

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 or Financing an Extortionate Extension of Credit; Collecting an Extension of Credit by Extortionate Means

- (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 commission of the offense or to facilitate escape, increase by 4 levels; or
- (B) if any person was physically restrained to facilitate commission of the offense or to facilitate escape, increase by 2 levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 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); November 1, 1991 (see Appendix C, amendment 398).

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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.
- (c) Special Instruction for Fines - Organizations
 - (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) if a bribe, the value of the benefit received or to be received in return for the unlawful payment; or (C) if a bribe, the consequential damages resulting from the unlawful payment.

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); November 1, 1991 (see Appendix C, amendment 422).

§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 Note:

1. In the case of a defendant who was a fiduciary of the benefit plan, an adjustment under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) will apply. "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); November 1, 1991 (see Appendix C, amendment 399).

§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.
- (c) Special Instruction for Fines - Organizations
- (1) In lieu of the pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) if a bribe, the value of the benefit received or to be received in return for the unlawful payment; or (C) if a bribe, the consequential damages resulting from the unlawful payment.

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. Amended effective November 1, 1991 (see Appendix C, amendment 422).

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PART F - OFFENSES INVOLVING FRAUD OR DECEIT

§2F1.1. Fraud and Deceit

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

- (1) If the 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 --

- (A) substantially jeopardized the safety and soundness of a financial institution; or
- (B) affected a financial institution and the defendant derived more than \$1,000,000 in gross receipts from the offense,

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. §§ 225, 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). Consistent with the provisions of §2X1.1 (Attempt, Solicitation or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell \$40,000 in worthless securities, or representing that a forged check for \$40,000 was genuine, the loss would be \$40,000.

There are, however, instances where additional factors are to be considered in determining the loss or intended loss:

(a) Fraud Involving Misrepresentation of the Value of an Item or Product Substitution

A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth \$40,000 and the stock is worth only \$10,000, the loss is the amount by which the stock was overvalued (i.e., \$30,000). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.

(b) Fraudulent Loan Application and Contract Procurement Cases

In fraudulent loan application cases and contract procurement cases where the defendant's capabilities are fraudulently represented, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered, or can expect to recover, from any assets pledged to secure the loan.

In some cases, the loss determined above may significantly understate or overstate the seriousness of the defendant's conduct. For example, where the defendant substantially understated his debts to obtain a loan, which he nevertheless repaid, the loss determined above (zero loss) will tend not to reflect adequately the risk of loss created by the defendant's conduct. Conversely, a defendant may understate his debts to a limited degree to obtain a loan (e.g., to expand a grain export business), which he genuinely expected to repay and for which he would have qualified at a higher interest rate had he made truthful disclosure, but he is unable to repay the loan because of some unforeseen event (e.g., an embargo imposed on grain exports) which would have caused a default in any event. In such a case, the loss determined above may overstate the seriousness of the defendant's conduct.

(c) Consequential Damages in Procurement Fraud and Product Substitution Cases

In contrast to other types of cases, loss in a procurement fraud or product substitution case includes not only direct damages, but also consequential damages that were reasonably foreseeable. For example, in a case involving a defense product substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting

the product so that it can be used for its intended purpose, plus the government's reasonably foreseeable cost of rectifying the actual or potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable. Inclusion of reasonably foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.

(d) Diversion of Government Program Benefits

In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses.

(e) Davis-Bacon Act Cases

In a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.

- 8. For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, 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. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.*
- 9. In the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.*
- 10. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, 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.*

In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it.

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. §§ 20, 656, 657, 1005-1007, and 1014; 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; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.*
16. *"The defendant derived more than \$1,000,000 in gross receipts from the offense," as used in subsection (b)(6)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded \$1,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).*
17. *If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise."*

18. *If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."*

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)(A) implements, in a broader form, the instruction to the Commission in Section 961(m) of Public Law 101-73.

Subsection (b)(6)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647.

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); November 1, 1991 (see Appendix C, amendments 364 and 393).

§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.
 - (4) 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) Cross References
 - (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).
 - (2) If the offense involved criminal sexual abuse, attempted criminal sexual abuse, or assault with intent to commit criminal sexual abuse, apply §2A3.1 (Criminal Sexual Abuse; Attempt or Assault with the Intent to Commit Criminal Sexual Abuse).
 - (3) If neither subsection (c)(1) nor (c)(2) is applicable, and the offense did not involve transportation for the purpose of prostitution, apply §2A3.2 (Criminal Sexual Abuse of a Minor or Attempt to Commit Such Acts) or §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact), as appropriate.

