

## PART E - OFFENSES INVOLVING CRIMINAL ENTERPRISES AND RACKETEERING

### 1. RACKETEERING

#### Introductory Commentary

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

Historical Note: Effective November 1, 1987.

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

- (a) Base Offense Level (Apply the greater):
- (1) 19; or
  - (2) the offense level applicable to the underlying racketeering activity.

#### Commentary

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

#### Application Notes:

1. *Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.*
2. *If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.*
3. *If the offense level for the underlying racketeering activity is less than the alternative minimum level specified (i.e., 19), the alternative minimum base offense level is to be used.*
4. *Certain conduct may be charged in the count of conviction as part of a "pattern of racketeering activity" even though the defendant has previously been sentenced for that conduct. Where such previously imposed sentence resulted from a conviction prior to the last overt act of the instant offense, treat as a prior sentence under §4A1.2(a)(1) and not as part of the instant offense. This treatment is designed to produce a result consistent with the distinction between the instant offense and criminal history found throughout the guidelines. If this treatment produces an anomalous result in a particular case, a guideline departure may be warranted.*

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 26); November 1, 1989 (see Appendix C, amendment 142).

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

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

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

Commentary

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

Application Notes:

1. *Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.*
2. *If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.*
3. *If the offense level for the underlying conduct is less than the alternative minimum base offense level specified (i.e., 6), the alternative minimum base offense level is to be used.*

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 27).

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

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

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

Commentary

Statutory Provision: 18 U.S.C. § 1959 (formerly 18 U.S.C. § 1952B).

Application Notes:

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

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

**Historical Note:** Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 143).

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

- (a) Base Offense Level (Apply the greater):
- (1) 32; or
  - (2) the offense level applicable to the underlying unlawful conduct.

**Commentary**

**Statutory Provision:** 18 U.S.C. § 1958 (formerly 18 U.S.C. § 1952A).

**Application Note:**

1. *If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.*

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

**Historical Note:** Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 144); November 1, 1990 (see Appendix C, amendment 311).

**§2E1.5. Hobbs Act Extortion or Robbery**

Apply §2B3.1 (Robbery), §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), §2B3.3 (Blackmail and Similar Forms of Extortion), or §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), as applicable.

**Commentary**

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

**Historical Note:** Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 145).

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## 2. EXTORTIONATE EXTENSION OF CREDIT

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

- (a) Base Offense Level: 20
- (b) Specific Offense Characteristics
  - (1) (A) If a firearm was discharged increase by 5 levels; or
  - (B) if a dangerous weapon (including a firearm) was otherwise used, increase by 4 levels; or
  - (C) if a dangerous weapon (including a firearm) was brandished, displayed or possessed, increase by 3 levels.
  - (2) If any victim sustained bodily injury, increase the offense level according to the seriousness of the injury:

	<u>Degree of Bodily Injury</u>	<u>Increase in Level</u>
(A)	Bodily Injury	add 2
(B)	Serious Bodily Injury	add 4
(C)	Permanent or Life-Threatening Bodily Injury	add 6
(D)	If the degree of injury is between that specified in subdivisions (A) and (B), add 3 levels; or	
(E)	If the degree of injury is between that specified in subdivisions (B) and (C), add 5 levels.	

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

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

#### Commentary

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

#### Application Notes:

1. Definitions of "firearm," "dangerous weapon," "otherwise used," "brandished," "bodily injury," "serious bodily injury," "permanent or life-threatening bodily injury," "abducted," and "physically restrained" are found in the Commentary to §1B1.1 (Application Instructions).

2. See also Commentary to §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) regarding the interpretation of the specific offense characteristics.

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 146-148).

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### 3. GAMBLING

#### Introductory Commentary

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

Historical Note: Effective November 1, 1987.

#### §2E3.1. Engaging in a Gambling Business

- (a) Base Offense Level: 12

#### Commentary

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

Historical Note: Effective November 1, 1987.

#### §2E3.2. Transmission of Wagering Information

- (a) Base Offense Level: 12

#### Commentary

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

Historical Note: Effective November 1, 1987.

**§2E3.3. Other Gambling Offenses**

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic
  - (1) If the offense is committed as part of, or to facilitate, a commercial gambling operation, increase by 6 levels.

Commentary

Statutory Provisions: 15 U.S.C. §§ 1172-1175; 18 U.S.C. §§ 1082, 1301-1304, 1306, 1511, 1953. For additional statutory provision(s), see Appendix A (Statutory Index).

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

Historical Note: Effective November 1, 1987.

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**4. TRAFFICKING IN CONTRABAND CIGARETTES**

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

- (a) Base Offense Level (Apply the greater):
  - (1) 9; or
  - (2) the offense level from the table in §2T4.1 (Tax Table) corresponding to the amount of the tax evaded.

Commentary

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

Application Note:

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

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

Historical Note: Effective November 1, 1987.

## 5. LABOR RACKETEERING

### Introductory Commentary

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

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

Historical Note: Effective November 1, 1987.

#### **§2E5.1. Offering, Accepting, or Soliciting a Bribe or Gratuity Affecting the Operation of an Employee Welfare or Pension Benefit Plan**

- (a) Base Offense Level:
  - (1) 10, if a bribe; or
  - (2) 6, if a gratuity.
- (b) Specific Offense Characteristics
  - (1) If the defendant was a fiduciary of the benefit plan, increase by 2 levels.
  - (2) Increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.

