, and is therefore grouped with an offense covered by this guideline.*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 39); November 1, 1989 (see Appendix C, amendment 196).

§2L2.3. Trafficking in a United States Passport

- (a) Base Offense Level: 9
- (b) Specific Offense Characteristic
 - (1) If the defendant committed the offense other than for profit, decrease by 3 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1542, 1544.

Application Note:

1. *"For profit" means for financial gain or commercial advantage.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 197).

§2L2.4. Fraudulently Acquiring or Improperly Using a United States Passport

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic
 - (1) If the defendant is an unlawful alien who has been deported (voluntarily or involuntarily) on one or more occasions prior to the instant offense, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1543, 1544.

Application Note:

1. *For the purposes of Chapter Three, Part D (Multiple Counts), a conviction for unlawfully entering or remaining in the United States (§2L1.2) arising from the same course of conduct is treated as a closely related count, and is therefore grouped with an offense covered by this guideline.*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 40); November 1, 1989 (see Appendix C, amendment 198).

§2L2.5. Failure to Surrender Canceled Naturalization Certificate

- (a) Base Offense Level: 6

Commentary

Statutory Provision: 18 U.S.C. § 1428.

Historical Note: Effective November 1, 1987.

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PART M - OFFENSES INVOLVING NATIONAL DEFENSE

1. TREASON

§2M1.1. Treason

- (a) Base Offense Level:
- (1) 43, if the conduct is tantamount to waging war against the United States;
 - (2) the offense level applicable to the most analogous offense, otherwise.

Commentary

Statutory Provision: 18 U.S.C. § 2381.

Background: Treason is a rarely-prosecuted offense that could encompass a relatively broad range of conduct, including many of the more specific offenses in this Part. The guideline contemplates imposition of the maximum penalty in the most serious cases, with reference made to the most analogous offense guideline in lesser cases.

Historical Note: Effective November 1, 1987.

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2. SABOTAGE

§2M2.1. Destruction of War Material, Premises, or Utilities

- (a) Base Offense Level: 32

Commentary

Statutory Provisions: 18 U.S.C. § 2153; 42 U.S.C. § 2284.

Application Note:

1. Violations of 42 U.S.C. § 2284 are included in this section where the defendant was convicted of acting with intent to injure the United States or aid a foreign nation.

Historical Note: Effective November 1, 1987.

§2M2.2. Production of Defective War Material, Premises, or Utilities

- (a) Base Offense Level: 32

Commentary

Statutory Provision: 18 U.S.C. § 2154.

Historical Note: Effective November 1, 1987.

§2M2.3. Destruction of National Defense Material, Premises, or Utilities

- (a) Base Offense Level: 26

Commentary

Statutory Provisions: 18 U.S.C. § 2155; 42 U.S.C. § 2284.

Application Note:

1. *Violations of 42 U.S.C. § 2284 not included in §2M2.1 are included in this section.*

Historical Note: Effective November 1, 1987.

§2M2.4. Production of Defective National Defense Material, Premises, or Utilities

- (a) Base Offense Level: 26

Commentary

Statutory Provision: 18 U.S.C. § 2156.

Historical Note: Effective November 1, 1987.

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3. ESPIONAGE AND RELATED OFFENSES

§2M3.1. Gathering or Transmitting National Defense Information to Aid a Foreign Government

- (a) Base Offense Level:
- (1) 42, if top secret information was gathered or transmitted; or
 - (2) 37, otherwise.

Commentary

Statutory Provisions: 18 U.S.C. § 794; 42 U.S.C. §§ 2274(a), (b), 2275.

Application Notes:

1. "Top secret information" is information that, if disclosed, "reasonably could be expected to cause exceptionally grave damage to the national security." Executive Order 12356.
2. The Commission has set the base offense level in this subpart on the assumption that the information at issue bears a significant relation to the nation's security, and that the revelation will significantly and adversely affect security interests. When revelation is likely to cause little or no harm, a downward departure may be warranted. See Chapter Five, Part K (Departures).
3. The court may depart from the guidelines upon representation by the President or his duly authorized designee that the imposition of a sanction other than authorized by the guideline is necessary to protect national security or further the objectives of the nation's foreign policy.

Background: Offense level distinctions in this subpart are generally based on the classification of the information gathered or transmitted. This classification, in turn, reflects the importance of the information to the national security.

Historical Note: Effective November 1, 1987.

§2M3.2. Gathering National Defense Information

(a) Base Offense Level:

- (1) 35, if top secret information was gathered; or
- (2) 30, otherwise.

Commentary

Statutory Provisions: 18 U.S.C. §§ 793(a), (b), (c), (d), (e), (g).

Application Notes:

1. See Commentary to §2M3.1.
2. If the defendant is convicted under 18 U.S.C. § 793(d) or (e), §2M3.3 may apply. See Commentary to §2M3.3.

Background: The statutes covered in this section proscribe diverse forms of obtaining and transmitting national defense information with intent or reason to believe the information would injure the United States or be used to the advantage of a foreign government.

Historical Note: Effective November 1, 1987.

§2M3.3. Transmitting National Defense Information

(a) Base Offense Level:

- (1) 29, if top secret information was transmitted; or
- (2) 24, otherwise.

Commentary

Statutory Provisions: 18 U.S.C. §§ 793(d), (e), (g).

Application Notes:

1. See Commentary to §2M3.1.
2. If the defendant was convicted of 18 U.S.C. § 793(d) or (e) for the willful transmission or communication of intangible information with reason to believe that it could be used to the injury of the United States or the advantage of a foreign nation, apply §2M3.2.

Background: The statutes covered in this section proscribe willfully transmitting or communicating to a person not entitled to receive it a document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense. Proof that the item was communicated with reason to believe that it could be used to the injury of the United States or the advantage of a foreign nation is required only where intangible information is communicated under 18 U.S.C. § 793(d) or (e).

Historical Note: Effective November 1, 1987.

§2M3.4. Losing National Defense Information

(a) Base Offense Level:

- (1) 18, if top secret information was lost; or
- (2) 13, otherwise.

Commentary

Statutory Provision: 18 U.S.C. § 793(f).

Application Note:

1. See Commentary to §2M3.1.

Background: Offenses prosecuted under this statute generally do not involve subversive conduct on behalf of a foreign power, but rather the loss of classified information by the gross negligence of an employee of the federal government or a federal contractor.

Historical Note: Effective November 1, 1987.

§2M3.5. Tampering with Restricted Data Concerning Atomic Energy

- (a) Base Offense Level: **24**

Commentary

Statutory Provision: 42 U.S.C. § 2276.

Application Note:

1. *See Commentary to §2M3.1.*

Historical Note: Effective November 1, 1987.

§2M3.6. Disclosure of Classified Cryptographic Information

- (a) Base Offense Level:
- (1) **29**, if top secret information was disclosed; or
 - (2) **24**, otherwise.

Commentary

Statutory Provision: 18 U.S.C. § 798.

Application Note:

1. *See Commentary to §2M3.1.*

Background: The statute covered in this section proscribes the disclosure of classified information concerning cryptographic or communication intelligence to the detriment of the United States or for the benefit of a foreign government.

Historical Note: Effective November 1, 1987.

§2M3.7. Unauthorized Disclosure to Foreign Government or a Communist Organization of Classified Information by Government Employee

- (a) Base Offense Level:
- (1) **29**, if top secret information was disclosed; or
 - (2) **24**, otherwise.

Commentary

Statutory Provision: 50 U.S.C. § 783(b).

Application Note:

1. See Commentary to §2M3.1.

Historical Note: Effective November 1, 1987.

§2M3.8. Receipt of Classified Information

(a) Base Offense Level:

- (1) 29, if top secret information was received; or
- (2) 24, otherwise.

Commentary

Statutory Provision: 50 U.S.C. § 783(c).

Application Note:

1. See Commentary to §2M3.1.

Historical Note: Effective November 1, 1987.

§2M3.9. Disclosure of Information Identifying a Covert Agent

(a) Base Offense Level:

- (1) 30, if the information was disclosed by a person with, or who had authorized access to classified information identifying a covert agent; or
- (2) 25, if the information was disclosed by a person with authorized access only to other classified information.

Commentary

Statutory Provision: 50 U.S.C. § 421.

Application Notes:

1. See Commentary to §2M3.1.
2. *This guideline applies only to violations of 50 U.S.C. § 421 by persons who have or previously had authorized access to classified information. This guideline does not apply to violations of*

50 U.S.C. § 421 by defendants, including journalists, who disclosed such information without having or having had authorized access to classified information. Violations of 50 U.S.C. § 421 not covered by this guideline may vary in the degree of harm they inflict, and the court should impose a sentence that reflects such harm. See §2X5.1 (Other Offenses).