(d) 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, 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 (d)(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. *Subsection (b)(4) 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.*
6. *If the adjustment in subsection (b)(4) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*
7. *The cross reference in subsection (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.*

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); November 1, 1991 (see Appendix C, amendment 400).

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2. SEXUAL EXPLOITATION OF A MINOR

§2G2.1. Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; 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. *Subsection (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 the adjustment in subsection (b)(2) applies, do not apply §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); November 1, 1991 (see Appendix C, amendment 400).

§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic

- (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. §§ 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); November 1, 1991 (see Appendix C, amendment 372).

§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).

§2G2.4. Receipt or Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct

- (a) Base Offense Level: 10
- (b) Specific Offense Characteristic
- (1) If the material involved a prepubescent minor or a minor under the age of twelve years, increase by 2 levels.
- (c) Cross References
- (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).
- (2) If the offense involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic), apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic).

Commentary

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

Application Note:

1. *This guideline assumes that the offense involved a small number of prohibited items. If the defendant possessed 50 or more books, magazines, periodicals, films, video tapes, or other items containing a visual depiction involving the sexual exploitation of a minor, and subsection (c)(1) or (c)(2) does not apply, an upward departure may be warranted.*

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 372).

§2G2.5. Recordkeeping Offenses Involving the Production of Sexually Explicit Materials

(a) Base Offense Level: 6

(b) Cross References

- (1) If the offense reflected an effort to conceal a substantive offense that 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).
- (2) If the offense reflected an effort to conceal a substantive offense that involved trafficking in material involving the sexual exploitation of a minor (including receiving, transporting, advertising, or possessing material involving the sexual exploitation of a minor with intent to traffic), apply §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic).

Commentary

Statutory Provision: 18 U.S.C. § 2257.

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 372).

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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 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic) or §2G2.4 (Receipt or Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), as appropriate.

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); November 1, 1991 (see Appendix C, amendment 372).

§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. "Underlying offense," as used in this guideline, includes any offense under federal, state, or local law other than an offense that is itself covered under Chapter Two, Part H, Subpart 1, 2, or 4. For example, in the case of a conspiracy to interfere with a person's civil rights (a violation of 18 U.S.C. § 241) that involved an aggravated assault (the use of force) to deny certain rights or benefits in furtherance of discrimination (a violation of 18 U.S.C. § 245), the underlying offense in respect to both the violation of 18 U.S.C. § 241 (to which §2H1.1 applies) and the violation of 18 U.S.C. § 245 (to which §2H1.3 applies) would be the aggravated assault.

"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 and cross references) from the offense guideline in Chapter Two that most closely corresponds to the underlying

offense. 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 arson, "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 arson plus 2 levels.

In certain cases, the count of which the defendant is convicted may set forth conduct that constitutes more than one underlying offense (e.g., two instances of assault, or one instance of assault and one instance of arson). In such cases, determine the offense level for the underlying offense by treating each underlying offense as if contained in a separate count of conviction. To determine which of the alternative base offense levels (e.g., §2H1.1(a)(1) or (a)(2)) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to each alternative base offense level. Use whichever results in the greater offense level. Example: The defendant is convicted of one count of conspiracy to violate civil rights that included two level 12 underlying offenses (of a type not grouped together under Chapter Three, Part D). No adjustment from Chapter Three, Parts A, B, or C applies. The base offense level from §2H1.1(a)(1) is 15. The offense level for each underlying offense from §2H1.1(a)(2) is 14 ($2 + 12$). Under Chapter Three, Part D (Multiple Counts), the two level 14 underlying offenses result in a combined offense level of 16. This offense level is greater than the alternative base offense level of 15 under §2H1.1(a)(1). Therefore, the case is treated as if there were two counts, one for each underlying offense, with a base offense level under §2H1.2(a)(2) of 14 for each underlying offense.

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); November 1, 1991 (see Appendix C, amendment 430).

§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).

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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:

- I. "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.

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, verdict, or any judicial determination 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).
5. The inclusion of "property damage" under subsection (b)(1) is designed to address cases in which property damage is caused or threatened as a means of intimidation or retaliation (e.g., to intimidate a witness from, or retaliate against a witness for, testifying). Subsection (b)(1) is not intended to apply, for example, where the offense consisted of destroying a ledger containing an incriminating entry.