### Commentary

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

#### Application Notes:

1. "Bribe" refers to the offer or acceptance of an unlawful payment with the specific understanding that it will corruptly affect an official action of the recipient.
2. "Gratuity" refers to the offer or acceptance of an unlawful payment other than a bribe.
3. "Fiduciary of the benefit plan" is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or

*exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.*

4. *"Value of the improper benefit to the payer" is explained in the Commentary to §2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right).*
5. *If the adjustment for a fiduciary at §2E5.1(b)(1) applies, do not apply the adjustment at §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

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

**Historical Note:** Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 149).

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

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

#### **Commentary**

**Statutory Provision:** 18 U.S.C. § 664.

#### **Application Notes:**

1. *In the case of a defendant who had a fiduciary obligation under the Employee Retirement Income Security Act, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) would apply.*
2. *"Fiduciary of the benefit plan" is defined in 29 U.S.C. § 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.*

**Background:** *This section covers theft or conversion from employee benefit plans by fiduciaries, or by any person, including borrowers to whom loans are disbursed based upon materially defective loan applications, service providers who are paid on inflated billings, and beneficiaries paid as the result of fraudulent claims.*

**Historical Note:** Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 28); November 1, 1989 (see Appendix C, amendment 150).

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

- (a) Base Offense Level (Apply the greater):
- (1) 6; or
  - (2) If the offense was committed to facilitate or conceal a theft or embezzlement, or an offense involving a bribe or a gratuity relating to the operation of an employee benefit plan, apply §2E5.2 or §2E5.1, as applicable.

Commentary

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

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 151).

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

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

Commentary

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

Application Note:

1. In the case of a defendant who was a union officer or occupied a position of trust in the union, as set forth in 29 U.S.C. § 501(a), an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) would apply.

Background: This section includes embezzlement or theft from a labor organization. It is directed at union officers and persons employed by a union.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 29); November 1, 1989 (see Appendix C, amendment 152).

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

- (a) Base Offense Level (Apply the greater):
- (1) 6; or
  - (2) If the offense was committed to facilitate or conceal a theft or embezzlement, or an offense involving a bribe or gratuity, apply §2E5.4 or §2E5.6, as applicable.

Commentary

Statutory Provisions: 29 U.S.C. §§ 439, 461. For additional statutory provision(s), see Appendix A (Statutory Index).

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 153).

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

- (a) Base Offense Level:
- (1) 10, if a bribe; or
  - (2) 6, if a gratuity.
- (b) Specific Offense Characteristic
- (1) Increase by the number of levels from the table in §2F1.1 (Fraud and Deceit) corresponding to the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater.

Commentary

Statutory Provision: 29 U.S.C. § 186.

Application Notes:

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

Historical Note: Effective November 1, 1987.

**PART F - OFFENSES INVOLVING FRAUD OR DECEIT**

**§2F1.1. Fraud and Deceit**

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

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

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

- (2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.
- (3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree or process, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.
- (4) If the offense involved the conscious or reckless risk of serious bodily injury, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.
- (5) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level as determined above is less than level 12, increase to level 12.

- (6) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

#### Commentary

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

#### Application Notes:

1. *The adjustments in §2F1.1(b)(3) are alternative rather than cumulative. If in a particular case, however, both of the enumerated factors applied, an upward departure might be warranted.*
2. *"More than minimal planning" (subsection (b)(2)(A)) is defined in the Commentary to §1B1.1 (Application Instructions).*
3. *"Scheme to defraud more than one victim," as used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one person. In this context, "victim" refers to the person or entity from which the funds are to come directly. Thus, a wire fraud in which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.*
4. *Subsection (b)(3)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously-affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.*
5. *Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, and the defendant had knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically-named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision.*
6. *Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. See Chapter Three, Part D (Multiple Counts).*
7. *Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). In keeping with the Commission's policy on attempts, if a probable or intended loss that the defendant was attempting to inflict can be determined, that figure would be used if it was larger than the actual loss. For example, if the fraud consisted of attempting to sell*

*\$40,000 in worthless securities, or representing that a forged check for \$40,000 was genuine, the "loss" would be treated as \$40,000 for purposes of this guideline.*

8. *The amount of loss need not be precise. The court is not expected to identify each victim and the loss he suffered to arrive at an exact figure. The court need only make a reasonable estimate of the range of loss, given the available information. The estimate may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. Estimates based upon aggregate "market loss" (e.g., the aggregate decline in market value of a stock resulting from disclosure of information that was wrongfully withheld or misrepresented) are especially appropriate for securities cases. The offender's gross gain from committing the fraud is an alternative estimate that ordinarily will understate the loss.*
9. *Dollar loss often does not fully capture the harmfulness and seriousness of the conduct. In such instances, an upward departure may be warranted. Examples may include the following:*
  - (a) *the primary objective of the fraud was non-monetary;*
  - (b) *false statements were made for the purpose of facilitating some other crime;*
  - (c) *the offense caused physical or psychological harm;*
  - (d) *the offense endangered national security or military readiness;*
  - (e) *the offense caused a loss of confidence in an important institution;*
  - (f) *completion of the offense was prevented, or the offense was interrupted before it caused serious harm.*
10. *In a few instances, the total dollar loss that results from the offense may overstate its seriousness. Such situations typically occur when a misrepresentation is of limited materiality or is not the sole cause of the loss. Examples would include understating debts to a limited degree in order to obtain a substantial loan which the defendant genuinely expected to repay; attempting to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it; and making a misrepresentation in a securities offering that enabled the securities to be sold at inflated prices, but where the value of the securities subsequently declined in substantial part for other reasons. In such instances, a downward departure may be warranted.*
11. *Offenses involving fraudulent identification documents and access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. The statutes provide for increased maximum terms of imprisonment for the use or possession of device-making equipment and the production or transfer of more than five identification documents or fifteen access devices. The court may find it appropriate to enhance the sentence for violations of these statutes in a manner similar to the treatment of analogous counterfeiting offenses under Part B of this Chapter.*
12. *If the fraud exploited vulnerable victims, an enhancement will apply. See §3A1.1 (Vulnerable Victim).*
13. *Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which §2S1.3 would be more*