Background: *The alternative base offense levels reflect a statutory distinction by providing a greater base offense level for a violation of 50 U.S.C. § 421 by an official who has or had authorized access to classified information identifying a covert agent than for a violation by an official with authorized access only to other classified information. This guideline does not apply to violations of 50 U.S.C. § 421 by defendants who disclosed such information without having, or having had, authorized access to classified information.*

Historical Note: Effective November 1, 1987.

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4. EVASION OF MILITARY SERVICE

§2M4.1. Failure to Register and Evasion of Military Service

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic
 - (1) If the offense occurred while persons were being inducted into the armed services, other than in time of war or armed conflict, increase by 6 levels.

Commentary

Statutory Provision: 50 U.S.C. App. § 462.

Application Notes:

1. *"While persons were being inducted into the armed services" means at a time of compulsory military service under the Selective Service laws.*
2. *The Commission has not considered the appropriate sanction for this offense when persons are being inducted during time of war or armed conflict.*

Historical Note: Effective November 1, 1987.

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5. PROHIBITED FINANCIAL TRANSACTIONS AND EXPORTS

§2M5.1. Evasion of Export Controls

- (a) Base Offense Level (Apply the greater):
- (1) 22, if national security or nuclear proliferation controls were evaded; or
 - (2) 14.

Commentary

Statutory Provisions: 50 U.S.C. App. §§ 2401-2420.

Application Notes:

1. *In the case of a violation during time of war or armed conflict, an upward departure may be warranted.*
2. *In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted. See Chapter Five, Part K (Departures).*
3. *In addition to the provisions for imprisonment, 50 U.S.C. App. § 2410 contains provisions for criminal fines and forfeiture as well as civil penalties. The maximum fine for individual defendants is \$250,000. In the case of corporations, the maximum fine is five times the value of the exports involved or \$1 million, whichever is greater. When national security controls are violated, in addition to any other sanction, the defendant is subject to forfeiture of any interest in, security of, or claim against: any goods or tangible items that were the subject of the violation; property used to export or attempt to export that was the subject of the violation; and any proceeds obtained directly or indirectly as a result of the violation.*

Historical Note: Effective November 1, 1987.

§2M5.2. Exportation of Arms, Munitions, or Military Equipment or Services Without Required Validated Export License

- (a) Base Offense Level (Apply the greater):
- (1) 22, if sophisticated weaponry was involved; or
 - (2) 14.

Commentary

Statutory Provision: 22 U.S.C. § 2778.

Application Notes:

1. *In the case of a violation during time of war or armed conflict, an upward departure may be warranted. See Chapter Five, Part K (Departures).*
2. *In determining the sentence within the applicable guideline range, the court may consider the degree to which the violation threatened a security interest of the United States, the volume of commerce involved, the extent of planning or sophistication, and whether there were multiple occurrences. Where such factors are present in an extreme form, a departure from the guidelines may be warranted.*

Historical Note: Effective November 1, 1987.

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6. ATOMIC ENERGY

§2M6.1. Unlawful Acquisition, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities

- (a) Base Offense Level: 30
- (b) Specific Offense Characteristic
 - (1) If the offense was committed with intent to injure the United States or to aid a foreign nation, increase by 12 levels.

Commentary

Statutory Provisions: 42 U.S.C. §§ 2077(b), 2122, 2131. Also, 18 U.S.C. § 831 (only where the conduct is similar to that proscribed by the aforementioned statutory provisions).

Historical Note: Effective November 1, 1987.

§2M6.2. Violation of Other Federal Atomic Energy Agency Statutes, Rules, and Regulations

- (a) Base Offense Level (Apply the greater):
 - (1) 30, if the offense was committed with intent to injure the United States or to aid a foreign nation; or
 - (2) 6.

Commentary

Background: *This section applies to offenses related to nuclear energy not specifically addressed elsewhere. This provision covers, for example, violations of statutes dealing with rules and regulations, license conditions, and orders of the Nuclear Regulatory Commission and the Department of Energy.*

Historical Note: Effective November 1, 1987.

**PART N - OFFENSES INVOLVING FOOD, DRUGS,
AGRICULTURAL PRODUCTS, AND ODOMETER LAWS**

1. TAMPERING WITH CONSUMER PRODUCTS

§2N1.1. Tampering or Attempting to Tamper Involving Risk of Death or Serious Injury

- (a) Base Offense Level: 25

Commentary

Statutory Provisions: 18 U.S.C. §§ 1365(a), (e).

Application Note:

1. If death, bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

Background: The base offense level reflects the risk of death or serious injury posed to significant numbers of people by this type of product tampering.

Historical Note: Effective November 1, 1987.

§2N1.2. Providing False Information or Threatening to Tamper with Consumer Products

- (a) Base Offense Level (Apply the greater):
- (1) 16;
 - (2) If the offense involved extortion, apply §2B3.2.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1365(c), (d).

Application Notes:

1. If the offense involved extortion, apply the guideline from §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) rather than the guideline from this section.
2. If death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

Historical Note: Effective November 1, 1987.

§2N1.3. Tampering With Intent to Injure Business

(a) Base Offense Level: 12

Commentary

Statutory Provision: 18 U.S.C. § 1365(b).

Application Note:

1. *If death or bodily injury, extreme psychological injury, or substantial property damage or monetary loss resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

Historical Note: Effective November 1, 1987.

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2. **FOOD, DRUGS, AND AGRICULTURAL PRODUCTS**

§2N2.1. Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product

(a) Base Offense Level: 6

Commentary

Statutory Provisions: 7 U.S.C. §§ 150bb, 150gg; 21 U.S.C. §§ 115, 117, 122, 134-134e, 151-158, 331, 333, 458-461, 463, 466, 610-611, 614, 617, 619-620, 642-644, 676; 42 U.S.C. § 262.

Application Notes:

1. *This guideline assumes a regulatory offense that involved knowing conduct. Where only negligence was involved, a downward departure may be warranted. See Chapter Five, Part K (Departures).*
2. *If the offense involved theft, fraud, bribery, revealing trade secrets, or destruction of property, apply the guideline applicable to the underlying conduct, rather than this guideline.*
3. *If death or bodily injury, extreme psychological injury, property damage or monetary loss resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

Historical Note: Effective November 1, 1987.

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3. ODOMETER LAWS AND REGULATIONS

§2N3.1. Odometer Laws and Regulations

- (a) Base Offense Level: 6
- (b) Cross Reference
 - (1) If the offense involved more than one vehicle, apply §2F1.1 (Fraud and Deceit).

Commentary

Statutory Provisions: 15 U.S.C. §§ 1983-1988, 1990c.

Background: *The base offense level takes into account the deceptive aspect of the offense assuming a single vehicle was involved. If more than one vehicle was involved, the guideline for fraud and deception, §2F1.1, is to be applied because it is designed to deal with a pattern or scheme.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 199).

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PART P - OFFENSES INVOLVING PRISONS AND CORRECTIONAL FACILITIES

§2P1.1. Escape, Instigating or Assisting Escape

(a) Base Offense Level:

- (1) 13, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense;
- (2) 8, otherwise.

(b) Specific Offense Characteristics

- (1) If the use or the threat of force against any person was involved, increase by 5 levels.
- (2) If the defendant escaped from non-secure custody and returned voluntarily within ninety-six hours, decrease the offense level under §2P1.1(a)(1) by 7 levels or the offense level under §2P1.1(a)(2) by 4 levels.
- (3) If the defendant was a law enforcement or correctional officer or employee, or an employee of the Department of Justice, at the time of the offense, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 751, 752, 755; 28 U.S.C. § 1826.

Application Notes:

1. "Non-secure custody" means custody with no significant physical restraint (e.g., where a defendant walked away from a work detail outside the security perimeter of an institution; where a defendant failed to return to any institution from a pass or unescorted furlough; or where a defendant escaped from an institution with no physical perimeter barrier).
2. "Returned voluntarily" includes voluntarily returning to the institution or turning one's self in to a law enforcement authority as an escapee (not in connection with an arrest or other charges).
3. If the adjustment in §2P1.1(b)(3) applies, no adjustment is to be made under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
4. If death or bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 200 and 201).

§2P1.2. Providing or Possessing Contraband in Prison

(a) Base Offense Level:

- (1) 23, if the object was a firearm or destructive device.
- (2) 13, if the object was a weapon (other than a firearm or a destructive device), any object that might be used as a weapon or as a means of facilitating escape, ammunition, LSD, PCP, or a narcotic drug.
- (3) 6, if the object was an alcoholic beverage, United States or foreign currency, or a controlled substance (other than LSD, PCP, or a narcotic drug).
- (4) 4, if the object was any other object that threatened the order, discipline, or security of the institution or the life, health, or safety of an individual.