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 avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense, a cross reference to §2X3.1 (Accessory After the Fact) is provided. Use of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 172-174); November 1, 1991 (see Appendix C, amendment 401).

§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.

(d) Special Instruction

- (1) In the case of counts of perjury or subornation of perjury arising from testimony given, or to be given, in separate proceedings, do not group the counts together under §3D1.2 (Groups of Closely-Related Counts).

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, verdict, or any judicial determination 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).
5. "Separate proceedings," as used in subsection (d)(1), includes different proceedings in the same case or matter (e.g., a grand jury proceeding and a trial, or a trial and retrial), and proceedings in separate cases or matters (e.g., separate trials of codefendants), but does not include multiple grand jury proceedings in the same case.

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); November 1, 1991 (see Appendix C, amendments 401 and 402).

§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, verdict, or any judicial determination 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); November 1, 1991 (see Appendix C, amendment 401).

§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. 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.
3. In the case of a failure to appear for service of sentence, any term of imprisonment imposed on the failure to appear count is to be imposed consecutively to any term of imprisonment imposed for the underlying offense. See §5G1.3(a). The guideline range for the failure to appear count is to be determined independently and the grouping rules of §§3D1.2-3D1.5 do not apply.

Otherwise, in the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense; and the failure to appear count and the count(s) for the underlying offense are grouped together under §3D1.2(c). Note that although 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, it does require that any sentence of imprisonment on a failure to appear count be imposed consecutively to any other sentence of imprisonment. Therefore, in such cases, the combined sentence must be constructed to provide a "total punishment" that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, where the combined applicable guideline range for both counts is 30-37 months and the court determines a "total punishment" of 36 months is appropriate, a sentence of thirty months for the underlying offense plus a consecutive six months sentence for the failure to appear count would satisfy these requirements.

4. In some cases, the defendant may be sentenced on the underlying offense (the offense in respect to which the defendant failed to appear) before being sentenced on the failure to appear offense. In such cases, criminal history points for the sentence imposed on the underlying offense are to be counted in determining the guideline range on the failure to appear offense only where the offense level is determined under subsection (a)(1) (i.e., where the offense constituted a failure to report for service of sentence).

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); November 1, 1991 (see Appendix C, amendment 403).

§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 after sufficient notice to the defendant by the government or the court, and applies only in the case of a conviction for a federal offense that is committed while on release on another federal charge.

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); November 1, 1991 (see Appendix C, amendment 431).

§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, verdict, or any judicial determination 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); November 1, 1991 (see Appendix C, amendment 401).

§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).

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PART K - OFFENSES INVOLVING PUBLIC SAFETY

1. EXPLOSIVES AND ARSON

§2K1.1. Failure to Report Theft of Explosive Materials

- (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. Amended effective November 1, 1991 (see Appendix C, amendment 404).

§2K1.2. Improper Storage of Explosive Materials

- (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. Amended effective November 1, 1991 (see Appendix C, amendment 404).

§2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials

- (a) Base Offense Level (Apply the Greatest):
- (1) 24, if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or
 - (2) 20, if the defendant had one prior felony conviction of either a crime of violence or a controlled substance offense; or
 - (3) 16, if the defendant is a prohibited person; or knowingly distributed explosive materials to a prohibited person; or
 - (4) 12, otherwise.

(b) Specific Offense Characteristics

- (1) If the offense involved twenty-five pounds or more of explosive materials, increase as follows:

	<u>Weight of Explosive Material</u>	<u>Increase in Level</u>
(A)	At least 25 but less than 100 lbs.	add 1
(B)	At least 100 but less than 250 lbs.	add 2
(C)	At least 250 but less than 500 lbs.	add 3
(D)	At least 500 but less than 1000 lbs.	add 4
(E)	1000 lbs. or more	add 5.

- (2) If the offense involved any explosive material that the defendant knew or had reason to believe was stolen, increase by 2 levels.

Provided, that the cumulative offense level determined above shall not exceed level 29.

- (3) If the defendant used or possessed any explosive material in connection with another felony offense; or possessed or transferred any explosive material with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

(c) Cross Reference

- (1) If the defendant used or possessed any explosive material in connection with the commission or attempted commission of another offense, or possessed or transferred any explosive material with knowledge or intent that it would be used or possessed in connection with another offense, apply --

- (A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense if the resulting offense level is greater than that determined above; or
- (B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 842(a)-(e), (h), (i), 844(d), (g), 1716; 26 U.S.C. § 5865.