*apt, and false statements to a customs officer, for which §2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than §2F1.1. Otherwise, in such cases, §2F1.1 is to be applied, but a departure from the guidelines may be considered.*

14. *"Financial institution," as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 215, 656-657, 1005-1008, 1014, and 1344; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.*
15. *An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if as a consequence of the offense the institution became insolvent, substantially reduced benefits to pensioners or insureds, was unable on demand to refund fully any deposit, payment or investment, or was so depleted of its assets as to be forced to merge with another institution in order to continue active operations.*

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

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

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

*Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or their generosity and charitable motives. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct. However, defendants who exploit victims' charitable impulses or trust in government create particular social harm. A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates*

*aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.*

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

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

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 30); November 1, 1989 (see Appendix C, amendments 154-156 and 303); November 1, 1990 (see Appendix C, amendment 317).

## **§2F1.2. Insider Trading**

- (a) Base Offense Level: 8
- (b) Specific Offense Characteristic
  - (1) Increase by the number of levels from the table in §2F1.1 corresponding to the gain resulting from the offense.

### Commentary

Statutory Provisions: 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5. For additional statutory provision(s), see Appendix A (Statutory Index).

### Application Note:

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

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

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

Historical Note: Effective November 1, 1987.

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

**1. PROSTITUTION**

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

- (a) Base Offense Level: 14
- (b) Specific Offense Characteristic
  - (1) If the offense involved the use of physical force, or coercion by threats or drugs or in any manner, increase by 4 levels.
- (c) Special Instruction
  - (1) If the offense involved the transportation of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the transportation of each person had been contained in a separate count of conviction.

Commentary

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

Application Notes:

1. *The base offense level assumes that the offense was committed for profit. In the infrequent case where the defendant did not commit the offense for profit and the offense did not involve physical force or coercion, the Commission recommends a downward departure of 8 levels.*
2. *The enhancement for physical force, or coercion, anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures).*
3. *"Coercion," as used in this guideline, includes any form of conduct that negates the voluntariness of the behavior of the person transported. This factor would apply, for example, where the ability of the person being transported to appraise or control conduct was substantially impaired by drugs or alcohol. In the case of transportation involving an adult, rather than a minor, this characteristic generally will not apply where the alcohol or drug was voluntarily taken.*
4. *For the purposes of §3B1.1 (Aggravating Role), the persons transported are considered participants only if they assisted in the unlawful transportation of others.*
5. *For the purposes of Chapter Three, Part D (Multiple Counts), each person transported is to be treated as a separate victim. Consequently, multiple counts involving the transportation of different persons are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of*

*conviction includes more than one person being transported, whether specifically cited in the count of conviction or not, each such person shall be treated as if contained in a separate count of conviction.*

**Historical Note:** Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 157 and 158); November 1, 1990 (see Appendix C, amendment 322).

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

- (a) Base Offense Level: 16
- (b) Specific Offense Characteristics
  - (1) If the offense involved the use of physical force, or coercion by threats or drugs or in any manner, increase by 4 levels.
  - (2) If the offense involved the transportation of a minor under the age of twelve years, increase by 4 levels.
  - (3) If the offense involved the transportation of a minor at least twelve years of age but under the age of sixteen years, increase by 2 levels.
- (c) Special Instruction
  - (1) If the offense involved the transportation of more than one person, Chapter Three, Part D (Multiple Counts) shall be applied as if the transportation of each person had been contained in a separate count of conviction.
- (d) Cross Reference
  - (1) If the offense involved the defendant causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).

**Commentary**

**Statutory Provisions:** 8 U.S.C. § 1328; 18 U.S.C. §§ 2421, 2422, 2423.

**Application Notes:**

1. *For the purposes of Chapter Three, Part D (Multiple Counts), each person transported is to be treated as a separate victim. Consequently, multiple counts involving the transportation of different persons are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one person being transported, whether specifically cited in the*

count of conviction or not, each such person shall be treated as if contained in a separate count of conviction.

2. *The enhancement for physical force, or coercion, anticipates no bodily injury. If bodily injury results, an upward departure may be warranted. See Chapter Five, Part K (Departures).*
3. *"Coercion," as used in this guideline, includes any form of conduct that negates the voluntariness of the behavior of the person transported. This factor would apply, for example, where the ability of the person being transported to appraise or control conduct was substantially impaired by drugs or alcohol.*
4. *"Sexually explicit conduct," as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256.*
5. *The cross reference in (d)(1) is to be construed broadly to include all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 159 and 160); November 1, 1990 (see Appendix C, amendment 323).

\* \* \* \* \*

## 2. SEXUAL EXPLOITATION OF A MINOR

### §2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production

- (a) Base Offense Level: 25
- (b) Specific Offense Characteristics
  - (1) If the offense involved a minor under the age of twelve years, increase by 4 levels; otherwise, if the offense involved a minor under the age of sixteen years, increase by 2 levels.
  - (2) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.
- (c) Special Instruction
  - (1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 18 U.S.C. § 2251(a), (b), (c)(1)(B).

Application Notes:

1. *For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate victim. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely-Related Counts). Special instruction (c)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.*
2. *Specific offense characteristic (b)(2) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the child and not simply to the legal status of the defendant-child relationship.*
3. *If specific offense characteristic (b)(2) applies, no adjustment is to be made under §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 161); November 1, 1990 (see Appendix C, amendment 324).

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

- (a) Base Offense Level: 13
- (b) Specific Offense Characteristics
  - (1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by 2 levels.
  - (2) If the offense involved distribution, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material, but in no event less than 5 levels.
  - (3) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.
- (c) Cross Reference
  - (1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to

Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1460, 2251(c)(1)(A), 2252.