(b) Specific Offense Characteristic

- (1) If the defendant was a law enforcement or correctional officer or employee, or an employee of the Department of Justice, at the time of the offense, increase by 2 levels.

(c) Cross Reference

- (1) If the defendant is convicted under 18 U.S.C. § 1791(a)(1) and is punishable under 18 U.S.C. § 1791(b)(1), the offense level is 2 plus the offense level from §2D1.1, but in no event less than level 26.

Commentary

Statutory Provision: 18 U.S.C. § 1791.

Application Notes:

1. If the adjustment in §2P1.2(b)(1) applies, no adjustment is to be made under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).
2. Pursuant to 18 U.S.C. § 1791(c), as amended, a sentence imposed upon an inmate for a violation of 18 U.S.C. § 1791 shall be consecutive to the sentence being served at the time of the violation.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 202 and 203).

§2P1.3. Engaging In, Inciting or Attempting to Incite a Riot Involving Persons in a Facility for Official Detention

(a) Base Offense Level:

- (1) 22, if the offense was committed under circumstances creating a substantial risk of death or serious bodily injury to any person.
- (2) 16, if the offense involved a major disruption to the operation of an institution.
- (3) 10, otherwise.

Commentary

Statutory Provision: 18 U.S.C. § 1792.

Application Note:

1. *If death or bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).*

Historical Note: Effective November 1, 1987.

§2P1.4. [Deleted]

Historical Note: Section 2P1.4 (Trespass on Bureau of Prisons Facilities), effective November 1, 1987, was deleted effective November 1, 1989 (see Appendix C, amendment 204).

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PART Q - OFFENSES INVOLVING THE ENVIRONMENT

1. ENVIRONMENT

§2Q1.1. Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants

- (a) Base Offense Level: 24

Commentary

Statutory Provisions: 33 U.S.C. § 1319(c)(3); 42 U.S.C. § 6928(e).

Application Note:

1. If death or serious bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

Background: This section applies to offenses committed with knowledge that the violation placed another person in imminent danger of death or serious bodily injury.

Historical Note: Effective November 1, 1987.

§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification

- (a) Base Offense Level: 8

- (b) Specific Offense Characteristics

- (1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by 6 levels; or
(B) if the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by 4 levels.
- (2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 9 levels.
- (3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.
- (4) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 4 levels.

- (5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.
- (6) If the offense involved a simple recordkeeping or reporting violation only, decrease by 2 levels.

Commentary

Statutory Provisions: 7 U.S.C. §§ 136j-136l; 15 U.S.C. §§ 2614 and 2615; 33 U.S.C. §§ 1319(c)(1), (2), 1517(b), 1321(b)(5); 42 U.S.C. §§ 300h-2, 6928(d), 7413, 9603(b), (c), (d); 43 U.S.C. §§ 1350, 1816(a), 1822(b).

Application Notes:

1. "Recordkeeping offense" includes both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.
2. "Simple recordkeeping or reporting violation" means a recordkeeping or reporting offense in a situation where the defendant neither knew nor had reason to believe that the recordkeeping offense would significantly increase the likelihood of any substantive environmental harm.
3. This section applies to offenses involving pesticides or substances designated toxic or hazardous at the time of the offense by statute or regulation. A listing of hazardous and toxic substances in the guidelines would be impractical. Several federal statutes (or regulations promulgated thereunder) list toxics, hazardous wastes and substances, and pesticides. These lists, such as those of toxic pollutants for which effluent standards are published under the Federal Water Pollution Control Act (e.g., 33 U.S.C. § 1317) as well as the designation of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (e.g., 42 U.S.C. § 9601(14)), are revised from time to time. "Toxic" and "hazardous" are defined differently in various statutes, but the common dictionary meanings of the words are not significantly different.
4. Except when the adjustment in subsection (b)(6) for simple recordkeeping offenses applies, this section assumes knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.
5. Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from the offense levels prescribed in these specific offense characteristics may be appropriate.
6. Subsection (b)(2) applies to offenses where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. See Chapter Five, Part K (Departures).

7. *Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels either upward or downward could be warranted.*
8. *Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels either upward or downward may be warranted.*
9. *Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).*

Background: *This section applies both to substantive violations of the statute governing the handling of pesticides and toxic and hazardous substances and to recordkeeping offenses. The first four specific offense characteristics provide enhancements when the offense involved a substantive violation. The last two specific offense characteristics apply to recordkeeping offenses. Although other sections of the guidelines generally prescribe a base offense level of 6 for regulatory violations, §2Q1.2 prescribes a base offense level of 8 because of the inherently dangerous nature of hazardous and toxic substances and pesticides. A decrease of 2 levels is provided, however, for "simple recordkeeping or reporting violations" under §2Q1.2(b)(6).*

Historical Note: Effective November 1, 1987.

§2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristics
 - (1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment, increase by 6 levels; or
 - (B) if the offense otherwise involved a discharge, release, or emission of a pollutant, increase by 4 levels.
 - (2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 11 levels.
 - (3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.
 - (4) If the offense involved a discharge without a permit or in violation of a permit, increase by 4 levels.
 - (5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

Commentary

Statutory Provisions: 33 U.S.C. §§ 403, 406, 407, 411, 1319(c)(1), (c)(2), 1415(b), 1907, 1908; 42 U.S.C. § 7413.

Application Notes:

1. "Recordkeeping offense" includes both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.
2. If the offense involved mishandling of nuclear material, apply §2M6.2 (Violation of Other Federal Atomic Energy Statutes, Rules, and Regulations) rather than this guideline.
3. The specific offense characteristics in this section assume knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.
4. Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation a departure of up to two levels in either direction from that prescribed in these specific offense characteristics may be appropriate.
5. Subsection (b)(2) applies to offenses where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. See Chapter Five, Part K (Departures).
6. Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels in either direction could be warranted.
7. Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels in either direction may be warranted.
8. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).

Background: This section parallels §2Q1.2 but applies to offenses involving substances which are not pesticides and are not designated as hazardous or toxic.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 205).

§2Q1.4. Tampering or Attempted Tampering with Public Water System

- (a) Base Offense Level: 18
- (b) Specific Offense Characteristics
 - (1) If a risk of death or serious bodily injury was created, increase by 6 levels.
 - (2) If the offense resulted in disruption of a public water system or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.
 - (3) If the offense resulted in an ongoing, continuous, or repetitive release of a contaminant into a public water system or lasted for a substantial period of time, increase by 2 levels.
 - (4) If the purpose of the offense was to influence government action or to extort money, increase by 6 levels.

Commentary

Statutory Provision: 42 U.S.C. § 300i-1.

Application Note:

1. "Serious bodily injury" is defined in the Commentary to §1B1.1 (Application Instructions).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 206).

§2Q1.5. Threatened Tampering with Public Water System

- (a) Base Offense Level: 10
- (b) Specific Offense Characteristic
 - (1) If the threat or attempt resulted in disruption of a public water system or evacuation of a community or a substantial public expenditure, increase by 4 levels.
- (c) Cross Reference
 - (1) If the purpose of the offense was to influence government action or to extort money, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

Commentary

Statutory Provision: 42 U.S.C. § 300i-1.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 207).

§2Q1.6. Hazardous or Injurious Devices on Federal Lands

- (a) Base Offense Level (Apply the greatest):
- (1) If the intent was to violate the Controlled Substance Act, apply §2D1.9 (Placing or Maintaining Dangerous Devices on Federal Property to Protect the Unlawful Production of Controlled Substances);
 - (2) If the intent was to obstruct the harvesting of timber, and property destruction resulted, apply §2B1.3 (Property Damage or Destruction (Other Than by Arson or Explosives));
 - (3) If the offense involved reckless disregard to the risk that another person would be placed in danger of death or serious bodily injury under circumstances manifesting extreme indifference to such risk, the offense level from §2A2.2 (Aggravated Assault);
 - (4) 6, otherwise.

Commentary

Statutory Provision: 18 U.S.C. § 1864.

Background: The statute covered by this guideline proscribes a wide variety of conduct, ranging from placing nails in trees to interfere with harvesting equipment to placing anti-personnel devices capable of causing death or serious bodily injury to protect the unlawful production of a controlled substance. Subsections (a)(1)-(a)(3) cover the more serious forms of this offense. Subsection (a)(4) provides a minimum offense level of 6 where the intent was to obstruct the harvesting of timber and little or no property damage resulted.

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 208).