Application Notes:

1. *"Explosive material(s)" include explosives, blasting agents, and detonators. See 18 U.S.C. § 841(c). "Explosives" is defined at 18 U.S.C. § 844(j). A destructive device, defined in the Commentary to §1B1.1 (Application Instructions), may contain explosive materials. Where the conduct charged in the count of which the defendant was convicted establishes that the offense involved a destructive device, apply §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) if the resulting offense level is greater.*
2. *"Crime of violence," "controlled substance offense," and "prior felony conviction(s)," as used in subsections (a)(1) and (a)(2), are defined at §4B1.2 (Definitions of Terms Used in Section 4B1.1), subsections (1) and (2), and Application Note 3 of the Commentary, respectively. For purposes of determining the number of such convictions under subsections (a)(1) and (a)(2), count any such prior conviction that receives any points under §4A1.1 (Criminal History Category).*
3. *"Prohibited person," as used in subsection (a)(3), means anyone who: (i) is under indictment for, or has been convicted of, a "crime punishable by imprisonment for a term exceeding one year," as defined at 18 U.S.C. § 841(l); (ii) is a fugitive from justice; (iii) is an unlawful user of, or is addicted to, any controlled substance; or (iv) has been adjudicated as a mental defective or involuntarily committed to a mental institution.*
4. *"Felony offense," as used in subsection (b)(3), means any offense punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.*
5. *For purposes of calculating the weight of explosive materials under subsection (b)(1), include only the weight of the actual explosive material and the weight of packaging material that is necessary for the use or detonation of the explosives. Exclude the weight of any other shipping or packaging materials. For example, the paper and fuse on a stick of dynamite would be included; the box that the dynamite was shipped in would not be included.*
6. *For purposes of calculating the weight of explosive materials under subsection (b)(1), count only those explosive materials that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any explosive material that a defendant attempted to obtain by making a false statement.*
7. *If the defendant is convicted under 18 U.S.C. § 842(h) (offense involving stolen explosive materials), and is convicted of no other offenses subject to this guideline, do not apply the adjustment in subsection (b)(2) because the base offense level itself takes such conduct into account.*
8. *Under subsection (c)(1), the offense level for the underlying offense is to be determined under §2X1.1 (Attempt, Solicitation, or Conspiracy) or, if death results, under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).*
9. *Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), or (a)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*

10. *An upward departure may be warranted in any of the following circumstances: (1) the quantity of explosive materials significantly exceeded 1000 pounds; (2) the explosive materials were of a nature more volatile or dangerous than dynamite or conventional powder explosives (e.g., plastic explosives); (3) the defendant knowingly distributed explosive materials to a person under twenty-one years of age; or (4) the offense posed a substantial risk of death or bodily injury to multiple individuals.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 183); November 1, 1991 (see Appendix C, amendment 373).

§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.*
3. *"Explosives," as used in the title of this guideline, includes any explosive, explosive material, or destructive device.*

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); November 1, 1991 (see Appendix C, amendment 404).

§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 or possessed the weapon or material in committing or attempting another offense, apply the guideline for such other offense, or §2X1.1 (Attempt, Solicitation, or Conspiracy), as appropriate, 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); November 1, 1991 (see Appendix C, amendment 404).

§2K1.6. Licensee Recordkeeping Violations Involving Explosive Materials

- (a) Base Offense Level: 6
- (b) Cross Reference
 - (1) If a recordkeeping offense reflected an effort to conceal a substantive explosive materials offense, apply §2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosives Materials; Prohibited Transactions Involving Explosive Materials).

Commentary

Statutory Provisions: 18 U.S.C. § 842(f), (g).

Background: The above-referenced provisions are recordkeeping offenses applicable only to "licensees," who are defined at 18 U.S.C. § 841(m).

Historical Note: Effective November 1, 1991 (see Appendix C, amendment 373). A former §2K1.6 (Shipping, Transporting, or Receiving Explosives with Felonious Intent or Knowledge; Using or Carrying Explosives in Certain Crimes), effective November 1, 1987, amended effective November 1, 1989 (see Appendix C, amendment 303) and November 1, 1990 (see Appendix C, amendment 331), was deleted by consolidation with §2K1.3 effective November 1, 1991 (see Appendix C, amendment 373).