Application Notes:

1. "Distribution," as used in this guideline, includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute.
2. "Sexually explicit conduct," as used in this guideline, has the meaning set forth in 18 U.S.C. § 2256.
3. The cross reference in (c)(1) is to be construed broadly to include all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.
4. If the defendant sexually abused a minor at any time, whether or not such sexual abuse occurred during the course of the offense, an upward departure is warranted. In determining the extent of such a departure, the court should take into consideration the offense levels provided in §§2A3.1, 2A3.2, and 2A3.4 most commensurate with the defendant's conduct.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 31); November 1, 1990 (see Appendix C, amendment 325).

**§2G2.3. Selling or Buying of Children for Use in the Production of Pornography**

(a) Base Offense Level: 38

Commentary

Statutory Provision: 18 U.S.C. § 2251A.

Background: The statutory minimum sentence for a defendant convicted under 18 U.S.C. § 2251A is twenty years imprisonment.

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 162).

\* \* \* \* \*

### 3. OBSCENITY

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

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristics
  - (1) If the offense involved an act related to distribution for pecuniary gain, increase by the number of levels from the table in §2F1.1 corresponding to the retail value of the material, but in no event by less than 5 levels.
  - (2) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.
- (c) Cross Reference
  - (1) If the offense involved transporting, distributing, receiving, possessing, or advertising to receive material involving the sexual exploitation of a minor, apply §2G2.2 (Transporting, Receiving, or Trafficking in Material Involving the Sexual Exploitation of a Minor).

#### Commentary

Statutory Provisions: 18 U.S.C. §§ 1460-1463, 1465-1466. For additional statutory provision(s), see Appendix A (Statutory Index).

#### Application Note:

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

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 163); November 1, 1990 (see Appendix C, amendment 326).

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

- (a) Base Offense Level: 12
- (b) Specific Offense Characteristics
  - (1) If a person who received the telephonic communication was less than eighteen years of age, or if a broadcast was made between six o'clock in the morning and eleven o'clock at night, increase by 4 levels.

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 1464, 1468; 47 U.S.C. § 223(b)(1)(A).

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

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 164). A former §2G3.2 (Obscene or Indecent Telephone Communications), effective November 1, 1987, was deleted effective November 1, 1989 (see Appendix C, amendment 164).

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## PART H - OFFENSES INVOLVING INDIVIDUAL RIGHTS

### 1. CIVIL RIGHTS

#### Introductory Commentary

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

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

Historical Note: Effective November 1, 1987.

#### **§2H1.1. Conspiracy to Interfere with Civil Rights; Going in Disguise to Deprive of Rights**

- (a) Base Offense Level (Apply the greater):
  - (1) 15; or
  - (2) 2 plus the offense level applicable to any underlying offense.
- (b) Specific Offense Characteristic
  - (1) If the defendant was a public official at the time of the offense, increase by 4 levels.

#### Commentary

Statutory Provision: 18 U.S.C. § 241.

#### Application Notes:

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

*offense was property damage by other means, the offense level from §2B1.3 (Property Damage or Destruction) would first be determined and 2 levels would be added. If the offense was a conspiracy or attempt to commit an offense, "2 plus the offense level applicable to any underlying offense" would be the offense level from the guideline applicable to a conspiracy or attempt to commit that offense plus 2 levels.*

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

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

**Historical Note:** Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 303); November 1, 1990 (see Appendix C, amendments 313 and 327).

## **§2H1.2. [Deleted]**

**Historical Note:** Section 2H1.2 (Conspiracy to Interfere with Civil Rights), effective November 1, 1987, amended effective November 1, 1989 (see Appendix C, amendment 303), was deleted by consolidation with §2H1.1 effective November 1, 1990 (see Appendix C, amendment 327).

## **§2H1.3. Use of Force or Threat of Force to Deny Benefits or Rights in Furtherance of Discrimination; Damage to Religious Real Property**

- (a) Base Offense Level (Apply the greatest):
  - (1) 10, if no injury occurred; or
  - (2) 15, if injury occurred; or
  - (3) 2 plus the offense level applicable to any underlying offense.
- (b) Specific Offense Characteristic
  - (1) If the defendant was a public official at the time of the offense, increase by 4 levels.

### **Commentary**

**Statutory Provisions:** 18 U.S.C. §§ 245, 247; 42 U.S.C. § 3631. For additional statutory provision(s), see Appendix A (Statutory Index).

### **Application Notes:**

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

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

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

**Historical Note:** Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 165).

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

- (a) Base Offense Level (Apply the greater):
  - (1) 10; or
  - (2) 6 plus the offense level applicable to any underlying offense.

#### Commentary

**Statutory Provision:** 18 U.S.C. § 242.

#### Application Notes:

1. "6 plus the offense level applicable to any underlying offense" means 6 levels above the offense level for any underlying criminal conduct. See the discussion in the Commentary to §2H1.1.
2. Do not apply the adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

**Background:** This maximum term of imprisonment authorized by 18 U.S.C. § 242 is one year if no bodily injury results, ten years if bodily injury results, and life imprisonment if death results. A base offense level of 10 is prescribed at §2H1.4(a)(1) providing a guideline sentence near the one-year statutory maximum for cases not resulting in death or bodily injury because of the compelling public interest in deterring and adequately punishing those who violate civil rights under color of law. The Commission intends to recommend that this one-year statutory maximum penalty be increased. An alternative base offense level is provided at §2H1.4(a)(2). The 6-level increase under subsection (a)(2) reflects the 2-level increase that is applied to other offenses covered in this Part plus a 4-level increase for the commission of the offense under actual or purported legal authority. This 4-level increase is inherent in the base offense level of 10 under subsection (a)(1).