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2. CONSERVATION AND WILDLIFE

§2Q2.1. Specially Protected Fish, Wildlife, and Plants; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants

- (a) Base Offense Level: 6

(b) Specific Offense Characteristics

- (1) If the offense involved a commercial purpose, increase by 2 levels.
- (2) If the offense involved fish, wildlife, or plants that were not quarantined as required by law, increase by 2 levels.
- (3) (If more than one applies, use the greater):
 - (A) If the market value of the specially protected fish, wildlife, or plants exceeded \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or
 - (B) If the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the overall population of the species or to a discrete subpopulation, increase by 4 levels.

Commentary

Statutory Provisions: 16 U.S.C. §§ 668(a), 707(b), 1174(a), 1338(a), 1375(b), 1540(b), 3373(d); 18 U.S.C. § 545.

Background: This section applies to violations of the Endangered Species Act, the Bald Eagle Protection Act, the Migratory Bird Treaty, the Marine Mammal Protection Act, the Wild Free-Roaming Horses and Burros Act, the Fur Seal Act, the Lacey Act, and to violations of 18 U.S.C. § 545 where the smuggling activity involved fish, wildlife, or plants. Enhancements are provided where the offense involved a commercial purpose, and where the fish, wildlife, or plants were not quarantined as required by law. An additional enhancement is provided where the market value of the species exceeded \$2,000 or the offense involved a quantity of fish, wildlife, or plants that was substantial in relation either to the population of the species or to a discrete subpopulation of the species.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 41); November 1, 1989 (see Appendix C, amendments 209 and 210).

§2Q2.2. [Deleted]

Historical Note: Section 2Q2.2 (Lacey Act; Smuggling and Otherwise Unlawfully Dealing in Fish, Wildlife, and Plants), effective November 1, 1987, was deleted by consolidation with §2Q2.1 effective November 1, 1989 (see Appendix C, amendment 209).

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PART R - ANTITRUST OFFENSES

§2R1.1. Bid-Rigging, Price-Fixing or Market-Allocation Agreements Among Competitors

(a) Base Offense Level: 9

(b) Specific Offense Characteristics

- (1) If the conduct involved participation in an agreement to submit non-competitive bids, increase by 1 level.
- (2) If the volume of commerce attributable to the defendant was less than \$1,000,000 or more than \$4,000,000, adjust the offense level as follows:

Volume of Commerce (Apply the Greatest) Adjustment to Offense Level

(A) Less than \$1,000,000	subtract 1
(B) \$1,000,000 - \$4,000,000	no adjustment
(C) More than \$4,000,000	add 1
(D) More than \$15,000,000	add 2
(E) More than \$50,000,000	add 3.

For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his principal in goods or services that were affected by the violation. When multiple counts or conspiracies are involved, the volume of commerce should be treated cumulatively to determine a single, combined offense level.

(c) Fines

A fine shall be imposed in addition to any term of imprisonment. The guideline fine range for an individual conspirator is from 4 to 10 percent of the volume of commerce, but not less than \$20,000. The fine range for an organization is from 20 to 50 percent of the volume of commerce, but not less than \$100,000.

Commentary

Statutory Provision: 15 U.S.C. § 1.

Application Notes:

- 1. *Because the guideline sentences depend on the volume of commerce done by each firm, role in the offense is implicitly taken into account. Accordingly, the provisions of §3B1.1 (Aggravating Role) are to be applied only in unusual circumstances. An increase for role under §3B1.1 might be appropriate only where a defendant actually coerced others into participating in a conspiracy -- an unusual circumstance. Conversely, a decrease for role under §3B1.2 (Mitigating Role) would not be appropriate merely because an individual defendant or his firm did not profit substantially from the violation. An individual defendant should be considered for a downward adjustment for a mitigating role in the offense only if he was responsible in some minor way for*

his firm's participation in the conspiracy. A complementary bidder who did not win a bid would not for that reason qualify for a downward adjustment, but a low-level employee who participated in only one of several agreements constituting a conspiracy would.

2. In setting the fine for individuals, the court should consider the extent of the defendant's participation in the offense, his role, and the degree to which he personally profited from the offense (including salary, bonuses, and career enhancement). If the court concludes that the defendant lacks the ability to pay the guideline fine, it should impose community service in lieu of a portion of the fine. The community service should be equally as burdensome as a fine.
3. In setting the fine for an organization, the court should consider whether the organization encouraged or took steps to prevent the violation, whether high-level management was aware of the violation, and whether the organization previously engaged in antitrust violations.
4. Another consideration in setting the fine is that the average level of mark-up due to price-fixing may tend to decline with the volume of commerce involved.
5. It is the intent of the Commission that alternatives such as community confinement not be used to avoid imprisonment of antitrust offenders.
6. Understatement of seriousness is especially likely in cases involving complementary bids. If, for example, the defendant participated in an agreement not to submit a bid, or to submit an unreasonably high bid, on one occasion, in exchange for his being allowed to win a subsequent bid that he did not in fact win, his volume of commerce would be zero, although he would have contributed to harm that possibly was quite substantial. The court should consider sentences near the top of the guideline range in such cases.
7. In the case of a defendant with previous antitrust convictions, a sentence at or even above the maximum of the applicable guideline range may be warranted. See §4A1.3 (Adequacy of Criminal History Category).

Background: These guidelines apply to violations of the antitrust laws. Although they are not unlawful in all countries, there is near universal agreement that restrictive agreements among competitors, such as horizontal price-fixing (including bid rigging) and horizontal market-allocation, can cause serious economic harm. There is no consensus, however, about the harmfulness of other types of antitrust offenses, which furthermore are rarely prosecuted and may involve unsettled issues of law. Consequently, only one guideline, which deals with horizontal agreements in restraint of trade, has been promulgated.

The agreements among competitors covered by this section are almost invariably covert conspiracies that are intended to and serve no purpose other than to restrict output and raise prices, and that are so plainly anticompetitive that they have been recognized as illegal *per se*, *i.e.*, without any inquiry in individual cases as to their actual competitive effect. The Commission believes that the most effective method to deter individuals from committing this crime is through imposing short prison sentences coupled with large fines. The controlling consideration underlying this guideline is general deterrence.

Under the guidelines prison terms for these offenders should be much more common, and usually somewhat longer, than currently is typical. Absent adjustments, the guidelines require confinement of four months or longer in the great majority of cases that are prosecuted, including all bid-rigging cases. The court will have the discretion to impose considerably longer sentences within the guideline ranges. Adjustments from Chapter Three, Part E (Acceptance of Responsibility) and, in rare instances, Chapter Three, Part B (Role in the Offense), may decrease these minimum sentences; nonetheless, in

very few cases will the guidelines not require that some confinement be imposed. Adjustments will not affect the level of fines.

The guideline imprisonment terms represent a substantial change from present practice. Currently, approximately 39 percent of all individuals convicted of antitrust violations are imprisoned. Considering all defendants sentenced, the average time served recently was only forty-five days. The guideline prison terms are, however, consistent with the parole guidelines. The fines specified in the guideline represent substantial increases over existing practice. The current average fine for individuals is only approximately \$27,000; for corporations, it is approximately \$160,000.

Tying the offense level to the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive and that there is an incentive to desist from a violation once it has begun. The offense levels are not based directly on the damage caused or profit made by the defendant because damages are difficult and time consuming to establish. The volume of commerce is an acceptable and more readily measurable substitute. The limited empirical data currently available show that fines increase with the volume of commerce and the term of imprisonment probably does as well.

The Commission believes that the volume of commerce is liable to be an understated measure of seriousness in some bid-rigging cases. For this reason, and consistent with current practice, the Commission has specified a 1 level increase for bid-rigging.

Substantial fines are an essential part of the sanction. It is estimated that the average additional profit attributable to price fixing is 10 percent of the selling price. The Commission has specified that a fine from two to five times that amount be imposed on organizational defendants as a deterrent because of the difficulty in identifying violators. Additional monetary penalties can be provided through private treble damage actions. A lower fine is specified for individuals. The Commission believes that most antitrust defendants have the resources and earning capacity to pay these fines, at least over time. The statutory maximum fine is \$250,000 for individuals and \$1,000,000 for organizations, but is increased when there are convictions on multiple counts.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 211 and 303).

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PART S - MONEY LAUNDERING AND MONETARY TRANSACTION REPORTING

Introductory Commentary

Money laundering activities are essential to the operation of organized crime. Congress recently enacted new statutes prohibiting these activities and increased the maximum penalties.