§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 §5D1.1 (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; Prohibited Transactions Involving Firearms or Ammunition

- (a) Base Offense Level (Apply the Greatest):
- (1) **26**, if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a); or
 - (2) **24**, if the defendant had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or
 - (3) **22**, if the defendant had one prior felony conviction of either a crime of violence or a controlled substance offense, and the instant offense involved a firearm listed in 26 U.S.C. § 5845(a); or
 - (4) **20**, if the defendant --
 - (A) had one prior felony conviction of either a crime of violence or a controlled substance offense; or

(B) is a prohibited person, and the offense involved a firearm listed in 26 U.S.C. § 5845(a); or

- (5) 18, if the offense involved a firearm listed in 26 U.S.C. § 5845(a); or
- (6) 14, if the defendant is a prohibited person; or
- (7) 12, except as provided below; or
- (8) 6, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), or (m).

(b) Specific Offense Characteristics

- (1) If the offense involved three or more firearms, 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 the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6.
- (3) If the offense involved a destructive device, increase by 2 levels.
- (4) If any firearm was stolen, or had an altered or obliterated serial number, increase by 2 levels.

Provided, that the cumulative offense level determined above shall not exceed level 29.

- (5) If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.
- (6) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

- (1) If the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense, apply --
 - (A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or
 - (B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)-(p), (r), 924(a), (b), (e), (f), (g); 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. "Firearm" includes (i) 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; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. See 18 U.S.C. § 921(a)(3).
2. "Ammunition" includes ammunition or cartridge cases, primer, bullets, or propellant powder designed for use in any firearm. See 18 U.S.C. § 921(a)(17)(A).
3. "Firearm listed in 26 U.S.C. § 5845(a)" includes: (i) any short-barreled rifle or shotgun or any weapon made therefrom; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; or (v) any "other weapon," as that term is defined by 26 U.S.C. § 5845(e). A firearm listed in 26 U.S.C. § 5845(a) does not include unaltered handguns or regulation-length rifles or shotguns. For a more detailed definition, refer to 26 U.S.C. § 5845.
4. "Destructive device" is a type of firearm listed in 26 U.S.C. § 5845(a), and includes any explosive, incendiary, or poison gas -- (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses; any type of weapon which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; or any combination of parts either designed or intended for use in converting any device into any destructive device listed above. For a more detailed definition, refer to 26 U.S.C. § 5845(f).
5. "Crime of violence," "controlled substance offense," and "prior felony conviction(s)," are defined in §4B1.2 (Definitions of Terms Used in Section 4B1.1), subsections (1) and (2), and Application Note 3 of the Commentary, respectively. For purposes of determining the number of such convictions under subsections (a)(1), (a)(2), (a)(3), and (a)(4)(A), count any such prior conviction that receives any points under §4A1.1 (Criminal History Category).

6. *"Prohibited person," as used in subsections (a)(4)(B) and (a)(6), means anyone who: (i) is under indictment for, or has been convicted of, a "crime punishable by imprisonment for more than one year," as defined by 18 U.S.C. § 921(a)(20); (ii) is a fugitive from justice; (iii) is an unlawful user of, or is addicted to, any controlled substance; (iv) has been adjudicated as a mental defective or involuntarily committed to a mental institution; or (v) being an alien, is illegally or unlawfully in the United States.*
7. *"Felony offense," as used in subsection (b)(5), means any offense punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.*
8. *Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.*
9. *For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.*
10. *Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1) - (a)(5), subsection (b)(2) is not applicable.*
11. *A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and a two-level enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.*
12. *If the defendant is convicted under 18 U.S.C. § 922(i), (j), or (k), or 26 U.S.C. § 5861(g) or (h) (offenses involving stolen firearms or ammunition), and is convicted of no other offense subject to this guideline, do not apply the adjustment in subsection (b)(4) because the base offense level itself takes such conduct into account.*
13. *Under subsection (b)(6), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (e.g., if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).*
14. *Under subsection (c)(1), the offense level for the underlying offense is to be determined under §2X1.1 (Attempt, Solicitation, or Conspiracy) or, if death results, under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).*

15. *Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), or (a)(5) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).*
16. *An upward departure may be warranted in any of the following circumstances: (1) the number of firearms significantly exceeded fifty; (2) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (3) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (4) the offense posed a substantial risk of death or bodily injury to multiple individuals.*
17. *A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. See §4B1.4.*

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 189); November 1, 1990 (see Appendix C, amendment 333); November 1, 1991 (see Appendix C, amendment 374).

§2K2.2. [Deleted]

Historical Note: Section 2K2.2 (Unlawful Trafficking and Other Prohibited Transactions Involving Firearms), effective November 1, 1987, amended effective January 15, 1988 (see Appendix C, amendment 34), November 1, 1989 (see Appendix C, amendment 189), and November 1, 1990 (see Appendix C, amendment 333), was deleted by consolidation with §2K2.1 effective November 1, 1991 (see Appendix C, amendment 374).