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

**Historical Note:** Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 166).

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

- (a) Base Offense Level (Apply the greater):
  - (1) 6; or
  - (2) 2 plus the offense level applicable to any underlying offense.
- (b) Specific Offense Characteristic
  - (1) If the defendant was a public official at the time of the offense, increase by 4 levels.

Commentary

Statutory Provision: 18 U.S.C. § 246.

Application Notes:

1. "2 plus the offense level applicable to any underlying offense" is defined in the Commentary to §2H1.1.
2. Where the adjustment in §2H1.5(b)(1) is applied, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 167); November 1, 1990 (see Appendix C, amendment 328).

\* \* \* \* \*

**2. POLITICAL RIGHTS**

**§2H2.1. Obstructing an Election or Registration**

- (a) Base Offense Level (Apply the greatest):
  - (1) 18, if the obstruction occurred by use of force or threat of force against person(s) or property; or
  - (2) 12, if the obstruction occurred by forgery, fraud, theft, bribery, deceit, or other means, except as provided in (3) below; or

- (3) 6, if the defendant (A) solicited, demanded, accepted, or agreed to accept anything of value to vote, refrain from voting, vote for or against a particular candidate, or register to vote, (B) gave false information to establish eligibility to vote, or (C) voted more than once in a federal election.

Commentary

Statutory Provisions: 18 U.S.C. §§ 241, 242, 245(b)(1)(A), 592, 593, 594, 597; 42 U.S.C. §§ 1973i, 1973j. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

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

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 168).

\* \* \* \* \*

### 3. PRIVACY AND EAVESDROPPING

#### §2H3.1. Interception of Communications or Eavesdropping

- (a) Base Offense Level: 9
- (b) Specific Offense Characteristic
  - (1) If the purpose of the conduct was to obtain direct or indirect commercial advantage or economic gain, increase by 3 levels.
- (c) Cross Reference
  - (1) If the purpose of the conduct was to facilitate another offense, apply the guideline applicable to an attempt to commit that offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 2511; 47 U.S.C. § 605. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

1. If the offense involved interception of satellite cable transmissions for purposes of commercial advantage or private financial gain (including avoiding payment of fees), apply §2B5.3 (Criminal Infringement of Copyright) rather than this guideline.

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 169).

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

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

Commentary

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

Historical Note: Effective November 1, 1987.

**§2H3.3. Obstructing Correspondence**

- (a) Base Offense Level:
  - (1) 6; or
  - (2) if the conduct was theft of mail, apply §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft);
  - (3) if the conduct was destruction of mail, apply §2B1.3 (Property Damage or Destruction).

Commentary

Statutory Provision: 18 U.S.C. § 1702. For additional statutory provision(s), see Appendix A (Statutory Index).

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

**Historical Note:** Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 313).

\* \* \* \* \*

#### **4. PEONAGE, INVOLUNTARY SERVITUDE, AND SLAVE TRADE**

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

- (a) Base Offense Level (Apply the greater):
- (1) 15; or
  - (2) 2 plus the offense level applicable to any underlying offense.

##### **Commentary**

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

##### **Application Note:**

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

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

**Historical Note:** Effective November 1, 1987.

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## PART J - OFFENSES INVOLVING THE ADMINISTRATION OF JUSTICE

### §2J1.1. Contempt

Apply 2X5.1 (Other Offenses).

#### Commentary

Statutory Provision: 18 U.S.C. § 401. For additional statutory provision(s), see Appendix A (Statutory Index).

#### Application Note:

1. *Because misconduct constituting contempt varies significantly and the nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are highly context-dependent, the Commission has not provided a specific guideline for this offense. In certain cases, the offense conduct will be sufficiently analogous to §2J1.2 (Obstruction of Justice) for that guideline to apply.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 170 and 171).

### §2J1.2. Obstruction of Justice

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

#### Commentary

Statutory Provisions: 18 U.S.C. §§ 1503, 1505-1513, 1516. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

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

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 172-174).

**§2J1.3. Perjury or Subornation of Perjury**

- (a) Base Offense Level: 12
- (b) Specific Offense Characteristics
  - (1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to suborn perjury, increase by 8 levels.
  - (2) If the perjury or subornation of perjury resulted in substantial interference with the administration of justice, increase by 3 levels.

(c) Cross Reference

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

Commentary

Statutory Provisions: 18 U.S.C. §§ 1621-1623. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 175).

**§2J1.4. Impersonation**

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic
  - (1) If the impersonation was committed for the purpose of conducting an unlawful arrest, detention, or search, increase by 6 levels.

(c) Cross Reference

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

Commentary

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

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 176).

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

(a) Base Offense Level:

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

(b) Specific Offense Characteristic

- (1) If the offense resulted in substantial interference with the administration of justice, increase by 3 levels.

Commentary

Statutory Provision: 18 U.S.C. § 3146(b)(2). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

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

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 177).

**§2J1.6. Failure to Appear by Defendant**

(a) Base Offense Level:

- (1) 11, if the offense constituted a failure to report for service of sentence; or
- (2) 6, otherwise.

(b) Specific Offense Characteristics

- (1) If the base offense level is determined under subsection (a)(1), and the defendant --
  - (A) voluntarily surrendered within 96 hours of the time he was originally scheduled to report, decrease by 5 levels; or
  - (B) was ordered to report to a community corrections center, community treatment center, "halfway house," or similar facility, and subdivision (A) above does not apply, decrease by 2 levels;

*Provided, however, that this reduction shall not apply if the defendant, while away from the facility, committed any federal, state, or local offense punishable by a term of imprisonment of one year or more.*
- (2) If the base offense level is determined under subsection (a)(2), and the underlying offense is --
  - (A) punishable by death or imprisonment for a term of fifteen years or more, increase by 9 levels; or
  - (B) punishable by a term of imprisonment of five years or more, but less than fifteen years, increase by 6 levels; or
  - (C) a felony punishable by a term of imprisonment of less than five years, increase by 3 levels.