The guidelines provide substantially increased punishments for these offenses. In fiscal year 1985, the time served by defendants convicted of felonies involving monetary transaction reporting under 31 U.S.C. §§ 5313, 5316, and 5322 averaged about ten months, and only a few defendants served as much as four to five years. However, courts have been imposing higher sentences as they come to appreciate the seriousness of this activity, and sentences as long as thirty-five years have been reported. Specifically, Congress made all reporting violations felonies in 1984, and enacted the Money Laundering Control Act of 1986 (18 U.S.C. §§ 1956, 1957), which creates new offenses and provides higher maximum sentences when knowledge, facilitation or concealment of serious criminal activity is proved.

Historical Note: Effective November 1, 1987.

§2S1.1. Laundering of Monetary Instruments

(a) Base Offense Level:

- (1) 23, if convicted under 18 U.S.C. § 1956(a)(1)(A) or (a)(2)(A);
- (2) 20, otherwise.

(b) Specific Offense Characteristics

- (1) If the defendant knew that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 3 levels.
- (2) If the value of the funds exceeded \$100,000, increase the offense level as follows:

<u>Value (Apply the Greatest)</u>	<u>Increase in Level</u>
(A) \$100,000 or less	no increase
(B) More than \$100,000	add 1
(C) More than \$200,000	add 2
(D) More than \$350,000	add 3
(E) More than \$600,000	add 4
(F) More than \$1,000,000	add 5
(G) More than \$2,000,000	add 6
(H) More than \$3,500,000	add 7
(I) More than \$6,000,000	add 8
(J) More than \$10,000,000	add 9
(K) More than \$20,000,000	add 10
(L) More than \$35,000,000	add 11
(M) More than \$60,000,000	add 12
(N) More than \$100,000,000	add 13.

Commentary

Statutory Provision: 18 U.S.C. § 1956.

Background: The statute covered by this guideline is a part of the Anti-Drug Abuse Act of 1986, and prohibits financial transactions involving funds that are the proceeds of "specified unlawful activity," if such transactions are intended to facilitate that activity, or conceal the nature of the proceeds or avoid a transaction reporting requirement. The maximum term of imprisonment authorized is twenty years.

In keeping with the clear intent of the legislation, this guideline provides for substantial punishment. The punishment is higher than that specified in §2S1.2 and §2S1.3 because of the higher statutory maximum, and the added elements as to source of funds, knowledge, and intent.

A higher base offense level is specified if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A) or (a)(2)(A) because those subsections apply to defendants who did not merely conceal a serious crime that had already taken place, but encouraged or facilitated the commission of further crimes. Effective November 18, 1988, 18 U.S.C. § 1956(a)(1)(A) contains two subdivisions. The base offense level of 23 applies to § 1956(a)(1)(A)(i) and (ii).

The amount of money involved is included as a factor because it is an indicator of the magnitude of the criminal enterprise, and the extent to which the defendant aided the enterprise. Narcotics trafficking is included as a factor because of the clearly expressed Congressional intent to adequately punish persons involved in that activity.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 212-214).

§2S1.2. Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity

- (a) Base Offense Level: 17
- (b) Specific Offense Characteristics
 - (1) If the defendant knew that the funds were the proceeds of:
 - (A) an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 5 levels; or
 - (B) any other specified unlawful activity (see 18 U.S.C. § 1956(c)(7)), increase by 2 levels.
 - (2) If the value of the funds exceeded \$100,000, increase the offense level as specified in §2S1.1(b)(2).

Commentary

Statutory Provision: 18 U.S.C. § 1957.

Application Note:

1. "Specified unlawful activity" is defined in 18 U.S.C. § 1956(c)(7) to include racketeering offenses (18 U.S.C. § 1961(1)), drug offenses, and most other serious federal crimes but does not include other money-laundering offenses.

Background: The statute covered by this guideline is a part of the Anti-Drug Abuse Act of 1986, and prohibits monetary transactions that exceed \$10,000 and involve the proceeds of "specified unlawful activity" (as defined in 18 U.S.C. § 1956), if the defendant knows that the funds are "criminally derived property." (Knowledge that the property is from a specified unlawful activity is not an element of the offense.) The maximum term of imprisonment specified is ten years.

The statute is similar to 18 U.S.C. § 1956, but does not require that the recipient exchange or "launder" the funds, that he have knowledge that the funds were proceeds of a specified unlawful activity, nor that he have any intent to further or conceal such an activity. In keeping with the intent of the legislation, this guideline provides for substantial punishment. The offense levels are higher than in §2S1.3 because of the higher statutory maximum and the added element of knowing that the funds were criminally derived property.

The 2-level increase in subsection (b)(1)(B) applies if the defendant knew that the funds were not merely criminally derived, but were in fact the proceeds of a specified unlawful activity. Such a distinction is not made in §2S1.1, because the level of intent required in that section effectively precludes an inference that the defendant was unaware of the nature of the activity.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 215).

§2S1.3. Failure to Report Monetary Transactions; Structuring Transactions to Evade Reporting Requirements

- (a) Base Offense Level:
 - (1) 13, if the defendant:
 - (A) structured transactions to evade reporting requirements; or
 - (B) made false statements to conceal or disguise the evasion of reporting requirements; or
 - (C) reasonably should have believed that the funds were criminally derived property;
 - (2) 5, otherwise.
- (b) Specific Offense Characteristics
 - (1) If the defendant knew or believed that the funds were criminally derived property, increase by 5 levels.
 - (2) If the base offense level is from (a)(1) above and the value of the funds exceeded \$100,000, increase the offense level as specified in §2S1.1(b)(2).

Commentary

Statutory Provisions: 18 U.S.C. § 1005; 26 U.S.C. § 7203 (if a willful violation of 26 U.S.C. § 6050I); 31 U.S.C. §§ 5313-5314, 5316, 5322, 5324.

Application Notes:

1. "Criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense. See 18 U.S.C. § 1957(f)(2).
2. Subsection (a)(1)(C) applies where a reasonable person would have believed from the circumstances that the funds were criminally derived property. Subsection (b)(1) applies if the defendant knew or believed the funds were criminally derived property. Subsection (b)(1) applies in addition to, and not in lieu of, subsection (a)(1)(C). Where subsection (b)(1) applies, subsection (a)(1)(C) also will apply. It is possible that a defendant "believed" or "reasonably should have believed" that the funds were criminally derived property even if, in fact, the funds were not so derived (e.g., in a "sting" operation where the defendant is told the funds were derived from the unlawful sale of controlled substances).

Background: The offenses covered by this guideline relate to records and reports of certain transactions involving currency and monetary instruments. The maximum prison sentence for these offenses is ten years if there is any pattern of unlawful activity, and five years otherwise.

A base offense level of 13 is provided for those offenses where the defendant either structured the transaction to evade reporting requirements, made false statements to conceal or disguise the activity, or reasonably should have believed that the funds were criminally derived property. A lower alternative base offense level of 5 is provided in all other cases. The Commission anticipates that such cases will involve simple recordkeeping or other more minor technical violations of the regulatory scheme governing certain monetary transactions committed by defendants who reasonably believe that the funds at issue emanated from legitimate sources.

Where the defendant actually knew or believed that the funds were criminally derived property, subsection (b)(1) provides for a 5 level increase in the offense level.

Except in rare cases, the dollar value of the transactions not reported is an important indicator of several factors that are pertinent to the sentence, including the size of the criminal enterprise, and the extent to which the defendant aided the enterprise.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 216-218).

PART T - OFFENSES INVOLVING TAXATION

1. INCOME TAXES

Introductory Commentary

The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.

Historical Note: Effective November 1, 1987.

§2T1.1. Tax Evasion

- (a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the "tax loss" is the greater of: (A) the total amount of tax that the taxpayer evaded or attempted to evade; and (B) the "tax loss" defined in §2T1.3.

- (b) Specific Offense Characteristics

- (1) If the defendant failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
- (2) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

Commentary

Statutory Provision: 26 U.S.C. § 7201.

Application Notes:

- False statements in furtherance of the evasion (see §§2T1.3, 2T1.5, and 2T1.8) are considered part of the offense for purposes of this guideline.*
- For purposes of the guideline, the tax loss is the amount of tax that the taxpayer evaded or attempted to evade. The tax loss does not include interest or penalties. Although the definition of tax loss corresponds to what is commonly called the "criminal deficiency," its amount is to be determined by the same rules applicable in determining any other sentencing factor. In some instances, such as when indirect methods of proof are used, the amount of the tax loss may be*

uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts.