§2K2.3. [Deleted]

Historical Note: Section 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), effective November 1, 1989 (see Appendix C, amendment 189), was deleted by consolidation with §2K2.1 effective November 1, 1991 (see Appendix C, amendment 374). 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)(A)-(F) (Robbery)), is not to be applied in respect to the guideline for the underlying offense.*

Provided, that where the maximum of the guideline range from Chapter Five, Part A (Sentencing Table) determined by an offense level adjusted under the procedure described in the preceding paragraph, plus the term of imprisonment required under 18 U.S.C. § 924(c) or § 929(a), is less than the maximum of the guideline range that would apply to the underlying offense absent such adjustment, the procedure described in the preceding paragraph does not apply. Instead, the guideline range applicable to the underlying offense absent such adjustment is to be used after subtracting the term of imprisonment imposed under 18 U.S.C. § 924(c) or § 929(a) from both the minimum and maximum of such range.

Example: A defendant, is to be sentenced under the robbery guideline; his unadjusted offense level from §2B3.1 is 30, including a 7-level enhancement for discharging a firearm; no Chapter Three adjustments are applicable; and his criminal history category is Category IV. His unadjusted guideline range from Chapter Five, Part A (Sentencing Table) is 135-168 months. This defendant has also been convicted under 18 U.S.C. § 924(c) arising from the possession of a weapon during the robbery, and therefore must be sentenced to an additional consecutive five-year term of imprisonment. The defendant's adjusted guideline range, which takes into account the conviction under 18 U.S.C. § 924(c) by eliminating the 7-level weapon enhancement, is 70-87 months. Because the maximum of the defendant's adjusted guideline range plus the five year consecutive sentence (87 months + 60 months = 147 months) is less than the maximum of the defendant's unadjusted guideline range (168 months), the defendant is to be sentenced using the unadjusted guideline range after subtracting the 60 month sentence to be imposed under 18 U.S.C. § 924(c) from both the minimum and maximum of the unadjusted range (e.g., 135 months - 60 months = 75 months; 168 months - 60 months = 108 months). A sentence imposed for the underlying offense using the guideline range determined in this manner (75-108 months) when combined with the consecutive sentence imposed under 18 U.S.C. § 924(c) or § 929(a), will produce the appropriate total term of imprisonment.

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); November 1, 1991 (see Appendix C, amendment 405).

§2K2.5. Possession of Firearm or Dangerous Weapon in Federal Facility; Possession or Discharge of Firearm in School Zone

- (a) Base Offense Level: 6
- (b) Specific Offense Characteristic
 - (1) If --
 - (A) the defendant unlawfully possessed or caused any firearm or dangerous weapon to be present in a federal court facility; or
 - (B) the defendant unlawfully possessed or caused any firearm to be present in a school zone,increase by 2 levels.
- (c) Cross Reference
 - (1) If the defendant used or possessed any firearm or dangerous weapon in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or dangerous weapon with knowledge or intent that it would be used or possessed in connection with another offense, apply --
 - (A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense if the resulting offense level is greater than that determined above; or
 - (B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(q), 930.

Application Notes:

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

2. "Federal court facility" includes the courtroom; judges' chambers; witness rooms; jury deliberation rooms; attorney conference rooms; prisoner holding cells; offices and parking facilities of the court clerks, the United States attorney, and the United States marshal; probation and parole offices; and adjoining corridors and parking facilities of any court of the United States. See 18 U.S.C. § 930(f)(3).
3. "School zone" is defined at 18 U.S.C. § 922(q). A sentence of imprisonment under 18 U.S.C. § 922(q) must run consecutively to any sentence of imprisonment imposed for any other offense. In order to comply with the statute, when the guideline range is based on the underlying offense, and the defendant is convicted both of the underlying offense and 18 U.S.C. § 922(q), the court should apportion the sentence between the count for the underlying offense and the count under 18 U.S.C. § 922(q). For example, if the 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. § 922(q) would satisfy this requirement.
4. Where the firearm was brandished, discharged, or otherwise used, in a federal facility, federal court facility, or school zone, and the cross reference from subsection (c)(1) does not apply, an upward departure may be warranted.

Historical Note: Effective November 1, 1989 (see Appendix C, amendment 191). Amended effective November 1, 1991 (see Appendix C, amendment 374).

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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).