Commentary

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

Application Notes:

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

**Background:** This section applies to a failure to appear by a defendant who was released pending trial, sentencing, appeal, or surrender for service of sentence. Where the base offense level is determined under subsection (a)(2), the offense level increases in relation to the statutory maximum of the underlying offense.

**Historical Note:** Effective November 1, 1987. Amended effective November 1, 1990 (see Appendix C, amendment 329).

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

If an enhancement under 18 U.S.C. § 3147 applies, add 3 levels to the offense level for the offense committed while on release as if this section were a specific offense characteristic contained in the offense guideline for the offense committed while on release.

#### **Commentary**

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

#### **Application Notes:**

1. Because 18 U.S.C. § 3147 is an enhancement provision, rather than an offense, this section provides a specific offense characteristic to increase the offense level for the offense committed while on release.
2. Under 18 U.S.C. § 3147, a sentence of imprisonment must be imposed in addition to the sentence for the underlying offense, and the sentence of imprisonment imposed under 18 U.S.C. § 3147 must run consecutively to any other sentence of imprisonment. Therefore, the court, in order to comply with the statute, should divide the sentence on the judgment form between the sentence attributable to the underlying offense and the sentence attributable to the enhancement. The court will have to ensure that the "total punishment" (*i.e.*, the sentence for the offense committed while on release plus the sentence enhancement under 18 U.S.C. § 3147) is in accord with the guideline range for the offense committed while on release, as adjusted by the enhancement in this section. For example, if the applicable adjusted guideline range is 30-37 months and the court determines "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus 6 months under 18 U.S.C. § 3147 would satisfy this requirement.

**Background:** An enhancement under 18 U.S.C. § 3147 may be imposed only upon application of the government; it cannot be imposed on the court's own motion. In this respect, it is similar to a separate count of conviction and, for this reason, is placed in Chapter Two of the guidelines.

Legislative history indicates that the mandatory nature of the penalties required by 18 U.S.C. § 3147 was to be eliminated upon the implementation of the sentencing guidelines. "Section 213(h) [renumbered as §200(g) in the Crime Control Act of 1984] amends the new provision in title I of this Act relating to consecutive enhanced penalties for committing an offense on release (new 18 U.S.C. § 3147) by eliminating the mandatory nature of the penalties in favor of utilizing sentencing guidelines." (Senate Report 98-225 at 186). Not all of the phraseology relating to the requirement of a mandatory sentence, however, was actually deleted from the statute. Consequently, it appears that the court is required to impose a consecutive sentence of imprisonment under this provision, but there is no requirement as to any minimum term. This guideline is drafted to enable the court to determine

*and implement a combined 'total punishment' consistent with the overall structure of the guidelines, while at the same time complying with the statutory requirement. Guideline provisions that prohibit the grouping of counts of conviction requiring consecutive sentences (e.g., the introductory paragraph of §3D1.2; §5G1.2(a)) do not apply to this section because 18 U.S.C. § 3147 is an enhancement, not a count of conviction.*

**Historical Note:** Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 32); November 1, 1989 (see Appendix C, amendment 178).

**§2J1.8. Bribery of Witness**

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

Commentary

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

Application Notes:

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

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

**Historical Note:** Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 33); November 1, 1989 (see Appendix C, amendment 179).

**§2J1.9. Payment to Witness**

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic
  - (1) If the payment was made or offered for refusing to testify or for the witness absenting himself to avoid testifying, increase by 4 levels.

Commentary

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

Application Notes:

1. For offenses covered under this section, Chapter Three, Part C (Obstruction) does not apply unless the defendant obstructed the investigation or trial of the payment to witness count.
2. In the event that the defendant is convicted under this section as well as for the underlying offense (i.e., the offense with respect to which the payment was made), see the Commentary to Chapter Three, Part C (Obstruction), and to §3D1.2(c) (Groups of Closely Related Counts).

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 180 and 181).

## PART K - OFFENSES INVOLVING PUBLIC SAFETY

### 1. EXPLOSIVES AND ARSON

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

- (a) Base Offense Level: 6

#### Commentary

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

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

Historical Note: Effective November 1, 1987.

#### §2K1.2. Improper Storage of Explosives

- (a) Base Offense Level: 6

#### Commentary

Statutory Provision: 18 U.S.C. § 842(j). For additional statutory provision(s), see Appendix A (Statutory Index).

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

Historical Note: Effective November 1, 1987.

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

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

If more than one applies, use the greatest:

- (1) If the defendant's conduct involved any written or oral false or fictitious statement, false record, or misrepresented identification, increase by 4 levels.
- (2) If the offense involved explosives that the defendant knew or had reason to believe were stolen, increase by 6 levels.

- (3) If the defendant knowingly distributed explosives to a person under twenty-one years of age, to a person prohibited by state law or ordinance from receiving such explosives at the place of distribution, or to a person the defendant had reason to believe intended to transport such materials into a state in violation of the law of that state, increase by 4 levels.
- (4) If the defendant was a person prohibited from receiving explosives under 18 U.S.C. § 842(i), or if the defendant knowingly distributed explosives to a person prohibited from receiving explosives under 18 U.S.C. § 842(i), increase by 10 levels.
- (5) If a recordkeeping offense reflected an effort to conceal a substantive offense involving explosives, apply the guideline for the substantive offense.

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(a), (h), (i), 844(b). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note:

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

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 183).