3. *In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. The following examples are illustrative of conduct that is part of the same course of conduct or common scheme or plan: (a) there is a continuing pattern of violations of the tax laws by the defendant; (b) the defendant uses a consistent method to evade or camouflage income, e.g., backdating documents or using off-shore accounts; (c) the violations involve the same or a related series of transactions; (d) the violation in each instance involves a false or inflated claim of a similar deduction or credit; and (e) the violation in each instance involves a failure to report or an understatement of a specific source of income, e.g., interest from savings accounts or income from a particular business activity. These examples are not intended to be exhaustive.*
4. *The guideline refers to §2T1.3 to provide an alternative minimum standard for the tax loss, which is based on a percentage of the dollar amounts of certain misstatements made in returns filed by the taxpayer. This alternative standard may be easier to determine, and should make irrelevant the issue of whether the taxpayer was entitled to offsetting adjustments that he failed to claim.*
5. *"Criminal activity" means any "racketeering activity" as defined in 18 U.S.C. § 1961. If §2T1.1(b)(1) applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative.*
6. *"Sophisticated means," as used in §2T1.1(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied for example, where the defendant used offshore bank accounts, or transactions through corporate shells.*

Background: *This guideline relies most heavily on the amount of tax evaded because the chief interest protected by the statute is the collection of taxes. A greater evasion is obviously more harmful to the treasury, and more serious than a smaller one with otherwise similar characteristics. Furthermore, as the potential benefit from tax evasion increases, the sanction necessary to deter also increases.*

The overlapping imprisonment ranges in the Sentencing Table are intended to minimize the significance of disputes. The consequence of an inexact estimate of the tax loss is never severe, even when the tax loss is near the boundary of a range. For example, although the difference between \$39,999 and \$40,001 results in a change from level 10 to level 11, any sentence of eight to twelve months would be within the guidelines regardless of the offense level determination made by the court. Indeed, any sentence between ten and twelve months would be within the guidelines for a tax loss ranging from \$20,000 to \$150,000. As a consequence, for all dollar amounts, the Sentencing Table affords the court considerable latitude in evaluating other factors, even when the amount of the tax loss is uncertain.

Roughly half of all tax evaders are now sentenced to probation without imprisonment, while the other half receives sentences that require them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax evasion and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax evasion are inconsequential in relation to the potential increase in revenue. Current estimates are that income taxes are underpaid by approximately \$90 billion annually.

Although currently some large-scale evaders serve as much as five years in prison, in practice the average sentence length for defendants sentenced to a term of imprisonment does not increase rapidly with the amount of tax evaded. Thus, the average time served by those sentenced to a term of imprisonment for evading less than \$10,000 in taxes is about nine months, while the corresponding figure for those evading over \$100,000 in taxes is about sixteen months. Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involve less than \$100,000 in tax evaded. The increase is expected to be somewhat larger for cases involving more taxes.

Failure to report criminally-derived income is included as a factor for deterrence purposes. Criminally-derived income is generally difficult to establish, so that the tax loss in such cases will tend to be substantially understated. An enhancement for offenders who violate the tax laws as part of a pattern of criminal activity from which they derive a substantial portion of their income also serves to implement the mandate of 28 U.S.C. § 994(n). Current-practice estimates are that, on average, the presence of this factor increases time served by the equivalent of 2 levels.

Although tax evasion always involves some planning, unusually sophisticated efforts to conceal the evasion decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes. Analyses of data for other frauds and property crimes show that careful planning or sophistication generally results in an average increase of at least 2 levels.

The guideline does not make a distinction for an employee who prepares fraudulent returns on behalf of his employer. The adjustments in Chapter Three, Part B (Role in the Offense) should be used to make appropriate distinctions.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 219-223).

§2T1.2. Willful Failure To File Return, Supply Information, or Pay Tax

(a) Base Offense Level:

- (1)** 1 level less than the level from §2T4.1 (Tax Table) corresponding to the tax loss; or
- (2)** 5, if there is no tax loss.

For purposes of this guideline, "tax loss" means the total amount of tax that the taxpayer owed and did not pay, but, in the event of a failure to file in any year, not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded \$20,000.

(b) Specific Offense Characteristics

- (1)** If the defendant failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
- (2)** If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

(c) Cross Reference

- (1) If the defendant is convicted of a willful violation of 26 U.S.C. § 6050I, apply §2S1.3 (Failure to Report Monetary Transactions) in lieu of this guideline.

Commentary

Statutory Provision: 26 U.S.C. § 7203 (other than a willful violation of 26 U.S.C. § 6050I).

Application Notes:

1. "Criminal activity" means any "racketeering activity" as defined in 18 U.S.C. § 1961. If §2T1.2(b)(1) applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative.
2. "Sophisticated means," as used in §2T1.2(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts or transactions through corporate shells.
3. In determining the total tax loss attributable to the offense (see §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. See Application Note 3 of the Commentary to §2T1.1.

Background: Violations of 26 U.S.C. § 7203 are usually serious misdemeanors that are similar to tax evasion, except that there need be no affirmative act in support of the offense. They are rarely prosecuted unless the defendant also owed taxes that he failed to pay.

Because the conduct generally is tantamount to tax evasion, the guideline is similar to §2T1.1. Because the offense is a misdemeanor, the offense level has been set at one below the level corresponding to evasion of the same amount of taxes.

An alternative measure of the tax loss, 10 percent of gross income in excess of \$20,000, has been provided because of the difficulty of computing the tax loss, which may become the subject of protracted civil litigation. It is expected that the measure used will generally understate the tax due, and will not call for a sentence approaching the maximum unless very large incomes are involved. Thus, the burden will remain on the prosecution to provide a more accurate estimate of the tax loss if it seeks enhanced punishment.

The intended impact of this guideline is to increase the average time served for this offense, and to increase significantly the number of violators who receive a term of imprisonment. Currently, the average time served for this offense is approximately 2.5 months, including those who are not sentenced to prison. Considering only those who do serve a term of imprisonment, the average term is about six to seven months.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 224-227).

§2T1.3. Fraud and False Statements Under Penalty of Perjury

(a) Base Offense Level:

- (1) Level from §2T4.1 (Tax Table) corresponding to the tax loss, if the offense was committed in order to facilitate evasion of a tax; or
- (2) 6, otherwise.

For purposes of this guideline, the "tax loss" is 28 percent of the amount by which the greater of gross income and taxable income was understated, plus 100 percent of the total amount of any false credits claimed against tax. If the taxpayer is a corporation, use 34 percent in lieu of 28 percent.

(b) Specific Offense Characteristics

- (1) If the defendant failed to report or to correctly identify the source of income exceeding \$10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.
- (2) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.

Commentary

Statutory Provision: 26 U.S.C. § 7206, except § 7206(2).

Application Notes:

1. "Criminal activity" means any "racketeering activity" as defined in 18 U.S.C. § 1961. If §2T1.3(b)(1) applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative.
2. "Sophisticated means," as used in §2T1.3(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts or transactions through corporate shells.
3. In determining the total tax loss attributable to the offense (*see* §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated. *See* Application Note 3 of the Commentary to §2T1.1.

Background: This guideline covers conduct that usually is analogous to tax evasion, although the elements differ. Accordingly, the offense is treated much like tax evasion.

Existence of a tax loss is not an element of these offenses. Furthermore, in instances where the defendant is setting the groundwork for evasion of a tax that is expected to become due in the future, he may make false statements that underreport income that as of the time of conviction may not yet have resulted in a tax loss. In order to gauge the seriousness of these offenses, the guidelines establish a rule for determining a "tax loss" based on the nature and magnitude of the false statements made.

Use of this approach also avoids complex problems of proof and invasion of privacy when returns of persons other than the defendant and co-defendants are involved.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 228-230).

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

(a) **Base Offense Level:**

- (1) Level from §2T4.1 (Tax Table) corresponding to the resulting tax loss, if any; or
- (2) 6, otherwise.

For purposes of this guideline, the "tax loss" is the tax loss, as defined in §2T1.3, resulting from the defendant's aid, assistance, procurement or advice.

(b) **Specific Offense Characteristics**

- (1) If the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income, increase by 2 levels.
- (2) If sophisticated means were used to impede discovery of the nature or extent of the offense, increase by 2 levels.
- (3) If the defendant was in the business of preparing or assisting in the preparation of tax returns, increase by 2 levels.

Commentary

Statutory Provision: 26 U.S.C. § 7206(2).

Application Notes:

1. *Subsection (b)(1) applies to persons who derive a substantial portion of their income through the promotion of tax fraud or tax evasion, e.g., through promoting fraudulent tax shelters. If this subsection applies, do not apply §4B1.3 (Criminal Livelihood), which is substantially duplicative.*
2. *"Sophisticated means," as used in §2T1.4(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts or transactions through corporate shells.*
3. *Subsection (b)(3) applies to persons who regularly act as tax preparers or advisers for profit. Do not employ §3B1.3 (Abuse of Position of Trust or Use of Special Skill) if this adjustment applies. Subsection (b)(1) may also apply to such persons.*
4. *In certain instances, such as promotion of a tax shelter scheme, the defendant may advise other persons to violate their tax obligations through filing returns that find no support in the tax laws.*

If this type of conduct can be shown to have resulted in the filing of false returns (regardless of whether the principals were aware of their falsity), the misstatements in all such returns will contribute to one aggregate "tax loss."