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

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

- (1) 24, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense, and that risk was created knowingly; or (B) involved the destruction or attempted destruction of a dwelling;
- (2) 20, if the offense (A) created a substantial risk of death or serious bodily injury to any person other than a participant in the offense; (B) involved the destruction or attempted destruction of a structure other than a dwelling; or (C) endangered a dwelling, or a structure other than a dwelling;
- (3) 2 plus the offense level from §2F1.1 (Fraud and Deceit) if the offense was committed in connection with a scheme to defraud; or

- (4) 2 plus the offense level from §2B1.3 (Property Damage or Destruction).
- (b) Specific Offense Characteristic
  - (1) If the offense was committed to conceal another offense, increase by 2 levels.
- (c) Cross Reference
  - (1) If death resulted, or the offense was intended to cause death or serious bodily injury, apply the most analogous guideline from Chapter Two, Part A (Offenses Against the Person) if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(a), (b), 33, 81, 844(f), (h) (only in the case of an offense committed prior to November 18, 1988), (i), 1153, 1855, 2275. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. If bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).
2. Creating a substantial risk of death or serious bodily injury includes creating that risk to fire fighters and other emergency and law enforcement personnel who respond to or investigate an offense.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 182, 184, and 185); November 1, 1990 (see Appendix C, amendment 330).

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

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

If more than one applies, use the greatest:

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

(c) Cross Reference

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

Commentary

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

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 182, 186, 187, and 303).

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

- (a) Base Offense Level (Apply the greatest):
  - (1) 18; or
  - (2) If the defendant committed the offense with intent to commit another offense against a person or property, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to such other offense; or
  - (3) If death resulted, apply the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).

Commentary

Statutory Provisions: 18 U.S.C. § 844(d); 26 U.S.C. § 5685. For additional statutory provision(s), see Appendix A (Statutory Index).

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 303); November 1, 1990 (see Appendix C, amendment 331).

**§2K1.7. Use of Fire or Explosives to Commit a Federal Felony**

- (a) If the defendant, whether or not convicted of another crime, was convicted under 18 U.S.C. § 844(h), the term of imprisonment is that required by statute.

(b) Special Instruction for Fines

- (1) Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section.

Commentary

Statutory Provision: 18 U.S.C. § 844(h).

Application Notes:

1. The statute requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.
2. Imposition of a term of supervised release is governed by the provisions of §SD1.1 (Imposition of a Term of Supervised Release).
3. Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the use of fire or explosives is not to be applied in respect to the guideline for the underlying offense.
4. Subsection (b) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. § 844(h). This is required because the offense level for the underlying offense may be reduced in that any specific offense characteristic for use of fire or explosives would not be applied (*see* Application Note 3). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense, although a fine is authorized under 18 U.S.C. § 3571.

Historical Note: Effective November 1, 1989 (*see* Appendix C, amendment 188). Amended effective November 1, 1990 (*see* Appendix C, amendment 332).

\* \* \* \* \*

2. FIREARMS

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition

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

- (1) 18, if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861; or

- (2) 12, if the defendant is convicted under 18 U.S.C. § 922(g), (h), or (n); or if the defendant, at the time of the offense, had been convicted in any court of an offense punishable by imprisonment for a term exceeding one year; or
- (3) 6, otherwise.

(b) Specific Offense Characteristics

- (1) If the defendant obtained or possessed the firearm or ammunition, other than a firearm covered in 26 U.S.C. § 5845(a), solely for lawful sporting purposes or collection, decrease the offense level determined above to level 6.
- (2) If the firearm was stolen or had an altered or obliterated serial number, increase by 2 levels.

(c) Cross References

- (1) If the offense involved the distribution of a firearm or possession with intent to distribute, apply §2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms) if the resulting offense level is greater than that determined above.
- (2) If the defendant used or possessed the firearm in connection with commission or attempted commission of another offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. § 922(a)(1), (a)(3), (a)(4), (a)(6), (e), (f), (g), (h), (i), (j), (k), (l), (n), and (o); 26 U.S.C. § 5861(b), (c), (d), (h), (i), (j), and (k). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. The definition of "firearm" used in this section is that set forth in 18 U.S.C. § 921(a)(3) (if the defendant is convicted under 18 U.S.C. § 922) and 26 U.S.C. § 5845(a) (if the defendant is convicted under 26 U.S.C. § 5861). These definitions are somewhat broader than that used in Application Note 1(e) of the Commentary to §1B1.1 (Application Instructions). Under 18 U.S.C. § 921(a)(3), the term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Under 26 U.S.C. § 5845(a), the term "firearm" includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or weapon made from a rifle, with a barrel or barrels less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain other large bore weapons.

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

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

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

*Available pre-guidelines data were not sufficient to determine the effect a stolen firearm had on the average sentence. However, reviews of pre-guidelines cases suggested that this factor tended to result in more severe sentences. Independent studies show that stolen firearms are used disproportionately in the commission of crimes.*

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 189); November 1, 1990 (see Appendix C, amendment 333).

## **§2K2.2. Unlawful Trafficking and Other Prohibited Transactions Involving Firearms**

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

- (1) **18**, if the defendant is convicted under 18 U.S.C. § 922(o) or 26 U.S.C. § 5861;
- (2) **6**, otherwise.

### **(b) Specific Offense Characteristics**

- (1) If the offense involved distribution of a firearm, or possession with intent to distribute, and the number of firearms unlawfully distributed, or to be distributed, exceeded two, increase as follows:

- |     | <u>Number of Firearms</u> | <u>Increase in Level</u> |
|-----|---------------------------|--------------------------|
| (A) | 3 - 4                     | add 1                    |
| (B) | 5 - 7                     | add 2                    |
| (C) | 8 - 12                    | add 3                    |
| (D) | 13 - 24                   | add 4                    |
| (E) | 25 - 49                   | add 5                    |
| (F) | 50 or more                | add 6.                   |
- (2) If any of the firearms was stolen or had an altered or obliterated serial number, increase by 2 levels.
- (3) If more than one of the following applies, use the greater:
- (A) If the defendant is convicted under 18 U.S.C. § 922(d), increase by 6 levels; or
- (B) If the defendant is convicted under 18 U.S.C. § 922(b)(1) or (b)(2), increase by 1 level.
- (c) Cross Reference
- (1) If the defendant, at the time of the offense, had been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, apply §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition) if the resulting offense level is greater than that determined above.

#### Commentary

Statutory Provisions: 18 U.S.C. § 922(a)(1), (a)(2), (a)(5), (b), (c), (d), (e), (f), (i), (j), (k), (l), (m), (o); 26 U.S.C. § 5861(a), (e), (f), (g), (j), and (l). For additional statutory provision(s), see Appendix A (Statutory Index).

#### Application Notes:

1. The definition of "firearm" used in this section is that set forth in 18 U.S.C. § 921(a)(3) (if the defendant is convicted under 18 U.S.C. § 922) and 26 U.S.C. § 5845(a) (if the defendant is convicted under 26 U.S.C. § 5861). These definitions are somewhat broader than that used in Application Note 1(e) of the Commentary to §1B1.1 (Application Instructions). Under 18 U.S.C. § 921(a)(3), the term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Under 26 U.S.C. § 5845(a), the term "firearm" includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or weapon made from a rifle, with a barrel or barrels less than 16 inches in length; a machine gun; a muffler or silencer for a firearm; a destructive device; and certain other large bore weapons.

2. *If the number of weapons involved exceeded fifty, an upward departure may be warranted. An upward departure especially may be warranted in the case of large numbers of military type weapons (e.g., machine guns, automatic weapons, assault rifles).*

**Background:** *This guideline applies to a variety of offenses involving firearms, ranging from unlawful distribution of silencers, machine guns, sawed-off shotguns and destructive devices, to essentially technical violations.*

**Historical Note:** Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 34); November 1, 1989 (see Appendix C, amendment 189); November 1, 1990 (see Appendix C, amendment 333).

**§2K2.3. Receiving, Transporting, Shipping or Transferring a Firearm or Ammunition With Intent to Commit Another Offense, or With Knowledge that It Will Be Used in Committing Another Offense**

- (a) Base Offense Level (Apply the greatest):
- (1) The offense level from §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the offense that the defendant intended or knew was to be committed with the firearm; or
  - (2) The offense level from §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition), or §2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms), as applicable; or
  - (3) 12.

**Commentary**

**Statutory Provisions:** 18 U.S.C. § 924(b), (f), (g).

**Historical Note:** Effective November 1, 1989 (see Appendix C, amendment 189). A former §2K2.3 (Prohibited Transactions in or Shipment of Firearms and Other Weapons), effective November 1, 1987, was deleted by consolidation with §2K2.2, effective November 1, 1989 (see Appendix C, amendment 189).

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

- (a) If the defendant, whether or not convicted of another crime, was convicted under 18 U.S.C. § 924(c) or § 929(a), the term of imprisonment is that required by statute.
- (b) Special Instructions for Fines
- (1) Where there is a federal conviction for the underlying offense, the fine guideline shall be the fine guideline that would have been applicable had there only been a conviction for the underlying offense. This guideline

shall be used as a consolidated fine guideline for both the underlying offense and the conviction underlying this section.

Commentary

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

Application Notes:

1. In each case, the statute requires a term of imprisonment imposed under this section to run consecutively to any other term of imprisonment.
2. Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use, or discharge of a firearm (e.g., §2B3.1(b)(2) (Robbery)), is not to be applied in respect to the guideline for the underlying offense.
3. Imposition of a term of supervised release is governed by the provisions of §5D1.1 (Imposition of a Term of Supervised Release).
4. Subsection (b) sets forth special provisions concerning the imposition of fines. Where there is also a conviction for the underlying offense, a consolidated fine guideline is determined by the offense level that would have applied to the underlying offense absent a conviction under 18 U.S.C. § 924(c) or 929(a). This is required because the offense level for the underlying offense may be reduced when there is also a conviction under 18 U.S.C. § 924(c) or 929(a) in that any specific offense characteristic for possession, use, or discharge of a firearm is not applied (see Application Note 2). The Commission has not established a fine guideline range for the unusual case in which there is no conviction for the underlying offense, although a fine is authorized under 18 U.S.C. § 3571.

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

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 190); November 1, 1990 (see Appendix C, amendment 332).

**§2K2.5. Possession of Firearms and Dangerous Weapons in Federal Facilities**

(a) Base Offense Level: 6

(b) Cross Reference

- (1) If the defendant possessed the firearm or other dangerous weapon with intent to use it in the commission of another offense, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense if the resulting offense level is greater than that determined above.

Commentary

Statutory Provision: 18 U.S.C. § 930.

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 191).

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**3. TRANSPORTATION OF HAZARDOUS MATERIALS**

**§2K3.1. Unlawfully Transporting Hazardous Materials in Commerce**

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

Commentary

Statutory Provision: 49 U.S.C. § 1809(b). For additional statutory provision(s), see Appendix A (Statutory Index).

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

Historical Note: Effective November 1, 1987.

**§2K3.2. Feloniously Mailing Injurious Articles**

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

- (1) If the offense was committed with intent (A) to kill or injure any person, or (B) to injure the mails or other property, apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the intended offense; or
- (2) If death resulted, apply the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide).

Commentary

Statutory Provision: 18 U.S.C. § 1716 (felony provisions only).

Background: This guideline applies only to the felony provisions of 18 U.S.C. § 1716. The Commission has not promulgated a guideline for the misdemeanor provisions of this statute.

Historical Note: Effective November 1, 1990 (see Appendix C, amendment 334).