Background: *An increased offense level is specified for tax preparers and advisers because their misconduct poses a greater risk of revenue loss and is more clearly willful. Other considerations are similar to those in §2T1.3.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 231 and 303).

§2T1.5. Fraudulent Returns, Statements, or Other Documents

- (a) Base Offense Level: 6

Commentary

Statutory Provision: 26 U.S.C. § 7207.

Background: *The offense is a misdemeanor. It is to be distinguished from 26 U.S.C. § 7206(1) (§2T1.3), which is a felony involving a false statement under penalty of perjury. The offense level has been set at 6 in order to give the sentencing judge considerable latitude because the conduct could be similar to tax evasion.*

Historical Note: Effective November 1, 1987.

§2T1.6. Failing to Collect or Truthfully Account for and Pay Over Tax

- (a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax not collected or accounted for and paid over.

Commentary

Statutory Provision: 26 U.S.C. § 7202.

Application Note:

1. *In the event that the employer not only failed to account to the Internal Revenue Service and pay over the tax, but also collected the tax from employees and did not account to them for it, it is both tax evasion and a form of embezzlement. In such instances, an upward departure may be warranted.*

Background: *The offense is a felony that is infrequently prosecuted. The failure to collect or truthfully account for the tax must be willful, as must the failure to pay. Where no effort is made to defraud the employee, the offense is a form of tax evasion, and is treated as such in the guidelines.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 232).

§2T1.7. Failing to Deposit Collected Taxes in Trust Account as Required After Notice

- (a) Base Offense Level (Apply the greater):
- (1) 4; or
 - (2) 5 less than the level from §2T4.1 (Tax Table) corresponding to the amount not deposited.

Commentary

Statutory Provisions: 26 U.S.C. §§ 7215, 7512(b).

Application Notes:

1. *If funds are deposited and withdrawn without being paid to the Internal Revenue Service, they should be treated as never having been deposited.*
2. *It is recommended that the fine be based on the total amount of funds not deposited.*

Background: *This offense is a misdemeanor that does not require any intent to evade taxes, nor even that taxes have not been paid. The more serious offense is 26 U.S.C. § 7202 (see §2T1.6).*

This offense should be relatively easy to detect and fines may be feasible. Accordingly, the offense level has been set considerably lower than for tax evasion, although some effort has been made to tie the offense level to the level of taxes that were not deposited.

Historical Note: Effective November 1, 1987.

§2T1.8. Offenses Relating to Withholding Statements

- (a) Base Offense Level: 4

Commentary

Statutory Provisions: 26 U.S.C. §§ 7204, 7205.

Application Note:

1. *If the defendant was attempting to evade, rather than merely delay, payment of taxes, a sentence above the guidelines may be warranted.*

Background: *The offenses are misdemeanors. Currently, imprisonment is unusual.*

Historical Note: Effective November 1, 1987.

§2T1.9. Conspiracy to Impair, Impede or Defeat Tax

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

- (1) Offense level determined from §2T1.1 or §2T1.3, as applicable; or
- (2) 10.

(b) Specific Offense Characteristics

If more than one applies, use the greater:

- (1) If the offense involved the planned or threatened use of violence, increase by 4 levels.
- (2) If the conduct was intended to encourage persons other than or in addition to co-conspirators to violate the internal revenue laws or impede or impair the Internal Revenue Service in the assessment and collection of revenue, increase by 2 levels.

Commentary

Statutory Provision: 18 U.S.C. § 371.

Application Notes:

1. This section applies to conspiracies to "defraud the United States by impeding, impairing, obstructing and defeating. . . the collection of revenue." United States v. Carruth, 699 F.2d 1017, 1021 (9th Cir. 1983), cert. denied, 104 S. Ct. 698 (1984). See also United States v. Browning, 723 F.2d 1544 (11th Cir. 1984); United States v. Klein, 247 F.2d 908, 915 (2d Cir. 1957), cert. denied, 355 U.S. 924 (1958). It does not apply to taxpayers, such as a husband and wife, who merely evade taxes jointly or file a fraudulent return.
2. The base offense level is the offense level (base offense level plus any applicable specific offense characteristics) from §2T1.1 or §2T1.3 (whichever is applicable to the underlying conduct), if that offense level is greater than 10. Otherwise, the base offense level is 10.
3. Specific offense characteristics from §2T1.9(b) are to be applied to the base offense level determined under §2T1.9(a)(1) or (2).

Background: This type of conspiracy generally involves substantial sums of money. It also typically is complex and may be far-reaching, making it quite difficult to evaluate the extent of the revenue loss caused. Additional specific offense characteristics are included because of the potential for these tax conspiracies to subvert the revenue system and the danger to law enforcement agents and the public.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 233 and 234).

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2. ALCOHOL AND TOBACCO TAXES

Introductory Commentary

This section deals with offenses contained in Parts I-IV of Subchapter J of Title 26, chiefly 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5691, and 5762, where the essence of the conduct is tax evasion or a regulatory violation. Because these offenses are no longer a major enforcement priority, no effort has been made to provide a section-by-section set of guidelines. Rather, the conduct is dealt with by dividing offenses into two broad categories: tax evasion offenses and regulatory offenses.

Historical Note: Effective November 1, 1987.

§2T2.1. Non-Payment of Taxes

- (a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the "tax loss" is the amount of taxes that the taxpayer failed to pay or attempted not to pay.

Commentary

Statutory Provisions: 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5691, 5762, provided the conduct constitutes non-payment, evasion or attempted evasion of taxes.

Application Notes:

1. The tax loss is the total amount of unpaid taxes that were due on the alcohol and/or tobacco, or that the defendant was attempting to evade.
2. Offense conduct directed at more than tax evasion (e.g., theft or fraud) may warrant an upward departure.

Background: The most frequently prosecuted conduct violating this section is operating an illegal still. 26 U.S.C. § 5601(a)(1).

Historical Note: Effective November 1, 1987.

§2T2.2. Regulatory Offenses

- (a) Base Offense Level: 4

Commentary

Statutory Provisions: 26 U.S.C. §§ 5601-5605, 5607, 5608, 5661, 5671, 5691, 5762, provided the conduct is tantamount to a record-keeping violation rather than an effort to evade payment of taxes.

Background: Prosecutions of this type are infrequent.

Historical Note: Effective November 1, 1987.

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3. CUSTOMS TAXES

Introductory Commentary

This part deals with violations of 18 U.S.C. §§ 496, 541-545, 547, 548, 550, 551, 1915 and 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b). These guidelines are primarily aimed at revenue collection or trade regulation. They are not intended to deal with the importation of contraband, such as drugs, or other items such as obscene material, firearms or pelts of endangered species, the importation of which is prohibited or restricted for non-economic reasons. Other, more specific legislation generally applies to most of these offenses. Importation of contraband or stolen goods would be a reason for referring to another, more specific guideline, or for imposing a sentence above that specified in these guidelines.

Historical Note: Effective November 1, 1987.

§2T3.1. Evading Import Duties or Restrictions (Smuggling)

- (a) Base Offense Level: Level from §2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the "tax loss" is the amount of the duty.

Commentary

Statutory Provisions: 18 U.S.C. §§ 496, 541-545, 547, 548, 550, 551, 1915; 19 U.S.C. §§ 283, 1436, 1464, 1465, 1586(e), 1708(b).

Application Notes:

1. *A sentence at or near the minimum of the guideline range typically would be appropriate for cases involving tourists who bring in items for their own use. Such conduct generally poses a lesser threat to revenue collection.*
2. *Particular attention should be given to those items for which entry is prohibited, limited, or restricted. Especially when such items are harmful or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, the court should impose a sentence above the guideline. A sentence based upon an alternative measure of the "duty" evaded, such as the increase in market value due to importation, or 25 percent of the items' fair market value in the United States if the increase in market value due to importation is not readily ascertainable, might be considered.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 235).

§2T3.2. Receiving or Trafficking in Smuggled Property

- (a) **Base Offense Level:** Level from §2T4.1 (Tax Table) corresponding to the tax loss.

For purposes of this guideline, the "tax loss" is the amount of the duty.

Commentary

Statutory Provision: 18 U.S.C. § 545.

Application Note:

1. *Particular attention should be given to those items for which entry is prohibited, limited, or restricted. Especially when such items are harmful or protective quotas are in effect, the duties evaded on such items may not adequately reflect the harm to society or protected industries resulting from their importation. In such instances, the court should impose a sentence above the guideline. A sentence based upon an alternative measure of the "duty" evaded, such as the increase in market value due to importation, or 25 percent of the items' fair market value in the United States if the increase in market value due to importation is not readily ascertainable, might be considered.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 236).

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4. TAX TABLE

§2T4.1. Tax Table

	<u>Tax Loss (Apply the Greatest)</u>	<u>Offense Level</u>
(A)	\$2,000 or less	6
(B)	More than \$2,000	7
(C)	More than \$5,000	8
(D)	More than \$10,000	9
(E)	More than \$20,000	10
(F)	More than \$40,000	11
(G)	More than \$70,000	12
(H)	More than \$120,000	13
(I)	More than \$200,000	14
(J)	More than \$350,000	15
(K)	More than \$500,000	16
(L)	More than \$800,000	17
(M)	More than \$1,500,000	18
(N)	More than \$2,500,000	19
(O)	More than \$5,000,000	20
(P)	More than \$10,000,000	21
(Q)	More than \$20,000,000	22
(R)	More than \$40,000,000	23
(S)	More than \$80,000,000	24.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 237).

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PART X - OTHER OFFENSES

1. CONSPIRACIES, ATTEMPTS, SOLICITATIONS

§2X1.1. Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)

- (a) **Base Offense Level:** The base offense level from the guideline for the object offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty.
- (b) **Specific Offense Characteristics**
 - (1) If an attempt, decrease by 3 levels, unless the defendant completed all the acts the defendant believed necessary for successful completion of the offense or the circumstances demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control.
 - (2) If a conspiracy, decrease by 3 levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control.
 - (3) (A) If a solicitation, decrease by 3 levels unless the person solicited to commit or aid the offense completed all the acts he believed necessary for successful completion of the object offense or the circumstances demonstrate that the person was about to complete all such acts but for apprehension or interruption by some similar event beyond such person's control.
 - (B) If the statute treats solicitation of the offense identically with the object offense, do not apply subdivision (A) above; *i.e.*, the offense level for solicitation is the same as that for the object offense.
- (c) **Cross Reference**
 - (1) When an attempt, solicitation, or conspiracy is expressly covered by another offense guideline section, apply that guideline section.

Commentary

Statutory Provisions: 18 U.S.C. §§ 371, 372, 2271.

Application Notes:

1. *Certain attempts, conspiracies, and solicitations are expressly covered by other offense guidelines.*

Offense guidelines that expressly cover attempts include: §2A2.1 (Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder); §2A3.1 (Criminal Sexual Abuse; Attempt or Assault with the Intent to Commit Criminal Sexual Abuse); §2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts); §2A3.3 (Criminal Sexual Abuse of a Ward or Attempt to Commit Such Acts); §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact); §2A4.2 (Demanding or Receiving Ransom Money); §2A5.1 (Aircraft Piracy or Attempted Aircraft Piracy); §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); §2D1.4 (Attempts and Conspiracies); §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan); §2N1.1 (Tampering or Attempting to Tamper Involving Risk of Death or Serious Injury); §2Q1.4 (Tampering or Attempted Tampering with Public Water System).

Offense guidelines that expressly cover conspiracies include: §2A2.1 (Assault With Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder); §2D1.4 (Attempts and Conspiracies); §2H1.2 (Conspiracy to Interfere with Civil Rights); §2T1.9 (Conspiracy to Impair, Impede or Defeat Tax).

Offense guidelines that expressly cover solicitations include: §2A2.1 (Assault with Intent to Commit Murder; Conspiracy or Solicitation to Commit Murder; Attempted Murder); §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right); §2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity); §2E5.1 (Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan).

2. *Under §2X1.1(a) the base offense level will be the same as that for the object offense which the defendant solicited, or conspired or attempted to commit. But the only specific offense characteristics from the guideline for the object offense that apply are those that are determined to have been specifically intended or actually occurred. Speculative specific offense characteristics will not be applied. For example, if two defendants are arrested during the conspiratorial stage of planning an armed bank robbery, the offense level ordinarily would not include aggravating factors regarding possible injury to others, hostage taking, discharge of a weapon, or obtaining a large sum of money, because such factors would be speculative. The offense level would simply reflect the level applicable to robbery of a financial institution, with the enhancement for possession of a weapon. If it was established that the defendants actually intended to physically restrain the teller, the specific offense characteristic for physical restraint would be added. In an attempted theft, the value of the items that the defendant attempted to steal would be considered.*
3. *If the object offense is not covered by a specific guideline, see §2X5.1 (Other Offenses).*
4. *In certain cases, the participants may have completed (or have been about to complete but for apprehension or interruption) all of the acts necessary for the successful completion of part, but not all, of the intended offense. In such cases, the offense level for the count (or group of closely-related multiple counts) is whichever of the following is greater: the offense level for the intended offense minus 3 levels (under §2X1.1(b)(1), (b)(2), or (b)(3)(A)), or the offense level for the part of the offense for which the necessary acts were completed (or about to be completed but for apprehension or interruption). For example, where the intended offense was the theft of \$800,000 but the participants completed (or were about to complete) only the acts necessary*

to steal \$30,000, the offense level is the offense level for the theft of \$800,000 minus 3 levels, or the offense level for the theft of \$30,000, whichever is greater.

In the case of multiple counts that are not closely-related counts, whether the 3-level reduction under §2X1.1(b)(1) or (2) applies is determined separately for each count.

Background: *In most prosecutions for conspiracies or attempts, the object offense was substantially completed or was interrupted or prevented on the verge of completion by the intercession of law enforcement authorities or the victim. In such cases, no reduction of the offense level is warranted. Sometimes, however, the arrest occurs well before the defendant or any co-conspirator has completed the necessary acts of the object offense. Under such circumstances, a reduction of 3 levels is provided under §2X1.1(b)(1) or (2).*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 42); November 1, 1989 (see Appendix C, amendments 238-242).

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2. AIDING AND ABETTING

§2X2.1. Aiding and Abetting

The offense level is the same level as that for the underlying offense.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2, 755-757.

Application Note:

1. "Underlying offense" means the offense the defendant is convicted of aiding or abetting.

Background: *A defendant convicted of aiding and abetting is punishable as a principal. 18 U.S.C. § 2. This section provides that aiding and abetting the commission of an offense has the same offense level as the underlying offense. An adjustment for a mitigating role (§3B1.2) may be applicable.*

Historical Note: Effective November 1, 1987.

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3. ACCESSORY AFTER THE FACT

§2X3.1. Accessory After the Fact

- (a) Base Offense Level: 6 levels lower than the offense level for the underlying offense, but in no event less than 4, or more than 30.

Commentary

Statutory Provisions: 18 U.S.C. §§ 3, 757, 1071, 1072.

Application Notes:

1. "Underlying offense" means the offense as to which the defendant is convicted of being an accessory. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note 1 of the Commentary to §1B1.3 (Relevant Conduct).
2. The adjustment from §3B1.2 (Mitigating Role) normally would not apply because an adjustment for reduced culpability is incorporated in the base offense level.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 243).

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4. MISPRISION OF FELONY

§2X4.1. Misprision of Felony

- (a) Base Offense Level: 9 levels lower than the offense level for the underlying offense, but in no event less than 4, or more than 19.

Commentary

Statutory Provision: 18 U.S.C. § 4.

Application Notes:

1. "Underlying offense" means the offense as to which the defendant is convicted of committing the misprision. Apply the base offense level plus any applicable specific offense characteristics that were known, or reasonably should have been known, by the defendant; see Application Note 1 of the Commentary to §1B1.3 (Relevant Conduct).
2. The adjustment from §3B1.2 (Mitigating Role) normally would not apply because an adjustment for reduced culpability is incorporated in the base offense level.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 244).

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5. ALL OTHER OFFENSES

§2X5.1. Other Offenses

If the offense is a felony or Class A misdemeanor for which no guideline expressly has been promulgated, apply the most analogous offense guideline. If there is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) shall control.

Commentary

***Background:** Many offenses, especially assimilative crimes, are not listed in the Statutory Index or in any of the lists of Statutory Provisions that follow each offense guideline. Nonetheless, the specific guidelines that have been promulgated cover the type of criminal behavior that most such offenses proscribe. The court is required to determine if there is a sufficiently analogous offense guideline, and, if so, to apply the guideline that is most analogous. Where there is efficiently analogous guideline, the provisions of 18 U.S.C. § 3553(b) control. That statute provides in relevant part as follows: "In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in [18 U.S.C. § 3553] subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission."*

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 43).